233 N.C. App.—No. 4 Pages 431-600

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 3, 2016

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OF
NORTH CAROLINA

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[1] Appointed 1 January 2015. [2] Sworn in 1 January 2015. [3] Sworn in 1 January 2015. [4] Appointed 31 July 2015. [5] Deceased 28 August 2015
[6] Deceased 3 May 2015. [7] Deceased 4 January 2015. [8] Deceased 27 January 2015 [9] Deceased 11 September 2015. [10] Retired 31 December 2014.
[11] Resigned 31 December 2014. [12] Resigned 31 December 2014.

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COURT OF APPEALS

CASES REPORTED

FILED 15 APRIL 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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.

DAVITA BISHOP, EMPLOYEE, PLAINTIFF
v.
INGLES MARKETS, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. COA13-1102

Filed 15 April 2014

1. Workers' Compensation—work-related injury—causation—sufficient evidence

The Full Industrial Commission did not err in a workers' compensation case by determining that plaintiff's work-related injury caused plaintiff's seizures. There was expert medical testimony in the record that the Full Commission relied on in determining the causal connection between plaintiff's fall and her current medical conditions. As a result, the Full Commission properly addressed the issue of causation.

2. Workers' Compensation—reopen record—additional evidence—no abuse of discretion

Plaintiff failed to show that the Full Industrial Commission abused its discretion in a workers' compensation case by reopening the record to obtain additional evidence.

3. Workers' Compensation—award of compensation—sufficient evidence

The Full Industrial Commission did not err in a workers' compensation case by awarding plaintiff temporary total indemnity compensation and medical compensation. Plaintiff provided sufficient evidence to satisfy either part one or part three of the test set forth in *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762.

Appeal by defendant-employer from Opinion and Award entered 12 July 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 March 2014.

Law Office of Gary A. Dodd, by Gary A. Dodd, for plaintiff-appellee.

Northup, McConnell & Sizemore PLLC, by Steven W. Sizemore, for defendant-appellant.

MARTIN, Chief Judge.

Defendant-employer Ingles Markets, Inc. appeals from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission awarding workers' compensation benefits, attorney's fees, and costs to plaintiff-employee Davita Bishop. For the reasons stated herein, we affirm.

On 30 January 2008, plaintiff slipped and fell on a recently waxed floor while working in the Ingles deli. After reporting the fall to the store manager, plaintiff sought medical treatment at OneBeacon Healthcare. She explained that she fell and hit her head, and that she was experiencing dizziness as well as pain to her head, lower back, and hip. Plaintiff was diagnosed as having a lower back sprain and a mild concussion. She was also given a note excusing her from work until 5 February 2008.

However, plaintiff's condition did not improve, and she went to Sisters of Mercy Urgent Care on 9 February 2008, complaining of pain in her left hip and lower back. Plaintiff was given a note excusing her from work until 13 February 2008. Plaintiff returned to Sisters of Mercy Urgent Care three times in February, and results of an MRI scan revealed "a slight anterolisthesis at L4-5, degenerative disc disease, spondylosis, facet arthrosis and annular bulging at L4-5 and L5-S1."

After the MRI, it was recommended that plaintiff begin physical therapy and that she return to work with the following restrictions: working for no more than four hours a day; no lifting of anything over ten pounds; and no standing, walking, or sitting for more than twenty minutes at a time. On 11 March 2008, plaintiff returned to work pursuant to these restrictions.

Plaintiff was referred to Dr. Richard Broadhurst and saw him on 29 May 2008 for an evaluation and treatment. On 14 July 2008, plaintiff saw Dr. Broadhurst again because she felt she was being asked to perform tasks at work that she was not physically capable of performing. In response, Dr. Broadhurst issued several work restrictions including, "lifting [no] more than ten pounds, no ladder climbing, no repetitive bending or twisting or forward reaching and to stand and walk to control the pain." On 28 August 2008, Dr. Broadhurst again issued work restrictions for plaintiff. Also in August 2008, plaintiff began taking classes, on days she did not have to work, in a Masters of Divinity program at Gardner-Webb University.

On 26 September 2008, plaintiff returned to OneBeacon and complained of "blackout spells," stating that she had fainted at work the day before. Plaintiff underwent an electroencephalogram ("EEG") which suggested that plaintiff might have partial epilepsy. As a result, plaintiff

was referred to Dr. Duff Rardin, who diagnosed plaintiff as possibly having epilepsy. On 5 November 2008, a coworker witnessed plaintiff have a blackout spell. Following this incident, plaintiff underwent an MRI that showed an abnormal signal.

While plaintiff's seizure condition was ongoing, Dr. Broadhurst, on 15 December 2008, determined that plaintiff had reached maximum medical improvement and assigned plaintiff permanent work restrictions. On 30 December 2008, however, Dr. Broadhurst asked Dr. Rardin if plaintiff's 30 January 2008 fall caused plaintiff's seizures. Dr. Rardin responded that he did not think that the fall caused plaintiff's seizures.

Plaintiff continued to suffer from seizures, so Dr. Rardin completed the medical section of plaintiff's Family Medical Leave ("FMAL") application, noting that plaintiff should not work due to her seizure activity. Dr. Rardin also recommended that plaintiff stop taking classes at Gardner-Webb due to her seizures. Plaintiff stopped working on 15 July 2009 when her FMAL application was approved.

On 29 July 2009, plaintiff was admitted to Mission Hospital for epilepsy monitoring, and the staff was able to observe one of plaintiff's seizures. It was determined that plaintiff's seizures were nonepileptic. Plaintiff, nonetheless, continued to have seizures. Dr. Rardin testified that stressors in a person's life can cause nonepileptic seizures, but he did not state an opinion about whether plaintiff suffered from such stressors. Also, while at Mission Hospital, Dr. C. Britt Peterson, a psychiatrist, saw plaintiff and diagnosed her with "a major depressive disorder or a possible adjustment disorder with depressed mood and possible conversion disorder."

Eventually, Dr. Rardin recommended that plaintiff see Karen Katz a licensed clinical social worker with a master's degree in social work and psychology from Syracuse University. During the first meeting, Ms. Katz took plaintiff's family history and conducted a clinical assessment. Ms. Katz used anxiety and depression screening tools to diagnose plaintiff with an anxiety disorder and chronic depression that Ms. Katz believed began early in plaintiff's life. Ms. Katz opined that plaintiff's 30 January 2008 fall exacerbated her preexisting anxiety and depression.

The forgoing evidence was presented to the Full Commission at a hearing on 15 November 2011. After the hearing, the Full Commission issued an order on 5 January 2012 reopening the record for receipt of "additional evidence to consist of an orthopedic evaluation and a neuropsychological evaluation." Pursuant to this order, Dr. Stephen David conducted an orthopedic evaluation of plaintiff, and Dr. John Barkenbus

conducted a neuropsychological evaluation of plaintiff. Both doctors also reviewed plaintiff's medical records and were deposed.

Dr. Barkenbus, a neuropsychiatry expert, testified that the medical records he reviewed did not indicate that plaintiff suffered from seizures prior to her fall. He also testified that plaintiff's anxiety and depression contributed to her seizure disorder, but that her fall was the initiating event that caused her resulting medical and psychological conditions. Dr. David, an expert in orthopedic surgery, testified that plaintiff's current medical problems prevent her from consistently sustaining gainful employment.

Based on this evidence, the Full Commission awarded plaintiff weekly compensation, medical compensation for her seizures, and attorney's fees. Commissioner Nance dissented from the Full Commission's Opinion and Award because she did not find Ms. Katz's testimony credible. Defendant appeals.

On appeal defendant argues that the Full Commission erred in (1) finding that plaintiff's fall caused her seizure disorder, (2) reopening the record to obtain additional evidence, and (3) awarding plaintiff disability compensation. We disagree.

The North Carolina Supreme Court has clearly stated that "appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, "[t]he Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

"Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred v. Exceptional Landscapes, Inc.*, __, N.C. App. __, __, 743 S.E.2d 48, 51 (2013). However, when we review the challenged findings of fact, we do not reweigh the evidence because the Commission is the fact finder. *Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747, *disc. rev. denied*, 357 N.C. 461, 586 S.E.2d 99 (2003). Instead, we limit our review to determining "whether the record contains any evidence tending to support the finding[s]." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). As a result, " '[t]he findings of fact of the Industrial Commission are conclusive on appeal

when supported by competent evidence, even though there [may] be evidence that would support findings to the contrary.' " *Id.* (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). Also, we view the evidence in the record in a light most favorable to the plaintiff, and the "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.*

[1] First, defendant argues that the Full Commission erred in determining that plaintiff's work-related injury caused plaintiff's seizures. In making this argument, defendant relies on *Hawkins v. General Electric Co.*, 199 N.C. App. 245, 249, 683 S.E.2d 385, 389 (2009), for the proposition that when "a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." Thus, throughout defendant's argument, it challenges several findings of fact, which we will address later, on the basis that the Full Commission could not find these facts based on Ms. Katz's testimony because she is not an expert.

The proposition that only an expert can give competent opinion evidence as to causation when a complicated medical question is involved has its basis in *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 256 S.E.2d 389, 391 (1980). In *Click*, the North Carolina Supreme Court stated:

> For an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment. *There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of. On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Id. (emphasis added) (citations omitted) (internal quotation marks omitted).

From this paragraph it is clear that the Court was concerned about the quality of the evidence relied upon by the Industrial Commission when considering complicated causation issues. Therefore, the Commission may make findings of fact based on the testimony of a person that is not an expert, but must rely on competent expert testimony to infer that there is causation when a complicated medical question is involved.

We will now address each of defendant's challenges to the Full Commission's findings of fact, as well as defendant's contention that there is no causal connection between the work-related injury and plaintiff's seizures.

First, defendant challenges finding of fact 36, which states:

> On September 18, 2009, Dr. Rardin referred Plaintiff to Karen Katz, a licensed clinical social worker, for psychological assistance regarding Plaintiff's non-epileptic seizure disorder. Ms. Katz has a Masters degree in psychology and is providing psychotherapy to Plaintiff. Ms. Katz is qualified and competent to state her opinions as to Plaintiff's psychological condition.

Defendant asserts that the Full Commission erred in finding that Ms. Katz could state her opinions as to plaintiff's psychological condition because Ms. Katz is not qualified to make a diagnosis or offer opinions as to causation. This argument fails.

As stated earlier, the Commission must rely on expert testimony when determining the issue of causation when complicated medical questions are involved. *See id.* Finding of fact 36 has nothing to do with causation; it simply recites Ms. Katz's educational training, the fact that she is treating plaintiff with respect to her psychological condition, which is within Ms. Katz's training, and that she could properly offer her opinion as to plaintiff's psychological condition.

Next, defendant challenges finding of fact 37, which states:

> Ms. Katz does not administer psychological "testing" but does perform "screening" for conditions such as anxiety. In Plaintiff's case she performed such screening and has assessed Plaintiff with generalized anxiety disorder, and dysthymia, a chronic depression which began early in her

> life. She also assessed that Plaintiff suffers from an adjustment disorder. This assessment by Ms. Katz is consistent with that of Dr. Peterson, the psychiatrist.

Defendant challenges this finding of fact on the basis that the Commission bolstered Ms. Katz's assessment by saying it was supported by Dr. Peterson. Again, this argument fails.

As stated earlier, when we review a record in a workers' compensation case, we limit our review to whether the record contains any evidence that tends to support the Commission's findings. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. In this case, Ms. Katz assessed that plaintiff was depressed. Also in evidence is a discharge summary from Mission Hospital that states that Dr. Peterson diagnosed plaintiff with a depressive disorder. This evidence supports the Commission's finding that the "assessment by Ms. Katz is consistent with that of Dr. Peterson."

Defendant also questions finding of fact 38, which states:

> It is Ms. Katz' opinion that Plaintiff's fall exacerbated her pre-existing depression and anxiety. During her treatment with Ms. Katz, Plaintiff has made slow, but steady progress. Ms. Katz opined that Plaintiff needs ongoing treatment with medications and psychotherapy and that Plaintiff is currently unable to work "full time."

Defendant contends that the Full Commission could not find that in "Ms. Katz' opinion . . . Plaintiff's fall exacerbated her pre-existing depression and anxiety." As discussed earlier, the Full Commission was permitted to find facts relating to Ms. Katz's testimony as long as the Full Commission did not rely on Ms. Katz's testimony when inferring causation. To the extent that the Full Commission relied upon Ms. Katz's testimony to infer causation, the Full Commission erred. However, in finding of fact 45 the Full Commission stated that it was giving great weight to Dr. Barkenbus's testimony when inferring causation, and Dr. Barkenbus testified that he thought plaintiff's fall was the initiating event that caused several medical and psychological issues.

Finally, defendant challenges findings of fact 44 and 45. Finding of fact 44 states:

> Based upon a preponderance of the evidence, the Full Commission finds that as a consequence of her January 30, 2008 accident, Plaintiff experienced an exacerbation of her underlying psychological condition, including her pre-existing anxiety and depression.

Finding of fact 45 states:

> Based upon a preponderance of the evidence of record, including the opinion of Dr. Barkenbus, which the Full Commission gives great weight, the Full Commission finds that Plaintiff's pre-existing anxiety and depression which were exacerbated by her compensable injury, contributed to her seizure disorder.

Defendant maintains that the Full Commission could not have found a preexisting psychological condition because no expert diagnosed plaintiff with a psychological condition, and no medical expert testified as to the exacerbation of any preexisting condition.

This argument challenges findings of fact, as well as the Full Commission's inference of causation. First, we only need to find some evidence in the record that supports the Full Commission's findings of fact. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Dr. Barkenbus, who was tendered as a medical expert, stated that in his report he was concerned with "some level of panic anxiety prior to [plaintiff's] fall, [and that] [t]here was more ongoing depression in the aftermath of her fall." Thus, there is evidence in the record to support the finding that plaintiff suffered from anxiety before her fall.

Second, Dr. Barkenbus testified that he thought the fall was the initiating event that caused several medical and psychological issues that affected plaintiff's ability to work. The Full Commission stated in finding of fact 45 that it was giving great weight to Dr. Barkenbus's testimony. Therefore, there is expert medical testimony in the record that the Full Commission relied on in determining the causal connection between plaintiff's fall and her current medical conditions. *See Click*, 300 N.C. at 167, 256 S.E.2d at 391. As a result, the Full Commission properly addressed the issue of causation.

[2] Next, we address the Full Commission's order reopening the record. When a party appeals a deputy commissioner's opinion and award to the Full Commission, it may "if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." N.C. Gen. Stat. § 97-85(a) (2013). As a result, this statute confers plenary powers to the Full Commission to receive additional evidence, rehear the parties, amend the award, and reconsider the evidence. *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. rev. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Therefore, the Full Commission's determination relating to one of its plenary powers "will not be reviewed on appeal

absent a showing of manifest abuse of discretion," *id.* at 131, 254 S.E.2d at 238, and an abuse of discretion occurs when a determination "is so arbitrary that it could not have been the result of a reasoned decision." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 26, 514 S.E.2d 517, 520 (1999).

Defendant does not argue that the Full Commission's decision to reopen the record was an unreasoned decision. Instead, defendant seems to argue that the Full Commission's decision was unfair because it gave the plaintiff a second opportunity to prove her case. Such an argument fails to show that the Full Commission abused its discretion, and we will not review its determination to reopen the record.

[3] Finally, defendant argues that the Full Commission should not have awarded plaintiff temporary total indemnity compensation and medical compensation because plaintiff failed to provide evidence that satisfies the test in *Russell v. Lowes Product Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). We disagree.

Under the Workers' Compensation Act, an employee is disabled when their earning capacity has been impaired. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986), *appeal after remand*, 86 N.C. App. 227, 356 S.E.2d 801 (1987). Thus, the employee must show that "he is unable to earn the same wage he had earned before the injury, either in the same employment or in other employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457.

The employee may meet this burden in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id.

In this case, the Full Commission concluded that plaintiff had satisfied the *Russell* test under either part one or part three. The Full Commission made the following unchallenged finding of fact:

> [I]t would have been futile for Plaintiff to look for suitable employment due to her limited and past relevant vocational history of working primarily as a deli cook which required prolonged standing and lifting up to 50 pounds, her limited vocation skills associated mainly with the type of work she is currently unable to perform . . . her current seizure disorder, in combination with her work related, severe permanent restrictions assigned by Dr. Broadhurst of no lifting more than ten pounds, sitting or resting up to ten minutes each hour, no ladder climbing, minimal stair climbing and no repetitious twisting or forward trunk reaching, and her other physical limitations due to severe pain, needing a cane to ambulate, her need for multiple medications and her non-work related medical conditions, including a stroke and heart attack following her injury.

This finding of fact supports the Full Commission's conclusion that it would have been futile for plaintiff to search for employment. *See Barrett v. All Payment Servs., Inc.*, 201 N.C. App. 522, 527, 686 S.E.2d 920, 924 (2009) (holding that the plaintiff had satisfied part three of the *Russell* test because the Commission found "it would be futile for [employee] to seek employment, given his advanced age, his prior work history, his pre-existing conditions, his severely debilitating back condition due [to] his current work related [sic] injury as well as non-work related [sic] causes and his work related [sic] physical restrictions" (alterations in original)), *writ of supersedeas and disc. rev. denied*, 363 N.C. 853, 693 S.E.2d 915 (2010).

In conclusion, for the reasons stated above, we affirm the Opinion and Award of the Full Commission.

Affirmed.

Judges McGEE and CALABRIA concur.

BLAKELEY v. TOWN OF TAYLORTOWN

[233 N.C. App. 441 (2014)]

TIMOTHY BLAKELEY, PLAINTIFF
v.
TOWN OF TAYLORTOWN, NORTH CAROLINA;
A MUNICIPAL CORPORATION, DEFENDANT

No. COA13-853

Filed 15 April 2014

1. Damages and Remedies—termination of employment—emotional distress

The trial court did not err by instructing the jury that it could award plaintiff both emotional distress damages and damages for future lost wages in an action arising from the termination of a police chief's at-will employment. There is a difference when emotional distress is a required element of a claim and when it is a type of damage. Plaintiff was not required to show either "severe emotional distress" or "extreme and outrageous conduct" by defendant to be awarded emotional distress or pain and suffering damages.

2. Damages and Remedies—jury's methodology not clear—consistent with evidence

Defendant was unable to meet its burden of showing that the trial court abused its discretion in denying defendant's motion to amend the verdict pursuant to Rule 59(a)(5) and (6) in an action arising from the dismissal of an at-will police chief. Although it was unclear exactly how the jury reached its overall figure, the jury's verdict was consistent with plaintiff's evidence, and defendant failed to show that the award was so excessive that it could have only resulted from passion or prejudice.

3. Damages and Remedies—mitigation—reasonable care and diligence

In an action arising from the dismissal of a police chief, the trial court did not abuse its discretion in denying defendant's motion to amend the verdict based on plaintiff's failure to mitigate his damages where the evidence clearly established that plaintiff used reasonable care and diligence when trying to find a new job.

4. Damages and Remedies—discharge from employment—amount earned after discharge

In an action arising from the termination of an at-will police chief's employment, the trial court abused its discretion by denying defendant's motion to amend the verdict with regard to the amount plaintiff earned after his employment with the town ended.

5. Damages and Remedies—compensatory damages—emotional distress included

In an action arising from the termination of an at-will police chief's employment, defendant's argument that "actual damages" do not include emotional distress damages and damages for future lost wages was without merit. Compensatory and actual damages are synonymous and compensatory damages include emotional distress and lost wages.

6. Police Officers—termination of employment—refusal to provide information

In an action arising from the termination of an at-will police chief's employment, the evidence was sufficient to go to the jury on the issue of whether plaintiff was discharged based on his refusal to provide town officials with confidential information on the status of ongoing drug cases. There is a difference between being asked on the progress of the drug cases versus being asked to provide information about confidential informants.

7. Criminal Law—closing argument—improper remarks—not prejudicial

There was no gross impropriety requiring intervention *ex mero motu* in plaintiff's closing arguments in an action arising from the termination of a police chief's at-will employment. Statements that characterized the Town and at-will employment in an unflattering way and highly inflammatory remarks about the mayor, among others, were improper, but not so prejudicial as to entitle defendant to a new trial.

Appeal by defendant from order entered 16 March 2012 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 5 February 2014.

The McGuinness Law Firm, by J. Michael McGuinness, and John W. Roebuck for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog, Jr., and Patrick H. Flanagan for defendant-appellant.

Amicus curiae brief submitted by Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for the Southern States Police Benevolent Association and the North Carolina Police Benevolent Association.

HUNTER, Robert C., Judge.

Defendant the Town of Taylortown ("the Town" or "defendant") appeals the order denying its motion for judgment notwithstanding the verdict or, in the alternative, for amendment of the judgment and/or a new trial. After careful review, we reverse the order denying defendant's motion to amend the verdict and remand for the trial court to reduce the jury's verdict by $5,886.97. As to all other bases for defendant's motions, we find no error.

Background

This action arises out of the termination of plaintiff Timothy Blakeley ("plaintiff" of "Chief Blakeley") from his at-will employment as the Chief of Police for the Town. Plaintiff was hired in 2003. In 2004, a dispute arose between plaintiff and the mayor of Taylortown, Ulysses S.G. Barrett, Jr., ("Mayor Barrett") regarding the Town's use of a Cushman ATV ("the ATV") on the streets and highways in the Town. Plaintiff had observed the vehicle being operated by a Town employee on the public streets and highways. After doing some research, plaintiff determined that the ATV was not being operated in a lawful manner. Plaintiff presented his findings to the Town Council sometime in August 2004. Plaintiff claims that he was told at the August meeting by Mayor Barrett to not concern himself with the ATV. After the meeting, plaintiff obtained more information and called Mayor Barrett up directly to discuss it. Plaintiff brought the information to Mayor Barrett's home. The next day, plaintiff received a "write-up" for failing to follow the chain of command. Specifically, plaintiff was written up for failing to first notify James Thompson, the Police Commissioner, before contacting Mayor Barrett. After this, members of the Town Council noticed an increased tension between plaintiff and Mayor Barrett.

In 2006, plaintiff was contacted by the North Carolina State Bureau of Investigation ("the SBI") concerning alleged corruption by the Taylortown Board. Eventually, as a result of this investigation, Mayor Barrett was charged with illegally benefiting from a public contract; these charges were later dropped. During the SBI investigation, sometime in August 2006, plaintiff informed the Town Council that he was involved in the investigation after he received permission from an SBI agent to do so. Plaintiff alleged that after he informed the Town Council about his involvement in the investigation, his professional relationship with Mayor Barrett and certain members of the Town Council "substantially and materially changed."

On 29 August 2006, Mayor Barrett sent plaintiff a written memo informing him that plaintiff's repeated requests during the annual budget process needed to stop. Moreover, Mayor Barrett also informed plaintiff that he had received complaints about him from several Town citizens.

During plaintiff's employment, there was a general concern about what was characterized as a drug problem in the Town. Chief Blakeley claimed that, throughout his employment, the Mayor and certain Town Council members requested confidential information about ongoing narcotics cases "constant[ly]" and "on a continuous basis." Specifically, plaintiff alleged that the Council members asked him for information about confidential informants. In November 2006, Commissioner Thompson held a meeting with Chief Blakeley and pressured him to discuss ongoing cases. In his monthly chief's report to the Board, Chief Blakeley contended that he provided them all the "legally permissible information" he could with regard to these cases. However, he claimed that he was continually pressured to provide additional confidential information, which he refused to do.

On 31 October 2006, Mayor Barrett wrote a memo criticizing plaintiff's record and claiming that he had no confidence in plaintiff's abilities. On 6 February 2007, the Town held a closed session meeting, which plaintiff attended. The Board provided plaintiff written notice of the issues they had with his performance. The Town also passed a motion that plaintiff would receive a review of his job performance within 30 days. Plaintiff claims that he never received a review. On 7 March 2007, the Board met again to consider a resolution to terminate plaintiff's employment. By a vote of 3 to 2, the Board voted to terminate plaintiff. Five days later, the Board voted again and voted 5 to 0 in favor of termination.

On 9 February 2010, plaintiff filed a complaint against the Town alleging the following causes of action: (1) common law wrongful discharge; (2) violations of North Carolina's Law of the Land clause; (3) violations of substantive and procedural due process; (4) common law misrepresentation; and (5) common law obstruction of justice. Defendant filed an answer and partial motion for judgment on the pleadings with regard to all of plaintiff's claims except the claim of wrongful discharge. On 7 June 2010, the matter came on for hearing before Judge John O. Craig, III. Judge Craig granted defendant's motion for judgment on the pleadings. On 10 June 2011, defendant moved for summary judgment as to plaintiff's remaining claim for wrongful discharge. This motion was denied in open court on 27 June 2011 by Judge James M. Webb.

The matter was tried during the 27 June 2011 term of court. After numerous motions regarding the jury instructions, the trial court instructed the jury on the common law tort of wrongful discharge of an at-will employee in violation of public policy. With regard to what public policy plaintiff claimed he refused to violate, the trial court instructed the jury on two statutes: (1) N.C. Gen. Stat. § 14-230, which prohibits a public official from refusing to discharge his duties; and (2) N.C. Gen. Stat. § 14-226(a), which prohibits the intimidation or interference with witnesses. The jury was asked to answer four issues: (1) Was the plaintiff's refusal to participate in conduct which violated public policy a substantial factor in the defendant's decision to terminate him?; (2) Would defendant have terminated plaintiff if he had not refused to participate in that conduct?; (3) What amount of damages is plaintiff entitled to recover?; and (4) By what amount should the plaintiff's actual damages be reduced? On 7 July 2011, the jury returned a verdict and answered the issues as: yes, no, $291,000, and $191,000, respectively. That same day, plaintiff filed a motion for equitable relief of front pay in lieu of reinstatement. Defendant filed a motion in response, arguing that plaintiff was not entitled to recover front pay as an at-will employee because at-will employees are not entitled to lost wages.

On 29 September 2011, defendant filed a motion for judgment notwithstanding the verdict or in the alternative for amendment of the judgment and/or a new trial. Pursuant to Rule 59, defendant argued that the trial court should amend the judgment because: (1) plaintiff failed to meet his burden of establishing actual damages; (2) the judgment should only include the actual wages plaintiff would have earned working for the Town up until the date of trial minus the amount of wages plaintiff actually earned during that time; and (3) in the alternative, the amount of the judgment should be amended to reflect the actual wages plus benefits plaintiff would have earned working for the Town minus the amount of wages plaintiff actually earned. Furthermore, defendant alleged that a new trial was warranted to correct an error of law, prevent a miscarriage of justice, prevent an erroneous judgment, fix a verdict that was against the weight of the evidence, fix the erroneous jury instructions, address plaintiff counsel's inflammatory and prejudicial statements during trial, and because the jury's award of damages was excessive.

On 16 March 2012, Judge Webb issued an order, among other things: (1) denying plaintiff's motion for equitable relief in the form of front pay; (2) denying defendant's Rule 59 motions; and (3) awarding plaintiff the amount of the verdict $100,000 plus $6,811.45 in costs and fees. Defendant timely appealed on 16 April 2012.

Standard of Review

On appeal, when defendants move for a new trial pursuant to Rule 59(a)(5), (6), and (7), a trial court's decision "may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Greene v. Royster*, 187 N.C. App. 71, 78, 652 S.E.2d 277, 282 (2007); *see also Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "An appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997). However, we review the trial court's denial of a motion for a new trial pursuant to Rule 59(a)(8) *de novo*. *Auto. Grp., LLC v. A-1 Auto Charlotte, LLC*, __ N.C. App. __, __, 750 S.E.2d 562, 565 (2013).

Arguments

I. Defendant's Motion to Amend the Verdict

[1] First, defendant argues that the trial court erred in denying its motion to amend the verdict pursuant to Rule 59 because: (1) plaintiff failed to meet his burden of establishing the amount of actual damages he was entitled to; (2) even assuming plaintiff proved actual damages, the jury's award was in excess of any actual damages proven at trial and the jury must have improperly considered either hypothetical future wages or emotional distress damages, neither of which constitute actual damages; and (3) the jury failed to properly adjust the damage award based on plaintiff's failure to mitigate his damages.

The only claim submitted to the jury was plaintiff's wrongful discharge claim in violation of public policy. Ordinarily, an employee without a definite term of employment is an employee at-will and may be discharged without reason. *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). However, the employee-at-will rule is subject to certain exceptions. Our appellate Courts first recognized a public-policy exception to the employment-at-will doctrine in *Sides v. Duke Univ.*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985), and *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). "An employer wrongfully discharges an at-will employee if the termination is done for an unlawful reason or purpose that contravenes public policy." *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999).

At trial, the jury was instructed that the amount of damages plaintiff may be entitled to included nominal damages and actual damages.

Furthermore, the trial court went on to instruct that should plaintiff prove by the greater weight of the evidence that he has suffered actual damages by reasons of the wrongful termination and the amount, those damages would include "that amount of money necessary to place the plaintiff in the same economic position in which he would have been if the wrongful termination had not occurred. Actual damages also means some actual loss, hurt, or harm[.]" The trial court went on to state that actual damages could include future losses. Defendant contends that the trial court's inclusion of future lost wages and emotional distress damages in the measure of plaintiff's actual damages constituted error.

Pursuant to Rule 59(a)(8) ("[e]rror in law occurring at the trial and objected to by the party making the motion"), defendant argues that the trial court committed an error of law in allowing plaintiff to recover damages for emotional distress and future lost wages because those types of damages at not available for a claim of wrongful discharge. Thus, the issue is whether a plaintiff asserting a cause of action for wrongful discharge is entitled to these traditional types of tort damages.

Initially, it should be noted that "[i]n order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving rise to the Rule 59(a)(8) motion." *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006). Here, even though defendant did not object to the instructions after the trial court read them to the jury, the record indicates that defendant properly objected to these jury instructions at the charge conference, and the trial court refused to alter the instructions on damages; thus, defendant properly preserved this issue for appellate review, *Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 575 (1984), and our review is *de novo*, *Auto. Grp., LLC*, __ N.C. App. at __, 750 S.E.2d at 565.

While our Courts clearly recognize that a claim for wrongful discharge of an at-will employee constitutes a tort claim, *see Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 662, 412 S.E.2d 97, 102-103 (1991) ("tort claim alleging wrongful discharge"); *McDonnell v. Guilford County Tradewind Airlines*, 194 N.C. App 674, 678, 670 S.E.2d 302, 306 (2009) (wrongful discharge in violation of public policy is a tort claim), exactly what type of damages a plaintiff may be entitled to and whether it includes all traditional types of damages allowed in other tort claims has not been explicitly addressed. Defendant contends that emotional distress damages and future lost wage damages are not available for the tort of wrongful discharge of an at-will employee. In support of this argument, defendant cites two cases, *Bennett v. Eastern Rebuilders, Inc.*, 52 N.C. App. 579, 279 S.E.2d 46 (1981), and *Block v. Paul Reverse*

Life Ins. Co., 143 N.C. App. 228, 547 S.E.2d 51 (2001), for the proposition that at-will employees are not entitled to back pay or lost wage damages. However, the plaintiffs in these cases sued their former employers for breach of contract, not based on a claim of wrongful discharge. *Bennett*, 52 N.C. App. at 582, 279 S.E.2d at 49; *Block*, 143 N.C. App. at 238, 547 S.E.2d at 59. We note that, in the majority of jurisdictions that recognize the common law tort of wrongful discharge for at-will employees, plaintiffs may recover for lost wages, future lost earnings, and emotional distress. *See* 86 A.L.R.5th 397 (2001). Moreover, we find no reason why these types of tort damages would not be available to a plaintiff seeking relief for wrongful discharge in violation of public policy. Therefore, the trial court did not err by instructing the jury that it may award plaintiff both emotional distress damages and damages for future lost wages.

In support of its argument, defendant contends that the tort of wrongful discharge is more similar to a claim of intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") than other types of torts. Accordingly, defendant argues that because plaintiff failed to show "extreme and outrageous" conduct by defendant or "severe emotional distress," he did not meet the "stringent standard" required for emotional distress recovery. However, defendant's argument confuses the distinction between emotional distress as a type of tort damage with emotional distress constituting a specific element in a cause of action. To prove a claim of IIED, a plaintiff must show, among other things, that a defendant engaged in "extreme and outrageous conduct," which caused "severe emotional distress." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 7, 437 S.E.2d 519, 522 (1993). Similarly, in an NIED claim, one of the required elements is that the plaintiff suffer "severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Associates, P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). In contrast, emotional distress damages, sometimes referred to as "pain and suffering" damages, is a "basis for recovery." *Iadanza v. Harper*, 169 N.C. App. 776, 780, 611 S.E.2d 217, 221 (2005). "Moreover, physical injury is only one aspect of 'pain and suffering,' which also may include emotional suffering[.]" *Id.* Thus, there is a difference when emotional distress is a required element of a claim and when it is a type of damage. Moreover, there is no requirement that a plaintiff must show severe emotional distress in order to recover pain and suffering damages. *See Iadanza*, 169 N.C. App. at 780, 611 S.E.2d at 221-22 (rejecting the argument that "the psychological component of damages for 'pain and suffering' must meet the same standard as the element of 'severe emotional distress' that is part of claims for infliction of emotional distress"). Thus, plaintiff was not required to show either "severe emotional distress" or "extreme and

outrageous conduct" by defendant to be awarded emotional distress or pain and suffering damages.

[2] Next, defendant contends that the trial court erred in not granting his motion to amend the verdict because the jury "manifestly disregarded" the jury instructions, pursuant to Rule 59(a)(5), and because the award was in excess of the evidence at trial, under Rule 59(a)(6).

Our review of this issue on appeal is abuse of discretion. *Greene*, 187 N.C. App. at 78, 652 S.E.2d at 282.

Here, it is unclear from the jury verdict how the jury reached the $291,000 award for damages. With regard to the damages for lost wages, plaintiff testified that he lost $140,462 in wages and benefits from the Town between the time of termination and trial. In calculating this number, plaintiff excluded the money he earned while he was employed as a police captain in Afghanistan. Furthermore, plaintiff claimed he lost approximately $6,626 in lost 401K benefits. Plaintiff also testified that his termination affected his future ability to obtain work in the field. Specifically, plaintiff contended that he had applied for approximately twenty-four other jobs in law enforcement in various parts of North Carolina and had four pending applications at the time of trial. Finally, plaintiff claimed that he suffered emotional distress as a result of the termination, including depression. It appears that the jury awarded plaintiff approximately $150,000 in either future lost wages, emotional distress, or a combination of both.

While defendant claims that the jury "manifestly disregarded" the instructions in awarding these types of damages, as discussed above, these types of traditional tort damages may be awarded in a wrongful discharge action. The trial court specifically instructed the jury that it could award these types of damages; thus, there is no basis for the contention that the jury "manifestly disregarded" the instructions. Furthermore, although it is unclear exactly how the jury reached its overall figure, the jury's verdict was consistent with plaintiff's evidence, and defendant has failed to show that the award was so excessive that it could have only resulted from passion or prejudice. Accordingly, defendant is unable to meet its burden of showing that the trial court abused its discretion in denying defendant's motion to amend the verdict pursuant to Rule 59(a)(5) and (6).

[3] Additionally, defendant contends that the jury disregarded the trial court's instructions because they did not reduce the award based on plaintiff's failure to mitigate his damages. Defendant claims that, while plaintiff applied for other law enforcement positions, he only applied for

chief of police positions. By failing to apply for other types of law enforcement positions, the jury should have reduced his award accordingly.

"Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, for any part of the loss incident to such failure, no recovery can be had." *Lloyd v. Norfolk Southern Railway Co.*, __ N.C. App. __, __, 752 S.E.2d 704, 706 (2013) (internal quotation marks omitted).

At trial, the court instructed the jury that plaintiff's damages must be reduced by the amount which he could have earned from similar employment using reasonable diligence and that "reasonable diligence requires that an employee seek and accept similar employment in the same locality." Given the testimony at trial concerning plaintiff's attempts to find new employment, defendant's argument is without merit. Plaintiff testified that he had applied for several types of positions, including a position as Chief of Police and an instructor of law enforcement at a college. In fact, plaintiff eventually took a contract position in Afghanistan as a police advisor for the Department of State. Furthermore, plaintiff listed twenty-four places he had applied to without specifying what type of position he applied for. Thus, the trial court did not abuse its discretion in denying defendant's motion to amend the verdict on this basis because the evidence clearly established that plaintiff used reasonable care and diligence when trying to find a new job.

[4] Next, defendant argues that the trial court abused its discretion in denying his motion to amend the verdict because the jury failed to properly reduce the amount of damages awarded by the amount of money plaintiff earned after his employment with the Town ended from substitute employment and unemployment benefits. Specifically, defendant contends that the award should have been reduced by $196,886.97, not $191,000.

At trial, plaintiff's tax records for the years 2008-2010 were submitted which showed that plaintiff earned approximately $186,772.97 from his employment with DynCorp and Trigger Time. Furthermore, he received $10,114 in unemployment benefits. In total, he earned $196,886.97. Consequently, the trial court abused its discretion in denying defendant's motion to amend the verdict with regard to this issue because the evidence clearly established that plaintiff earned $196,886.97 from other employers and unemployment benefits. Accordingly, we reverse the order denying defendant's motion to amend on this basis and remand to the trial court to reduce the verdict by $5,886.97—the difference between

$191,000, the amount the jury reduced its award by, and $196,886.97, the amount that the award should have been reduced by as established by the evidence.

II. Defendant's Motion for a New Trial

[5] Next, defendant argues that the trial court erred in denying its motion for a new trial because: (1) the trial court erred in instructing the jury that it may include damages for emotional distress in plaintiff's award of actual damages; (2) the evidence was not sufficient to justify the verdict because plaintiff failed to meet his burden of establishing that defendant requested him to participate in conduct which violated public policy; and (3) plaintiff counsel's statements during closing argument were highly inflammatory and prejudicial.

As noted above, we review the trial court's denial of defendant's motion for a new trial on these bases for abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 627, 516 S.E.2d 858, 862 (1999).

With regard to defendant's argument concerning the jury instructions, as discussed, plaintiff was entitled to seek emotional distress damages and future lost wage damages in his claim for wrongful discharge. Furthermore, our Courts have repeatedly held that actual damages include emotional distress damages. *See Ringgold v. Land*, 212 N.C. 369, 371, 193 S.E. 267, 268 (1937) ("'Actual damages' are synonymous with 'compensatory damages' and with 'general damages.' Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered.") (internal citations omitted); *see also First Value Homes, Inc. v. Morse*, 86 N.C. App. 613, 617, 359 S.E.2d 42, 44 (1987). Furthermore, "[c]ompensatory damages provide recovery for, *inter alia*, mental or physical pain and suffering, lost wages and medical expenses." *Iadanza*, 169 N.C. App. at 780, 611 S.E.2d at 221. Therefore, since compensatory and actual damages are synonymous and compensatory damages include emotional distress and lost wages, defendant's argument that "actual damages" do not include emotional distress damages and damages for future lost wages is without merit.

[6] Next, defendant contends that the evidence was insufficient to establish that defendant requested plaintiff participate in conduct which violated public policy. Specifically, defendant characterizes the evidence as too vague and unspecific to submit the issue to the jury.

To state a claim for wrongful discharge in violation of public policy, an employee has the burden of showing that his "dismissal occurred for

a reason that violates public policy." *Considine v. Compass Grp. USA, Inc.*, 145 N.C. App. 314, 317, 551 S.E.2d 179, 181, *aff'd per curiam*, 354 N.C. 568, 557 S.E.2d 528 (2001). However, "something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception. An employer wrongfully discharges an at-will employee if the termination is done for an *unlawful reason* or *purpose* that contravenes public policy." *Garner v. Rentenbach Constructors Inc.*, 350 N.C. 567, 571, 515 S.E.2d 438, 441 (1999) (internal quotation marks omitted).

> While there is no specific list that enumerates what actions fall within this exception, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employer's request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.

Combs v. City Elec. Supply Co., 203 N.C. App. 75, 80, 690 S.E.2d 719, 723 (2010) (internal quotation marks omitted).

Contrary to defendant's characterization of the evidence, we conclude that the evidence was sufficient to go to the jury on the issue of whether plaintiff was discharged based on his refusal to provide confidential information on the status of ongoing drug cases. Plaintiff claims that he was discharged in retaliation for his refusal to provide members of the Town Council and Mayor Barrett with confidential information about ongoing narcotics cases. Had he chosen to provide this information, plaintiff argued that he would have violated N.C. Gen. Stat. § 14-230. N.C. Gen. Stat. § 14-230 provides, in pertinent part that "[i]f any . . . official . . . of any city or town . . . shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor." Initially, we note that "a chief of police as well as a policeman is an officer of the municipality which engages his services, within the meaning of the provisions of G.S. § 14-230[.]" *State v. Hord*, 264 N.C. 149, 156-57, 141 S.E.2d 241, 246 (1965). As Chief of Police, plaintiff had a duty to protect the integrity of ongoing criminal cases. In doing so, plaintiff was required to ensure that information about those cases, particularly information about informants, remain confidential. Otherwise, the safety of those informants would be jeopardized.

Plaintiff testified that he was repeatedly asked by members of the Town Council to provide confidential information on "an ongoing basis."

Commissioner Lonnie Jones testified that one of the reasons plaintiff was discharged was based on his failure to keep the Board properly apprised of the status of investigations even after being repeatedly requested to do so. There is a difference between being asked on the progress of the drug cases versus being asked to provide information about confidential informants. By asking him to provide this information, defendant was not only asking him to violate N.C. Gen. Stat. § 14-230, but it was also asking him to violate public policy which protects the safety of confidential informants. Given that plaintiff believed and testified that defendant wanted confidential information which he was legally not allowed to share and the fact that, had he done so, plaintiff would have violated the law and public policy, defendant is unable to establish that the trial court abused its discretion in denying its motion for a new trial.

[7] Finally, defendant contends that the trial court erred in denying his motion for a new trial based on plaintiff counsel's inflammatory and prejudicial remarks during closing arguments.

Since defendant did not object at trial to these remarks, where a party fails to object during closing arguments, "our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene ex mero motu." *O'Carroll v. Texasgulf, Inc.*, 132 N.C. App. 307, 315, 511 S.E.2d 313, 319 (1999).

In its brief, defendant cites several statements made by plaintiff counsel that it characterized as grossly improper. We agree with defendant that those statements made by plaintiff's counsel that characterized the Town and at-will employment in an unflattering way and the highly inflammatory remarks regarding Mayor Barrett, among others, were improper. Upon review, however, these statements were not so prejudicial as to entitle defendant to a new trial. Defendant did not object to this argument at trial, and our review is limited to discerning whether the statements were so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu*. *Id.* We do not believe the argument rises to the level of gross impropriety, and, thus, the trial court did not abuse its discretion by failing to intervene.

Conclusion

With regard to defendant's motion to amend the verdict based on the jury's failure to properly offset the amount of damages by the amount of money plaintiff earned in other jobs and in unemployment benefits, we remand for the trial court to reduce the judgment by $5,886.97. As to all

other bases for the denial of defendant's motion to amend the verdict and motion for a new trial, we find no error.

REVERSED AND REMANDED IN PART; NO ERROR IN PART.

Judges GEER and McCULLOUGH concur.

TERRI DEW BOOKMAN, ADMINISTRATRIX OF THE ESTATE OF CARTHINA ROBERSON DEW, PLAINTIFF
v.
BRITTHAVEN, INC., D/B/A BRITTHAVEN OF WILSON, DAVITA RX, LLC, WILSON MEDICAL CENTER, MORGAN JONES, AND COURTNEY LASSITGER, DEFENDANTS

No. COA13-948

Filed 15 April 2014

1. Appeal and Error—interlocutory orders and appeals—order denying arbitration

An order denying a motion to compel arbitration was interlocutory but immediately appealable.

2. Arbitration and Mediation—motion to compel—documents signed by family

A motion to compel arbitration in a wrongful death action was remanded where decedent was admitted to Britthaven after being discharged from the hospital after surgery, the decedent's husband and adult daughter signed all of the documents when checking decedent into Britthaven following surgery, and the question of whether arbitration should be compelled was remanded for further findings on whether the husband and daughter had the apparent authority to bind decedent.

Appeal by defendant from order entered 10 May 2013 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 21 January 2014.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellee.

Williams Mullen, by Brian C. Vick and Elizabeth D. Scott, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Britthaven, Inc. d/b/a Britthaven of Wilson ("Britthaven") appeals from the trial court's order denying its motion to compel arbitration. On appeal, Britthaven argues that apparent authority existed to bind the principal to the arbitration agreement, and therefore, the trial court erred by ruling that the arbitration agreement is unenforceable.

After careful review, we reverse the trial court's order and remand for further proceedings.

Background

On 24 August 2010, Carthina Dew ("Mrs. Dew") was admitted into Britthaven after being discharged from Wilson Medical Center following surgery on her broken femur. Mrs. Dew was awake, alert, lucid, and responsive to questions when she arrived at Britthaven. However, she did not sign any of the legal documents needed to admit her into the facility. Her husband, Frederick Dew ("Mr. Dew"), and her daughter, Terri Dew Bookman ("Mrs. Bookman"), signed all relevant documents. They met with Janet Watson ("Ms. Watson"), Britthaven's admission coordinator. Ms. Watson filed an affidavit with the trial court averring that Mr. Dew and Mrs. Bookman presented themselves as having authority to sign all documents needed on Mrs. Dew's behalf prior to her admission into Britthaven. Ms. Watson presented Mr. Dew and Mrs. Bookman with twelve documents, including one titled "RESIDENT AND FACILITY ARBITRATION AGREEMENT – READ CAREFULLY" ("the arbitration agreement"). When it came time to sign the documents, Mr. Dew had Mrs. Bookman sign his name, "Fred Dew," on the arbitration agreement and all other admission documents. Mrs. Bookman primarily signed Mr. Dew's name on signatory lines intended for either the resident's signature or the signature of the resident's representative or responsible party. For example, on the "Facility Resident Directory Opt Out Instructions," Mrs. Bookman signed "Fred Dew" on the line reserved for the "Signature of Resident or Legal Representative."

Mrs. Dew was discharged from Britthaven on or about 7 September 2010. She died on 3 November 2010, allegedly due to complications with large pressure ulcers. On 28 September 2011, Mrs. Bookman filed a wrongful death action against Britthaven and four other defendants in her capacity as Administratrix of Mrs. Dew's estate ("plaintiff").[1] Britthaven

1. Britthaven is the only defendant that is a party to this appeal.

moved to compel arbitration pursuant to the arbitration agreement bearing Mrs. Bookman's signature of Mr. Dew's name. At the hearing on Britthaven's motion, plaintiff challenged the validity of the arbitration agreement by arguing that neither Mrs. Bookman nor Mr. Dew had actual authority to execute the arbitration agreement on Mrs. Dew's behalf. The trial court agreed, entering an order denying Britthaven's motion to compel arbitration, but did not determine whether Mr. Dew or Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf. That order was appealed to this Court, where the case was remanded by unpublished opinion for findings of fact and conclusions of law relating to the issue of apparent authority. *See Bookman v. Britthaven, Inc.*, No. COA12-663, 2013 WL 1314965 (N.C. Ct. App. April 2, 2013) ("*Bookman I*").[2]

On remand, Britthaven's request to present further evidence on the issue of apparent authority went unanswered by plaintiff's counsel and the trial court. The trial court entered a new order drafted by plaintiff's counsel without conducting an evidentiary hearing or considering any further evidence. It concluded that neither Mr. Dew nor Mrs. Bookman had "legal authority, expressed authority, actual authority, implied authority, or apparent authority" to sign the arbitration agreement on Mrs. Dew's behalf, and thus it denied Britthaven's motion to compel arbitration. Britthaven filed timely notice of appeal from the order.

Discussion

I. Apparent Authority

Britthaven's sole argument on appeal is that the trial court erred by denying its motion to compel arbitration because Mr. Dew and Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf. After careful review, we reverse and remand.

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2. Plaintiff contends that under the doctrine of the law of the case, the *Bookman I* Court determined that "the [trial court's] additional findings fully support the conclusion of law that neither Mr. Dew nor Mrs. Bookman had apparent authority to execute the Arbitration Agreement on behalf of Mrs. Dew and that Defendant-Britthaven's Motion to Compel Arbitration must be denied." However, the *Bookman I* Court explicitly stated that "[n]othing in this opinion is intended to express any view on the merits of the apparent agency issue," and "[w]e do not address plaintiff's arguments regarding the merits of the apparent agency argument because that issue must be considered in the first instance by the trial court." *Bookman I*, at *1, *4. Thus, plaintiff's argument is overruled. *See Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009) ("[T]he law of the case applies only to issues that were decided in the former proceeding.").

[1] Britthaven's appeal from the trial court's order denying its motion to compel arbitration is interlocutory. Appeals may be taken from interlocutory orders in two circumstances:

> First, the trial court may certify that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. N.C.G.S. § 1A–1, Rule 54(b) [2013]. Second, a party may appeal an interlocutory order that "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment."

Dep't of Transp. v. Rowe, 351 N.C. 172, 174–75, 521 S.E.2d 707, 709 (1999) (citation omitted), *cert. denied*, 534 U.S. 1130, 151 L. E. 2d 972 (2002). This Court has previously held that "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289-90, 681 S.E.2d 512, 514 (2009) (citation and quotation marks omitted). Thus, we hold that Britthaven's appeal is properly before us.

[2] "When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66, *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). "The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Ellision v. Alexander*, 207 N.C. App. 401, 404, 700 S.E.2d 102, 106 (2010). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66.

"The law of contracts governs the issue of whether an agreement to arbitrate exists." *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). In order to hold an alleged principal contractually liable to a third party for the acts of his agent, the third party has the burden of proving that

> a particular person was at the time acting as a servant or agent of the [principal]. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. This can be shown only by proof that the principal

> authorized the acts to be done or that, after they were done, he ratified them. One who seeks to enforce against an alleged principal a contract made by an alleged agent has the burden of proving the existence of the agency and the authority of the agent to bind the principal by such contract.

Simmons v. Morton, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968) (citations omitted).

Here, the trial court was to determine whether Mr. Dew or Mrs. Bookman had apparent authority to bind Mrs. Dew as their principal to the arbitration agreement.

> 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. Under the doctrine of apparent authority, a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent.

Munn v. Haymount Rehab. & Nursing Ctr., 208 N.C. App. 632, 639, 704 S.E.2d 290, 295 (2010) (citation and quotation marks omitted). Furthermore, "the principal cannot restrict his liability for acts of his agent within the scope of his apparent authority by limitations thereon of which the person dealing with the agent has not notice." *Morpul Research Corp. v. Westover Hardware, Inc.*, 263 N.C. 718, 721, 140 S.E.2d 416, 419 (1965).

> The law of apparent authority usually depends upon the unique facts of each case[.] . . . Thus, in a case where the evidence is conflicting, or susceptible to different reasonable inferences, the nature and extent of an agent's authority is a question of fact to be determined by the trier of fact. Where different reasonable and logical inferences may not be drawn from the evidence, the question is one of law for the court.

Foote & Davies, Inc. v. Arnold Craven, Inc., 72 N.C. App. 591, 595, 324 S.E.2d 889, 893 (1985) (citations omitted).

On remand, the trial court found as fact that:

> 13. Neither Frederick Washington Dew nor Terri Dew Bookman discussed with Carthina Roberson Dew anything

with regards to consenting to any arbitration on her behalf on August 24, 2010 or at anytime relevant hereto.

. . .

15. Carthina Roberson Dew did not delegate to Terri Dew Bookman or Frederick Washington Dew the right and/or authority to *agree to any arbitration agreement* on her behalf on August 24, 2010 or at anytime relevant hereto.

. . .

18. Carthina Roberson Dew did not give the authority either expressed or implied to Terri Dew Bookman or Frederick Washington Dew to *execute the Resident and Facility Arbitration Agreement.*

19. Carthina Roberson Dew did not hold Terry Dew Bookman nor Frederick Washington Dew out to Britthaven, Inc., as having or possessing the right and/or authority to *execute or agree to any arbitration agreement* on her behalf on August 24, 2010 or at anytime relevant hereto, nor did she make or indicate any manifestations of such authority to Britthaven, Inc.

. . .

21. At no time during the admission procedure on August 24, 2010 or at anytime relevant hereto did Carthina Roberson Dew hold Terry Dew Bookman or Frederick Washington Dew out as possessing the right to *agree or enter into any arbitration agreement* on her behalf.

22. At no time during the admission procedure on August 24, 2010 or at anytime relevant hereto did Carthina Roberson Dew permit Terry Dew Bookman or Frederick Washington Dew to represent that they possessed the right or authority to agree or *enter into any arbitration agreement on her behalf.* (Emphasis added.)

Based on these findings of fact, the trial court concluded that neither Mr. Dew nor Mrs. Bookman had apparent authority to sign the arbitration agreement on Mrs. Dew's behalf and that any belief on Britthaven's part of apparent authority was unreasonable and unjustified under the circumstances. Even assuming that the trial court's findings of fact are supported by competent evidence and are thus binding on appeal, *Ellision*, 207 N.C. App. at 404, 700 S.E.2d at 106, they are insufficient to support

the trial court's conclusion that no apparent authority existed to bind Mrs. Dew to the arbitration agreement.

Significantly, the trial court made no factual findings as to whether Mrs. Dew conferred authority on Mrs. Bookman or Mr. Dew to conduct the admission process in general on her behalf. Thus, its analysis as to the arbitration agreement is incomplete. Ms. Watson averred that both Mr. Dew and Mrs. Bookman "presented themselves as having full authority to act on behalf of Mrs. Dew, and to sign and execute any and all necessary documents on her behalf." Indeed, not only does plaintiff not challenge the enforceability of any of the eleven other contracts signed by Mrs. Bookman and Mr. Dew on Mrs. Dew's behalf, Mrs. Bookman averred that she signed documents in Mr. Dew's name so that Mrs. Dew could be "admitted" into Britthaven. The complaint itself states that Mrs. Dew was "admitted" into Britthaven, and the trial court found as fact that "[Mrs. Dew] was admitted as a resident" of Britthaven. Ms. Watson averred that the paperwork signed by Mrs. Bookman and Mr. Dew is "necessary" for a resident to be admitted into Britthaven. Therefore, the trial court's finding of fact that Mrs. Dew was "admitted" and plaintiff's own concession that Mrs. Dew was "admitted" tends to show that at the very least, there may have been actual or apparent authority conferred on Mr. Dew or Mrs. Bookman to execute some or all of the contracts that were needed in order to complete the admission process.

If such authority did exist, the issue regarding the apparent authority to enter into the arbitration agreement would become one of scope. The North Carolina Supreme Court has established that "[t]he principal is liable upon a contract duly made by his agent with a third person . . . when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority." *Morpul Research Corp.*, 263 N.C. at 721, 140 S.E.2d at 418. Throughout the admission process, Mrs. Bookman and Mr. Dew signed twelve contracts with Britthaven on Mrs. Dew's behalf. Of those twelve contracts, they now challenge the enforceability of only one – the arbitration agreement. Mrs. Bookman signed Mr. Dew's name on signatory lines reserved for Mrs. Dew or her "Legal Representative," "Responsible Party," and "Agent or Representative." Ms. Watson averred that neither Mr. Dew nor Mrs. Bookman "raised any objection to agreeing to or signing any of the documents that I presented them" and that "[a]t no time during the admission process, did Mr. Dew or his daughter make any statement or take any action to suggest that their authority to act on behalf of Mrs. Dew was limited in any way or that either lacked the authority to sign any of the paperwork on her behalf." Given that Mrs. Bookman and Mr. Dew may have had authority to conduct the admission process for Mrs.

Dew, and Ms. Watson averred that she was unaware of any limitation on this authority if it existed, there remains evidence which the trial court failed to address in its findings of fact and conclusions of law "that would allow, but not require, a finding of apparent authority" to enter into the arbitration agreement. *Bookman I*, at *4.

Rather than allowing Britthaven, the party bearing the burden of proof, to put on further evidence as to these matters after remand from *Bookman I*, the trial court entered new findings of fact taken verbatim from plaintiff's proposed order. Such findings are only supported by affidavits from Mrs. Bookman and Mr. Dew that were initially presented to the trial court in support of plaintiff's argument that there was no *actual* authority to bind Mrs. Dew to the arbitration agreement. Plaintiff presented no evidence for the purpose of resolving the issue of apparent authority. Thus, because the trial court denied Britthaven the opportunity to carry its burden of establishing apparent authority and failed to address all issues raised by the evidence it had before it, we conclude that it did not fully comply with the *Bookman I* Court's mandate to enter "further findings of fact and conclusions of law regarding whether either Mr. Dew or [Mrs.] Bookman had apparent authority to enter into the arbitration agreement in this case." *Bookman I*, at *4; *see Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (1992) ("In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment.").

Because the trial court failed to enter findings of fact or conclusions of law resolving: (1) whether Mr. Dew or Mrs. Bookman had authority to bind Mrs. Dew to the other admission contracts; (2) whether the arbitration agreement fit into the scope of this potential authority; (3) whether there was any limitation on this potential authority; and (4) whether Britthaven was aware of any limitation on this authority if one existed, we must reverse the trial court's order and remand. We further instruct the trial court to conduct an evidentiary hearing as needed to resolve these outstanding issues.

Conclusion

For the reasons stated above, we reverse the trial court's order denying Britthaven's motion to compel arbitration and remand for further proceedings.

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.

DEAVEN GREY DAVIS, DANETTE DAVIS AND DICKIE G. DAVIS, PLAINTIFFS
v.
HERMILO SALAZAR URQUIZA, DEFENDANT

No. COA13-1089

Filed 15 April 2014

Process and Service—insufficient service of process—motion to dismiss—uninsured motorist carrier—service on claims adjuster

The trial court did not err by granting the motion of an uninsured motorist carrier to dismiss for insufficient process or insufficient service of process. Where a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service within the limitations period. In the instant case, plaintiffs' service upon a claims adjuster was insufficient. Plaintiffs' alias and pluries summonses issued after defendant was served had no legal effect.

Appeal by plaintiffs from order entered 11 March 2013 by Judge James M. Webb in Surry County Superior Court. Heard in the Court of Appeals 18 February 2014.

Daggett, Shuler, Koontz, Nauman & Bell, P.L.L.C., by Michael W. Clark, for plaintiff-appellants.

Willardson & Lipscomb, LLP, by John S. Willardson, for unnamed defendant-appellee, North Carolina Farm Bureau Mutual Insurance Company.

STEELMAN, Judge.

Where valid service of process was not made upon an uninsured motorist carrier within the applicable statute of limitations period, the trial court did not err in granting the motion of the uninsured motorist carrier to dismiss for insufficient process or insufficient service of process.

I. Factual and Procedural Background

On 15 July 2009, Deaven Grey Davis, then a minor, was a passenger in a vehicle struck by another vehicle operated by Hermilo Salazar Urquiza ("defendant"). On 31 May 2012, Deaven Davis, along with her parents, Danette and Dickie G. Davis (collectively, "plaintiffs") filed

suit against defendant, seeking monetary damages for personal injuries resulting from the collision.

Defendant was an uninsured motorist. Plaintiffs contended that North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") provided uninsured motorists' coverage for the collision in accordance with N.C. Gen. Stat. § 20-279.21(b)(3). Defendant was served with a copy of the summons and complaint on 29 July 2012. Plaintiffs also contended that National Grange Insurance Company ("National Grange") provided applicable uninsured motorists' coverage.

On 5 June 2012, counsel for plaintiffs mailed a copy of the summons and complaint to Steve Wagoner, a claims adjuster for Farm Bureau, by certified mail, at Wagoner's office in Wilkesboro. These documents were received on 7 June 2012. On 6 July 2012, Farm Bureau filed an answer to plaintiffs' complaint, as an unnamed party, specifically asserting the defenses of insufficiency of process and insufficiency of service of process, as well as the statute of limitations. On 27 December 2012, Farm Bureau gave notice to plaintiffs of a hearing on 7 January 2013 concerning its motion to dismiss based upon insufficiency of process and insufficiency of service of process. On 31 December 2012, Farm Bureau served the affidavit of H. Julian Philpott, Jr. This affidavit stated that Steve Wagoner "was not now, nor has he ever been an officer, director or managing agent of North Carolina Farm Bureau Mutual Insurance Company, nor has he ever been a designated process agent for that company..."

Plaintiffs caused alias and pluries summonses to be issued by the Clerk of Superior Court of Surry County, directed to defendant, on 20 July 2012, 25 September 2012, and 10 December 2012. On 2 January 2013, plaintiffs mailed a copy of the summons and complaint to Wayne Goodwin, Commissioner of Insurance, by certified mail, in order to serve Farm Bureau in accordance with the provisions of N.C. Gen. Stat. § 58-16-30. This was received by the Commissioner of Insurance on 7 January 2013.

On 7 January 2013, Farm Bureau's motion to dismiss was heard before the trial court. By order filed 11 March 2013, the trial court granted defendant's motion, and dismissed plaintiffs' complaint against Farm Bureau as an unnamed defendant, with prejudice.

Plaintiffs appeal.

II. Standard of Review

"We review de novo the grant of a motion to dismiss." *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003). Where there is no

valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b) should be granted. *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974).

III. Service of Process

In their sole argument on appeal, plaintiffs contend that the trial court erred in dismissing the complaint against Farm Bureau for insufficient process and/or insufficient service of process. We disagree.

N.C. Gen. Stat. § 20-279.21(b)(3), concerning uninsured motorist coverage, provides that:

> [T]he insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. . . . The failure to post notice to the insurer 60 days in advance of the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2013). This statute provides that, in order for an uninsured motorist carrier to be bound by a proceeding, mere notice is insufficient; the carrier must be formally served with process. *See Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 576, 573 S.E.2d 118, 122 (2002) (holding that the statute "unequivocally requires that the UM carrier be served with a copy of the summons and complaint in order to be bound by a judgment against the uninsured motorist.").

Under Rule 4(j)(6) of the North Carolina Rules of Civil Procedure, service of process can be effected upon a corporation:

> a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.
>
> d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

N.C. R. Civ. P. 4(j)(6) (2013). In addition, N.C. Gen. Stat. § 58-16-30 provides that an insurance company can be served by serving the North Carolina Commissioner of Insurance. N.C. Gen. Stat. § 58-16-30 (2013).

We have previously held that statutes concerning service of process must be strictly complied with, and that even actual notice, if it does not comply with statutory requirements, does not give the court jurisdiction over a party. *Fulton v. Mickle*, 134 N.C. App. 620, 623-24, 518 S.E.2d 518, 520-21 (1999). In *Fulton*, we held that service upon a party was defective for two reasons: first, because it was delivered by regular mail instead of certified mail; second, because the recipient was not one of those listed in Rule 4(j)(6) as authorized to receive service. We hold that this latter basis, the lack of an authorized recipient, is controlling in the instant case.

"[A] defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit. However, once the defendant has pled the statute of limitations, the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Lawrence v. Sullivan*, 192 N.C. App. 608,

621-22, 666 S.E.2d 175, 182-83 (2008) (citations and quotations omitted). In *Lawrence*, the plaintiff, seeking to bring an action against Sullivan, served process within the applicable limitations period by certified mail. The letter was signed for by one James Holt. The plaintiff voluntarily dismissed the case, and then refiled it within one year. The defendant, in her affidavit, stated that she did not reside at the residence where the certified letter was delivered or receive a copy of the summons and complaint. The trial court held that the defendant had rebutted the presumption of valid service within the limitations period, placing the burden upon the plaintiff to prove that the action accrued within the limitations period. The trial court held that the plaintiff failed to do so, and that defendant was entitled to a dismissal due to insufficient process or service of process within the applicable limitations period. We affirmed. *Id.* at 623, 666 S.E.2d at 183.

In the instant case, plaintiffs mailed a copy of the summons and complaint to Steve Wagoner, a claims adjuster for Farm Bureau, by certified mail on 5 June 2012. Plaintiffs' complaint alleged that the accident took place on 15 July 2009. The applicable statute of limitations for personal injury in tort, and for service on a UM carrier, arising out of an automobile accident is three years. N.C. Gen. Stat. § 1-52(16) (2013); *Thomas v. Washington*, 136 N.C. App. 750, 754, 525 S.E.2d 839, 842 (2000) (holding that "the three-year tort statute of limitations, which begins running on the date of an accident, also applies to the uninsured motorist carrier.").

The affidavit of H. Julian Philpott, Jr., states that Wagoner was neither an officer nor director, nor a designated agent for service of process, for Farm Bureau. This affidavit rebutted the presumption that service upon Wagoner was effective. Plaintiff failed to present evidence to demonstrate effective service within the limitations period. We therefore hold that plaintiffs' purported service of process upon Steve Wagoner was defective.

Plaintiffs contend that this case presents us with "a new set of facts with no case law directly on point." This is simply not correct. Our opinion in *Thomas v. Washington* is controlling. In *Thomas*, the plaintiff had uninsured motorist coverage, and was in an accident on 31 March 1995; "the three-year statute of limitations applicable to automobile negligence actions ran on 31 March 1998." *Thomas*, 136 N.C. App. at 751-53, 525 S.E.2d at 841.[1] The plaintiff instituted an action within the

1. We are puzzled as to why appellee does not directly cite to *Thomas v. Washington* in its brief. Rather, its argument is based upon a recommended decision of a federal

limitations period, and properly served the individual defendants; however, the uninsured motorist carrier was not served within the applicable three-year period. Plaintiff contended that service upon the insurance company was nonetheless effective, despite being served upon the company's registered agent after the expiration of the limitations period. Plaintiff's contention was that the limitations period was based on contract, not on tort, and that the action was kept alive through alias or pluries summonses. *Id.* at 753-54, 525 S.E.2d at 842. We disagreed, holding that the three-year tort statute of limitations applied, and that alias or pluries summonses only extend the action upon defendants who are not served, until such time as service can be made. *Id.* at 753-55, 525 S.E.2d 842-43. We further held that:

> Our appellate courts have required strict compliance with the statutes which provide for service of process on insurance companies in similar situations. For example, in *Fulton v. Mickle* this Court held that mailing a copy of the summons and complaint by *regular mail to a claims examiner for the insurer* did not comply with the requirement of Rule 4(j)(6)(c) of the Rules of Civil Procedure that a copy of the summons and complaint be mailed by "registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served...."

Id. at 755, 525 S.E.2d at 843.

Where a plaintiff seeks to bind an uninsured motorist carrier to the result in a case, the carrier must be served by the traditional means of service, within the limitations period. In the instant case, plaintiffs' service upon a claims adjuster was insufficient. As we held in *Thomas*, plaintiffs' alias and pluries summonses issued after defendant was served have no legal effect. *Id.* at 755, 525 S.E.2d at 843. Plaintiffs' service upon the Commissioner of Insurance outside of the limitations period mandated dismissal.

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magistrate in *Neth. Ins. Co. v. Cockman*, 342 F. Supp. 2d 396 (M.D.N.C. 2004), which references *Thomas v. Washington*. Appellee cites this decision as if it was authoritative. It is not. With regard to matters of North Carolina state law, "neither this Court nor our Supreme Court is 'bound by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive.'" *Libertarian Party of N.C. v. State*, 200 N.C. App. 323, 331, 688 S.E.2d 700, 706 (2009) *aff'd as modified*, 365 N.C. 41, 707 S.E.2d 199 (2011) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989)). Briefs should cite directly to controlling North Carolina precedent.

The trial court did not err in granting Farm Bureau's motion to dismiss for insufficiency of process or insufficiency of service of process.

This argument is without merit.

AFFIRMED.

Judges McGEE and ERVIN concur.

DUKE ENERGY CAROLINAS, LLC, Plaintiff
v.
BRUTON CABLE SERVICE, INC., Defendant/Third-Party Plaintiff
v.
ROBERT WAYNE TAYLOR and wife, LOIS K. TAYLOR; DAVIS-MARTIN-POWELL AND ASSOCIATES, INC., and JON ERIC DAVIS, Third-Party Defendants

No. COA13-686

Filed 15 April 2014

1. Pleadings—unsworn letters and correspondence—summary judgment

The trial court erred in a case involving an easement dispute by admitting unsworn letters between counsel for third-party plaintiff and third-party defendant in violation of N.C.G.S. § 1A-1, Rule 56(e) and by considering them in the decision to grant defendants' motion for summary judgment.

2. Statutes of Limitations and Repose—land surveyor—ten-year period—action timely commenced

The trial court erred in a case involving an easement dispute by granting summary judgment in favor of third-party defendant based on the statute of limitations. The ten-year limitation period in N.C.G.S. § 1-47(6)(a) applied and third-party plaintiff commenced its action within ten years of the last act giving rise to the cause of action.

3. Indemnity—third-party action—joinder permissible

Third-party plaintiff's claim was proper where it alleged indemnity with language mirroring in part that of N.C.G.S. § 1A-1, Rule 14(a). Furthermore, because third-party plaintiff properly alleged indemnification pursuant to Rule 14 in the third-party complaint, the joinder of claims was permissible pursuant to N.C.G.S. § 1A-1, Rule 18.

Appeal by defendant/third-party plaintiff from order entered 11 October 2012 by Judge Lucy N. Inman in Randolph County Superior Court. Heard in the Court of Appeals 6 November 2013.

Biesecker, Tripp, Sink & Fritts, L.L.P., by Joe E. Biesecker, for third-party plaintiff-appellant Bruton Cable Service, Inc.

Pharr Law, PLLC, by Steve M. Pharr, for third-party defendant-appellees Davis-Martin-Powell and Associates, Inc. and Jon Eric Davis.

CALABRIA, Judge.

Defendant/third-party plaintiff Bruton Cable Service, Inc. ("Bruton") appeals from an order granting summary judgment in favor of third-party defendants Davis-Martin-Powell and Associates, Inc. ("DMP") and Jon Eric Davis ("Davis") (collectively "defendants"). Bruton voluntarily dismissed its claims against third-party defendants Robert Wayne Taylor and Lois K. Taylor ("the Taylors") on 29 April 2013. Duke Energy Carolinas, LLC ("Duke") voluntarily dismissed its claims against Bruton on 2 May 2013. Neither the Taylors nor Duke are parties to the instant appeal. We reverse.

I. Background

In April 2005, Bruton, a North Carolina corporation, purchased Lots 7 and 59 ("the property") from the Taylors. The property was located in the Randolph Hills Subdivision, Phase II ("the subdivision"), in Randolph County, North Carolina. Prior to Bruton's ownership of the property, DMP, a North Carolina corporation engaged in the business of surveying, engineering, and land planning, prepared the plat. Davis, a DMP employee and registered surveyor, certified the plat that was recorded on 8 July 2003 at Plat Book 84, Page 95 at the Randolph County Register of Deeds. The final recorded plat showed Duke's right-of-way easement (the "Duke easement" or "Duke's easement") pursuant to an agreement dated 20 May 1970.

According to Davis' plat, Duke's easement extended 150 feet over and across Lots 7 and 59 of the subdivision. Relying on the information in the recorded final subdivision plat ("the plat") depicting a 150-foot Duke easement, Bruton planned the location of single-family homes and a septic tank repair and drain field on the property. Bruton began construction in 2006.

On 31 October 2006, Duke representative Ervin Summers ("Summers") visited the property to determine whether the construction was within Duke's easement. Summers then sent Bruton a letter dated 8 February 2007 stating Duke's objection to all encroachments that existed within Duke's deeded and recorded 200-foot easement for the property. Summers requested the removal of the encroachments on Duke's easement. At the time Bruton received Duke's letter, the house on Lot 59 was almost complete and the house on Lot 7 was approximately 60% complete. Bruton also sent DMP several letters regarding the encroachment due to the inaccurate survey.

On 7 July 2011, since the parties were unsuccessful in negotiations regarding the disputed easement, Duke filed a complaint against Bruton alleging that a portion of Bruton's house that was under construction encroached upon Duke's easement, and sought, *inter alia*, an order to remove the encroachment from the 200-foot wide electrical transmission line easement. Duke also sought a permanent injunction against Bruton, prohibiting it from further interfering with Duke's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines.

On 22 December 2011, Bruton filed an answer and a third-party complaint against DMP and Davis. In its answer, Bruton denied liability and acknowledged that any alleged liability was the result of Bruton's reasonable and justifiable reliance upon defendants' actions, representations, and warranties that the Duke easement was 150 feet wide.

In its third-party complaint against defendants, Bruton alleged, *inter alia*, that

> DMP and Davis, in the course of their business and profession, prepared the final map for the Randolph Hills Subdivision, Phase II, for the benefit of persons who would acquire Lots 7 and 59. [Defendants] reasonably knew that a purchaser of Lots 7 and 59 would reasonably rely on the information and representation contained in that survey as shown on the map.
>
> 33. In performing the services necessary for the production of the map . . . [defendants] were required to comply with the provisions of N.C.G.S. § 47-30(f)(8). [Defendants] did not comply with that statute. The failure to comply with that statute caused [Bruton] to incur damages. That statute was enacted for the benefit and protection of the general public. [Bruton], as a purchaser of Lots 7 and 59

and as a member of the general public, is one of the class of persons for whose benefit [defendants] supplied the information and statements shown on the plat. [Bruton] is a person for whose protection that statute was enacted by the legislature. Although [Bruton] was not personally aware of the defect in the map, [Bruton] was entitled to rely on the accuracy of that map. [Defendants] knew or should have known that members of the public such as [Bruton] and other purchasers of lots in that subdivision would rely on the accuracy of that map.

34. On or about 29 April 2005 [Bruton] acquired ownership of Lots 7 and 59, Phase II, Randolph Hills Subdivision according to the plat which is duly recorded in Plat Book 84, Page 95 in the Register of Deeds of Randolph County, North Carolina.

. . .

37. [Bruton] reasonably relied on [defendants'] representation of the [Duke] easement as shown on the final recorded map.

38. After acquiring the two lots, [Bruton] began construction of a house on each lot in late 2006. Each house was located in order to comply with the required set-back and zoning limits, the requirements of the Restrictive Covenants, other applicable laws and rules and outside the [Duke] easement as shown on the plat prepared by [defendants]. [Bruton's] agents relied on the plat.

39. On or about February 10, 2007, [Bruton] received a letter dated February 8, 2007 from [Duke]. The letter asserted that [Duke] had a 200-foot wide easement on Lots 7 and 59. [Duke] informed [Bruton] that no portion of either house, driveway, septic system or other improvements could be located within any area of the 200-foot wide easement.

. . .

41. When [Bruton] received that letter, the house on Lot 59 was almost complete and the house on Lot 7 was approximately sixty percent (60%) complete. To mitigate possible damages, [Bruton] ceased work on each house and incurred expenses to relocate the septic tank system on Lot 59 outside of the alleged Duke easement.

> Approximately 50% of the house on Lot 7 is within the alleged [Duke] easement. If the Court grants [Duke] any or all the relief it requests, the house on Lot 7 will have to be disassembled and demolished. Both houses were planned as single-family residences.
>
> 42. [Bruton] spent approximately $191,301.90 for Lot 7 and construction of the house on Lot 7. [Bruton] spent approximately $224,821.23 for Lot 59 and construction of the house on Lot 59. [Bruton] will have to remove the house on Lot 7 and remove the unused septic system from encroaching on the easement. [Bruton] will incur expenses.
>
> 43. [Defendants] were negligent in that they failed to accurately identify and locate the [Duke] easement on the map . . . as required by N.C.Gen.Stat. [sic] § 47-30(f)(8) and other applicable law. Such failure constitutes negligence. [Defendants] failed to exercise that care and competence in obtaining and communicating accurate information regarding the [Duke] easement. [Defendants] negligently misrepresented the accurate width of the [Duke] easement. The actions of [defendants] constitute a mistake on their part.
>
> 44. As a direct and proximate result of [defendants'] negligence, [Bruton] has been damaged in an amount incurred or to be incurred in excess of $10,000.00 for purchase price of each lot, construction of each house, removal of the house on Lot 7 and removal of the septic tank system on Lot 59.
>
> 45. [Bruton] could not have prevented the damages it has incurred or will incur.

On 9 January 2012, defendants filed an answer to Bruton's third-party complaint. As one of the affirmative defenses, defendants alleged Bruton's claims were barred by the statute of limitations. On 18 July 2012, defendants filed a motion to dismiss the complaint, and in the alternative, a motion for summary judgment. After a hearing on 17 September 2012, at which defendants specifically argued that Bruton's claim was time-barred by the statute of limitations, the trial court granted summary judgment in favor of defendants. Bruton appeals.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "A genuine issue of material fact arises when the facts alleged . . . are of such nature as to affect the result of the action." *N. Carolina Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 116 (2011) (citation and quotation marks omitted). In a summary judgment motion, the court may consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to see if there is any genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). This Court reviews the pleadings and all other evidence in the record in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Sadler*, 365 N.C. at 182, 711 S.E.2d at 117.

III. Summary Judgment

Bruton argues that the trial court erred in admitting unsworn letters and considering them in the decision to grant defendants' motion for summary judgment, and more importantly by basing that decision on the statute of limitations. We agree.

A. Admission of Correspondence

[1] As an initial matter, submitted affidavits must meet the requirements of Rule 56(e) of the North Carolina Rules of Civil Procedure: "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2013). Unsworn letters and correspondence are not the type of evidence considered by the court pursuant to Rule 56, and should not be considered during summary judgment. *Strickland v. Doe*, 156 N.C. App. 292, 296, 577 S.E.2d 124, 129 (2003). Instead, "parties are required to set forth facts in affidavits or as otherwise provided." *Id.*, 577 S.E.2d at 129 (quotation marks omitted). *See also Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 709, 582 S.E.2d 343, 345-46 (2003) (unsworn statements and inadmissible hearsay "cannot be relied upon" in a summary judgment motion).

In the instant case, defendants introduced several letters between Bruton's counsel and defense counsel purporting to support their

summary judgment motion. While defendants contend the letters were offered for the purpose of showing Bruton's awareness of damages, the reason for offering the letters does not negate the fact that the letters themselves were unsworn correspondence that did not comply with the requirements of Rule 56.

Bruton also argues that the letters should not have been admitted because they contained impermissible hearsay, legal opinions and presumptions, and statements in the course of settlement negotiations. However, since the trial court erred by improperly considering unsworn correspondence between Bruton's counsel and defense counsel, and defendants did not comply with the requirements of Rule 56, it is unnecessary to address these arguments.

B. Statute of Limitations

[2] In addition to considering unsworn correspondence, we address whether the Bruton's third-party action was barred by the statute of limitations.

To determine whether Bruton timely filed its third-party complaint, we must determine when Bruton, as the aggrieved party, became entitled to maintain an action. Bruton specifically alleged in the third-party complaint that defendants, as registered land surveyors, negligently misrepresented the accurate width of the Duke easement. According to our Supreme Court in *Raftery v. Wm. C. Vick Constr. Co.*, a statute of limitations begins to run against an aggrieved party when that aggrieved party becomes entitled to maintain an action for the wrongful act that was committed. 291 N.C. 180, 186-87, 230 S.E.2d 405, 408 (1976) (citation omitted). In a claim specifically alleging negligent misrepresentation, the cause of action accrues when two events occur: (1) the claimant discovers the misrepresentation, and (2) the claimant suffers harm because of the misrepresentation. *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 35, 681 S.E.2d 465, 478 (2009) (citation omitted).

Although defendants contend that N.C. Gen. Stat. § 1-52(16) should apply, N.C. Gen. Stat. § 1-52(18) specifically excludes § 1-52(16) and includes § 1-47(6). Pursuant to N.C. Gen. Stat. § 1-52(18) (2013), a three-year limitation applies to actions "[a]gainst any registered land surveyor . . . or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-47(6)." According to N.C. Gen. Stat. § 1-47(6), an action against any registered land surveyor and any person acting under his supervision or control

for physical damage or for economic or monetary loss due to negligence in the performance of surveying or platting must be commenced "within 10 years after the last act or omission giving rise to the cause of action." N.C. Gen. Stat. § 1-47(6)(a) (2013). This limitation applies *to the exclusion of* N.C. Gen. Stat. § 1-52(16). N.C. Gen. Stat. § 1-47(6)(c) (2013).

Since Davis is a registered land surveyor, DMP is a company specifically engaged in surveying and platting, and this appeal involves a complaint based upon negligent surveying that caused Bruton to suffer property damage and economic loss due to defendants' negligent survey, N.C. Gen. Stat. §§ 1-52(18) and 1-47(6) both apply. However, both statutes provide differing limitation periods for actions against registered land surveyors. Pursuant to *Fowler v. Valencourt*, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) (citations omitted). "Moreover, where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." *Id.* at 350, 435 S.E.2d at 533 (citation omitted). Therefore, the ten-year limitation period applies.

In the instant case, Bruton officially discovered defendants' misrepresentation in the survey regarding the location of the easement when Bruton received Summers' letter dated 8 February 2007 regarding the encroachments on Duke's easement. Duke filed a complaint against Bruton on 7 July 2011. Bruton, as the aggrieved party in Duke's complaint, was then entitled to maintain a cause of action against the third-party defendants for negligent misrepresentation of the easement.

Since Duke's allegations caused Bruton economic loss, Bruton filed an answer and third-party complaint against defendants on 22 December 2011, alleging, *inter alia*, that Bruton reasonably relied upon the representation in the plat prepared by Davis depicting Duke's right of way as 150-feet wide. Since Bruton promptly filed its third-party action against defendants after receiving the Duke action, we hold that pursuant to N.C. Gen. Stat. § 1-47(6), which is the more specific statute, Bruton commenced its action within 10 years of the last act giving rise to the cause of action. The trial court erred by granting summary judgment for defendants. Bruton's third-party complaint for negligent misrepresentation against defendants was timely filed and was not time-barred.

Defendants contend that Bruton's claim for negligent misrepresentation of the easement accrued in 2006, when Summers initially visited the property. However, even if Bruton's claim accrued in 2006, the

third-party complaint was still filed within 10 years, and thus timely filed pursuant to N.C. Gen. Stat. § 1-47(6).

IV. Validity of Third-Party Action

[3] Since we conclude that Bruton's third-party complaint was timely filed and not time-barred by the applicable statute of limitations, the final issue is whether Bruton was permitted to file its third-party action. Defendants contend that Bruton's claim is an inappropriate direct action disguised as a third-party action.

Pursuant to Rule 14, "any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." N.C. Gen. Stat. § 1A-1, Rule 14(a) (2013). Since Bruton's third-party complaint specifically alleges "that the third-party defendants are liable to Bruton Cable for all or part of [Duke's] claims against Bruton Cable," Bruton's third-party complaint alleges indemnity with language mirroring in part that of Rule 14(a).

Defendants also contend that Bruton's negligent misrepresentation claim is inappropriate because a third-party plaintiff may only assert derivative damages against a third-party defendant. However, Rule 18 of the North Carolina Rules of Civil Procedure states that "[a] party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or alternate claims, as many claims, legal or equitable, as he has against an opposing party." N.C. Gen. Stat. § 1A-1, Rule 18(a) (2013). Since Bruton properly alleges indemnification pursuant to Rule 14 in the third-party complaint, the joinder of claims is permissible pursuant to Rule 18.

V. Conclusion

Bruton's third-party complaint alleged negligent misrepresentation for justifiably relying to its detriment on defendants' misrepresentation of the accurate width of the Duke easement in the recorded plat. As a result, Bruton suffered physical damage and economic or monetary loss. Because N.C. Gen. Stat. § 1-47(6) applies pursuant to *Fowler*, Bruton was required to file its third-party complaint within 10 years of the last act or omission giving rise to the cause of action. Bruton's third-party complaint was properly filed pursuant to the North Carolina Rules of Civil Procedure within 10 years of both Summers' visit to the property in October 2006 and the official letter from Duke in February 2007. In the light most favorable to Bruton as the nonmoving party, defendants are

not entitled to judgment as a matter of law. For these reasons, summary judgment should have been denied. We reverse.

Reversed.

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

STEVEN G. GORDON, PLAINTIFF
v.
DEBORAH J. GORDON, DEFENDANT

No. COA13-937

Filed 15 April 2014

1. Contempt—civil—findings—ability to pay

The trial court did not err by holding plaintiff in civil contempt for his willful disregard of the order requiring him to pay $5,000 per month to defendant (his former wife) and ordering him jailed unless he paid $20,000 to defendant. The trial court considered plaintiff's ability to comply as of the date of the hearing and within the sixty days afforded to him to take any additional measures he may need to take.

2. Contempt—civil—credit—amount owed on distributive award—no double counting

The trial court did not err in a civil contempt case by failing to credit plaintiff with the $7,322.42 seized by defendant from plaintiff's checking account. The $7,322 seized did reduce the amount he owed on the distributive award judgment, and plaintiff did not get to count the amount seized by defendant twice.

Appeal by plaintiff from Order entered on or about 24 April 2013 by Judge Jan H. Samet in District Court, Guilford County. Heard in the Court of Appeals 6 February 2014.

Randolph M. James, PC, by Randolph M. James, for plaintiff-appellant.

Woodruff Law Firm, P.A., by Jessica Snowberger Bullock, for defendant-appellee.

STROUD, Judge.

Steven Gordon ("plaintiff") appeals from an order entered on or about 24 April 2013 finding him to be in civil contempt and ordering him jailed unless he pays $20,000 to his former wife, Deborah Gordon ("defendant"), within 60 days. We affirm.

I. Background

Much of the background to this case was discussed in our opinion arising from the last contempt order that plaintiff appealed:

> The parties were married in 1983 and separated in 2007. On 21 August 2009, the parties executed a mediated settlement agreement, pursuant to which Plaintiff was required to pay Defendant a distributive award in the amount of $1,200,000.00 and to pay $5,600.00 per month in post-separation support until $1,000,000.00 of the distributive award had been paid. In return, Defendant agreed to waive the right to receive additional post-separation support or alimony.
>
> On 24 August 2009, Plaintiff filed a complaint for divorce. On 28 October 2009, Defendant filed an answer in which she admitted the material facts alleged in Plaintiff's complaint and asserted counterclaims for, among other things, divorce, distribution of the parties' IRA accounts, breach of contract, specific performance of the mediated settlement agreement, and attorney's fees. In a reply filed on 13 November 2009, Plaintiff admitted that he had not made all the payments required by the mediated settlement agreement and asserted various defenses stemming from his alleged inability to obtain a bank loan or otherwise procure the funds needed to make the required payments.
>
> On 5 May 2010, the trial court entered a consent order which provided, in pertinent part, that:
>
> . . . .
>
> Plaintiff shall pay to Defendant on the first day of each month beginning June 1, 2010 the sum of $9000, by direct deposit to her checking account until the earlier to occur of the following:
>
> (i) July 31, 2011 or

(ii) The sale of 8640 Adkins Road, Colfax, NC

. . . .

On 12 April 2012, the trial court orally determined that Plaintiff was in contempt of the consent judgment by willfully failing to list the Adkins Road property for sale with Ms. Laney; stated that Defendant had chosen, instead, to list the property with an "inexperienced" agent who "doesn't even come close to having the qualities, the skills necessary, the connections necessary to sell this price of a house;" and noted that, in the court's "opinion [, Plaintiff] really [wasn't] trying to satisfy this obligation" because he did not "believe that [he] should have to pay [Defendant any more] money." As a result, the trial court told Plaintiff that he was being held in contempt of court for willfully failing to list the property with Ms. Laney and that, in the event that he failed to execute a listing contract with her within fourteen days, he would be jailed pending compliance with the relevant provision of the consent judgment.

Gordon v. Gordon, ___ N.C. App. ___, 746 S.E.2d 21, 2013 WL 3049072 at *1-*3 (2013) (unpublished) (brackets and ellipses omitted), *disc. rev. denied*, ___ N.C. ___, 753 S.E.2d 679 (2014). Defendant appealed the 2012 contempt order to this Court. *Id.* at *4. We affirmed. *Id.* at *13.

Since the 2012 order, there have been additional conflicts between the parties over the money plaintiff owes defendant. After November 2012, plaintiff failed to pay the $5,000 per month that had been ordered by the trial court. As a result, defendant filed a motion for contempt. The trial court issued an order to show cause, finding that there was probable cause to believe plaintiff was in contempt of the 2010 Consent Order. Plaintiff responded, claiming that he was unable to make the required payments.

The trial court held a hearing on defendant's contempt motion on 26 February 2013. By order entered 24 April 2013, the trial court made written findings of fact and conclusions of law. The trial court held plaintiff in civil contempt and ordered that he be jailed if he failed to pay $20,000 in arrearages within 60 days "until such time as he complies with this order." Plaintiff filed notice of appeal to this Court on 30 April 2013.

II. Civil Contempt

[1] Plaintiff argues on appeal that the trial court erred in holding him in contempt because it failed to find that he has the present ability to pay the $20,000 he concedes that he owes. We disagree.

A. Standard of Review and Burden of Proof

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. A show cause order in a civil contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show why he should not be held in contempt.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted). Here, there was a show cause order with a judicial finding of probable cause. Therefore, the burden was on plaintiff "to show why he should not be held in contempt." *Id.* at 594, 679 S.E.2d at 143.

B. Present Ability to Pay

The trial court found plaintiff to be in civil contempt and ordered him to pay $20,000 in arrearages within 60 days or be sent to jail. Plaintiff argues that there was no finding and no evidence that he was presently able to comply or take reasonable steps to purge his contempt and that therefore he could not be subjected to an indefinite term in jail for civil contempt.

> For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order.

Jones v. Jones, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983); *see also* N.C. Gen. Stat. § 5A-21(a)(3) (2013). "Reasonable measures" to pay an outstanding judgment could include "borrowing the money, selling defendant's . . . property . . . , or liquidating other assets, in order to pay the arrearage." *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 787-88 (1980).

> When a defendant has the present means to comply with a court order and deliberately refuses to comply, there is a present and continuing contempt and the court may commit such defendant to jail for an indefinite term, that is, until he complies with the order. Under such circumstances, however, there must be a specific finding of fact supported by competent evidence to the effect that such defendant possesses the means to comply with the court order. Our Supreme Court has indicated . . . that the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition—so that there will be convincing evidence that the failure to pay is deliberate and wilful.

Bennett v. Bennett, 21 N.C. App. 390, 393-94, 204 S.E.2d 554, 556 (1974).

First, we must address plaintiff's argument that the trial court failed to find that he has the present ability to comply with its order. The trial court specifically found that

> 17. The evidence before the Court establishes conclusively that Plaintiff had the present ability to pay the $5,000 monthly alimony for the months of November and December of 2012 and January and February of 2013.
>
> 18. During the relevant period, Plaintiff had available to him from his business for his personal use at least $20,000 in cash used for the purchase of vehicles used as leased vehicles. He also had available at least $20,000 available to pay alimony through cash advances available through lines of credit associated with credit cards. Evidence also shows that Plaintiff had as much as $16,000 in business cash used to pay mortgage payments for his relatives' mortgages or rents.

The trial court then concluded that "Plaintiff *had* the present ability to comply with the May 5, 2010 Consent Order Judgment directing Plaintiff to pay [the] $5,000 per month alimony payment." (emphasis added.)

Plaintiff contends that the trial court's use of the word "had" rather than the word "has" is fatal to its judgment, as this shows that the Court failed to make findings as to his present ability to pay. Plaintiff claims that although he may have *had* the ability to pay $20,000 at some time in the past prior to the hearing, at the time of the hearing he no longer

had such present ability. The hearing was held on 26 February 2013, at which time the trial court took the matter under advisement; the order was entered on 24 April 2013. Plaintiff does not claim that his circumstances changed between date of the February 2013 hearing and entry of the order in April 2013; his argument focuses only on the word "had."

Although we agree that a trial court must make findings as to a contemnor's present ability to pay before holding him in civil contempt, we cannot take the word "had" out of the context of the entire order. Perhaps some of the confusion as to verb tense arises from the fact that at any civil contempt hearing, the parties are presenting evidence of what has happened in the past to prove the present state of affairs to enable the trial court to make findings of fact about what the present circumstances are and what will likely happen in the future. And then the written order from that hearing is actually prepared and entered after the hearing, so that the trial court is necessarily referring to events that occurred and evidence that was presented in the past, which was the present on the date the events happened or on the date of the hearing. Time stubbornly refuses to stand still even long enough for a hearing to be completed or an order prepared and entered. We must read the findings of fact with these considerations in mind.

The findings in this case are similar to those we approved in *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990). In *Hartsell*, the trial court found that " 'defendant had at all times been fully capable and able of complying with all provisions of the Court's decree' and that 'defendant had the present ability and continuing capability to comply with all remaining provisions of the Court's decree with which he had not heretofore complied.' " *Id.* at 385, 393 S.E.2d at 573 (brackets omitted). Despite the trial court's use of the word "had," we affirmed the trial court's conclusion that the defendant's failure to comply was willful and that he had the *present* ability to comply because there was evidence that he had "the present ability to take reasonable measures that would enable him to comply." *Id.* at 386, 393 S.E.2d at 574.

Taking the findings as a whole, it is clear that the trial court considered plaintiff's ability to comply as of the date of the hearing and within the sixty days afforded to him to take any additional measures he may need to take. The trial court properly took an inventory of plaintiff's recent income and expenses in considering his ability to comply throughout the relevant period, including February 2013, when the hearing was held. *See Bennett*, 21 N.C. App. at 393-94, 204 S.E.2d at 556. It made findings on his various sources of income, how he pays his expenses, and other voluntary expenses he has undertaken to pay rather

than paying the judgment. Given the extensive evidence presented and findings made regarding plaintiff's income and expenses, we hold that the trial court's finding on present ability to pay is adequate.

Plaintiff further argues that there was no evidence to support a finding that he had the present ability to pay. Plaintiff claims that the trial court "made no findings regarding cash available to plaintiff as of the hearing or as of the day the Order was entered." This is true, but the trial court also did not order plaintiff to pay immediately on the day of the hearing nor immediately on the date the order was entered. The trial court gave plaintiff 60 days after entry of the order to acquire the $20,000, and the findings show that plaintiff had various options to accomplish this.

The trial court found that plaintiff's 2012 income was approximately $139,641. Plaintiff earned approximately $15,000 per month in November and December 2012. The trial court also found that "the personal debts of the Plaintiff are paid through the business and $180,000 in personal expenses were paid from October 2011 through October 2012." The trial court found that plaintiff voluntarily pays thousands of dollars in expenses for his adult children and his mother, totaling more than $16,500 over the course of four months. Plaintiff does not challenge any of these findings as unsupported by competent evidence, so they are binding on appeal. *Tucker*, 197 N.C. App. at 594, 679 S.E.2d at 143.

Although plaintiff should have well been able to pay defendant by temporarily ceasing to pay the expenses he had been paying for his adult children and mother, the trial court also made findings regarding his ability to take reasonable measures that would enable him to comply by borrowing the funds. The evidence showed that plaintiff had two credit cards. As of December 2012, one had a cash advance available of $4,500 and the other had an available cash advance of $4,590. The credit cards also provided plaintiff with available lines of credit in excess of $44,887. Plaintiff does not argue that he expected his income or expenses to change substantially in the foreseeable future. Plaintiff did contend at the hearing that his business, Flash Gordon Motors & Leasing, Inc., was in decline, and of course this was contested by defendant's evidence. In any event, the trial court heard and considered this evidence, weighed its credibility, and made its findings, which did not include a finding that the business was failing. Therefore, it was fully appropriate for the trial court to base its finding of present ability to pay on evidence of income and expenses in the recent past. *See Parsons v. Parsons*, ___ N.C. App. ___, ___, 752 S.E.2d 530, 534 2013 (noting that future expenses "can [generally] only be predicted based on past experience"). This evidence

shows that plaintiff could take reasonable steps to pay the full $20,000 he owes by paying a portion of his $15,000 monthly income, taking out cash advances from his credit cards, ceasing to voluntarily pay the expenses of other family members, and/or transferring any expenses in excess of his income to his credit cards for those months.

Plaintiff further challenges the trial court's consideration of his business assets in finding a present ability to comply. He contends that considering business expenditures "would effectively eliminate the corporate identity of any closely-held corporation." Again, we disagree.

In determining a contemnor's present ability to pay, the appellate courts of this state have directed trial courts to "take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition." *Bennett*, 21 N.C. App. at 393-94, 204 S.E.2d at 556. Considering how a contemnor pays his expenses is an important part of this analysis.

In *Foy v. Foy*, 69 N.C. App. 213, 316 S.E.2d 315 (1984), we affirmed a trial court's finding of willful noncompliance with an alimony order. In reviewing the trial court's willfulness findings, we considered the defendant's interest in a closely held company as a possible source of funds for the defendant, even though he did not receive any direct income. *Foy*, 69 N.C. App. at 215, 316 S.E.2d at 316-17. Plaintiff's interest in his company is far more clearly established than that of the defendant in *Foy*.

Here, the trial court's findings indicated that plaintiff had a history of using his corporate assets to pay for his personal debts and personal expenses. In fact, the evidence showed that he had used corporate assets to pay $180,000 in personal expenses from October 2011 through October 2012. Plaintiff does not argue that this finding is unsupported by the evidence. These expenditures relate directly to plaintiff's assets and liabilities and to his ability to pay the arrearages. Therefore, the trial court properly considered plaintiff's corporate assets and liabilities and did not impair or disregard his business's corporate identity in any way.

Given this evidence and the findings made by the trial court, we hold that the trial court did not err in concluding that within 60 days plaintiff could take reasonable steps to pay the entire $20,000 of the arrearages between using the cash advances, charging any expenses not covered by the business to one of his credit cards, and ceasing to voluntarily pay thousands of dollars to his other relatives. *See Williford v. Williford*, 56 N.C. App. 610, 612, 289 S.E.2d 907, 909 (1982) ("[P]ayment of alimony may not be avoided merely because the husband has remarried and

voluntarily assumed additional obligations." (citation, quotation marks, and ellipses omitted)); *Teachey*, 46 N.C. App. at 335, 264 S.E.2d at 787-88 (noting that reasonable efforts could include borrowing money and liquidating assets); *Watson v. Watson*, 187 N.C. App. 55, 67, 652 S.E.2d 310, 319 (2007) (affirming a finding of civil contempt where the trial court afforded the defendant 90 days to take reasonable measures to pay the required sum), *disc. rev. denied*, 362 N.C. 373, 662 S.E.2d 551 (2008).

Plaintiff argues that compliance with the order would require him to take on debts he could never hope to pay off, but neither the evidence nor the findings support plaintiff's dim view of his wherewithal. The trial court's uncontested findings show that he earned approximately $15,000 per month in the months preceding the hearing, that plaintiff had the ability to pay thousands of dollars per month to family members, and that his debts and $180,000 of his personal expenses were paid by his business. Drawing money from any of these sources could properly be considered "reasonable measures" to pay off the arrearages. *See Teachey*, 46 N.C. App. at 335, 264 S.E.2d at 787-88.

C. Crediting the Amount Seized from Plaintiff

[2] Plaintiff next contends that the trial court erred in not crediting him with the $7,322.42 seized by defendant from his checking account. These funds were seized by execution upon a judgment which was entered upon the distributive award of $1,025,000; that judgment is not a subject of this appeal. Plaintiff's argument conveniently ignores the fact that these funds were seized by execution to pay this outstanding judgment, which is separate from his alimony obligation, as well as the 5 May 2010 consent order, which differentiates between the $5,000 per month he is required to pay in alimony and the $1,025,000 distributive award.[1] The 5 May 2010 order specifically states that the "alimony does not reduce the $1,025,000 distributive award."

The 12 April 2012 judgment and order further clarified this distinction. At that time, plaintiff still owed approximately $894,023 toward the distributive award. The trial court continued to require that plaintiff pay $5,000 per month as alimony until the distributive award was paid in full. The trial court specifically stated that the monthly $5,000 payment "is not a credit against the money judgment." It further clarified that "[t]he requirement that Plaintiff Husband make monthly payments to

1. Plaintiff also argues that the $5,000 per month ordered by the trial court in the May 2010 consent order was not actually "alimony." Plaintiff specifically consented to the order which identified this payment as "alimony." He never appealed from that order and cannot now collaterally attack that determination.

Defendant Wife for support and maintenance does not alter, limit, delay, or postpone Defendant Wife's rights to enforce the money judgment and to pursue all collection rights and remedies."[2] As these prior orders make clear, the $7,322 was seized by execution on the judgment entered as to the $1,025,000 distributive award. The $7,322 seized did reduce the amount he owed on the distributive award judgment, and plaintiff does not get to count the amount seized by defendant twice.

III. Conclusion

Based on plaintiff's repeated, willful disregard of court orders, as found by the trial court, and the trial court's adequate findings regarding plaintiff's present ability to pay $20,000 within 60 days, we conclude that the trial court did not err in holding plaintiff in civil contempt for his willful disregard of the order requiring him to pay $5,000 per month to defendant. We affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

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2. Plaintiff did appeal that order and the subsequent June 2012 order holding plaintiff in contempt for willful failure to comply with the 5 May 2010 order. Both orders were affirmed by this Court. *Gordon*, 2013 WL 3049072 at *13. We further rejected plaintiff's characterization of the $5,000 monthly payment as an "alternative penalty." *Id.*

CURTIS RAY HOLMES, PLAINTIFF
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE CO., INC., DEFENDANT

No. COA13-1096

Filed 15 April 2014

Contracts—breach—insurance policy—interpretation of terms—vacant building

The trial court did not err in a breach of contract case by granting summary judgment to defendant and denying plaintiff's motion for summary judgment. The undisputed facts showed that the building was "vacant" for purposes of the insurance contract for more than 60 days prior to the theft. As a result, under that contract, plaintiff was not entitled to compensation for his loss and defendant did not breach the contract by refusing to pay the $40,000 to replace the stolen heating units.

Appeal by plaintiff from Order entered 10 July 2013 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 6 February 2014.

Cahoon & Swisher, North & Cooke, by A. Wayland Cooke, for plaintiff-appellant.

Nelson Levine De Luca & Hamilton, LLC, by David L. Brown and David G. Harris II, for defendant-appellee.

STROUD, Judge.

Dr. Curtis Holmes ("plaintiff") appeals from an order denying his motion for summary judgment and granting summary judgment in favor of North Carolina Farm Bureau Mutual Insurance Co., Inc. We affirm.

I. Background

Plaintiff is a dentist and property owner living in Greensboro. He owns several office buildings in the Greensboro area, including one at 5415 Friendly Avenue ("5415 Friendly") and one across the street at 5411 Friendly Avenue ("5411 Friendly"). Plaintiff purchased an office-lessor's insurance policy from defendant to cover his property. The policy excludes from coverage any building that has been vacant for more than 60 consecutive days before a loss, including loss by theft. The policy

defines a vacant building for property owner policies under section 9(a)(1)(b) of the policy. Under this section, a building is vacant "when 70% or more of its total square footage: (i) Is not rented; or (ii) Is not used to conduct customary operations." The policy clarifies that "[w]hen this policy is issued to the owner of a building, building means the entire building."

In November 2011, someone stole eight heating and air conditioning units from outside 5415 Friendly. Plaintiff informed the police, but the perpetrator was never found. Plaintiff also made a claim to defendant for the loss under the office-lessor policy. Defendant refused to cover plaintiff's loss because it believed that the vacancy provision of the policy applied.

Plaintiff filed a complaint in Guilford County Superior Court alleging breach of the insurance contract and seeking recovery in excess of $40,000 for the stolen heating units plus attorney's fees and costs. Defendant answered, contending that plaintiff's recovery was barred by the vacancy provision of the insurance contract. Defendant also filed a counterclaim for declaratory judgment concerning the rights and obligations of the parties under this policy. The parties conducted discovery and filed cross-motions for summary judgment. The evidence forecast by the parties tended to show the following:

5415 Friendly has five separate units: named "A," "B," "C," "D," and "G." Unit A was 1,344 square feet; Unit B was 1,064 square feet; Unit C was either 2,688 or 2,577 square feet[1]; Unit D was 2,128 square feet; and Unit G was 1,064 square feet. The total square footage of 5415 Friendly was thus either 8,288 square feet or 8,177 square feet. As of November 2011, only one of the five units at 5415 Friendly was rented—Unit A. Units B, D, and G were all vacant.[2] The classification of Unit C was the primary point of contention at the summary judgment hearing.

The evidence showed that Unit C was not leased in the sixty days before the theft. However, plaintiff had been allowing one of the tenants of 5411 Friendly, two independent real estate attorneys named Charles McNeil III and Ken Lucas, to use Unit C as storage for their old files and excess furniture. The attorneys had a key to Unit C and could have used

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1. In his deposition, plaintiff stated that Unit C was approximately 2,688 square feet. In his responses to defendant's requests for admission, however, he claimed that Unit C was 2,577 square feet.

2. The evidence showed that plaintiff used Unit D to store excess furniture, but he agreed that it should be considered "vacant."

the entire space until plaintiff found a regular tenant. Mr. McNeil and Mr. Lucas kept their files in one 144 square foot room in Unit C. They did not use two additional 144 square foot rooms which contained various furniture of uncertain provenance. The rest of the space was not used.

Mr. McNeil testified that he, Mr. Lucas, or one of their employees would go to Unit C once or twice a week to store, retrieve, or review files. He further stated that they would sometimes sit in one of the chairs in Unit C to review the stored files, but that they normally only stayed five to ten minutes. None of them used any of the space on the second floor of Unit C. Mr. McNeil stated that the storage and review of old files was a "customary operation" of his law practice.

After reviewing the discovery and hearing arguments from the parties, the trial court allowed defendant's motion for summary judgment, and denied plaintiff's motion, by order entered 10 July 2013. Plaintiff filed notice of appeal to this Court on 31 July 2013.

II. Summary Judgment

On appeal, plaintiff argues that the trial court erred in granting summary judgment to defendant and denying his motion for summary judgment because the undisputed facts showed that over 30% of 5415 Friendly was either rented or used for customary operations.

A. Standard of Review

> We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law. As part of that process, we view the evidence in the light most favorable to the nonmoving party.

Cox v. Roach, ___ N.C. App. ___, ___, 723 S.E.2d 340, 347 (2012) (citation and quotation marks omitted), *disc. rev. denied*, 366 N.C. 423, 736 S.E.2d 497 (2013).

B. Analysis

Both parties agree that there are no genuine issues of material fact. They only disagree on the proper interpretation of the vacancy provision of the insurance contract. That provision states:

9. Vacancy

a. Description of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.

(b) When this policy is issued to the owner of a building, building means the entire building. Such building is vacant when 70% or more of its total square footage:

(i) Is not rented; or

(ii) Is not used to conduct customary operations.

. . . .

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

. . . .

(e) Theft;

Defendant contends that under the definition in subsection (a)(1)(b), which applies to plaintiff as an owner, if either 30% or less of the entire covered building is rented, or if 30% or less of the building is used to conduct customary operations, then the building is considered vacant. Under this interpretation, a building could be 30% rented and have another 30% used for customary operations, but the building would still be considered vacant. Plaintiff argues, by contrast, that this provision means that if more than 30% of the building is either rented or used to conduct customary operations, then it is not vacant. Under this interpretation, that same building with 30% rented and 30% used for

customary operations would be considered 60% occupied, and therefore not vacant. We conclude that we need not resolve this issue here because even under plaintiff's interpretation of the contract, 5415 Friendly was vacant for more than sixty days before the theft.

It is uncontested that all of Unit A, 1,344 square feet, was rented during the relevant period. Unit A constitutes approximately 16% of the total square footage of the building. Unit C has been the sole point of contention in this case. There was no evidence that it was rented at a relevant time. Therefore, the only question is whether Unit C was used for "customary operations" and how much of Unit C was so used.

The evidence showed that Mr. McNeil and Mr. Lucas only stored files in one 144 square foot room of Unit C. The evidence did show that Mr. McNeil and Mr. Lucas used that room on a fairly regular basis, once or twice a week. They would store and retrieve client files in the room and sometimes sit in the chair in that room to review the files. Mr. McNeil opined that the storage and review of these archived files was a part of his customary operations. Nevertheless, that 144 square foot room was the only portion of Unit C that they used as part of these operations. Although there was evidence that some pieces of furniture were stored in two additional rooms, there was no evidence that Mr. McNeil and Mr. Lucas ever used those rooms. Mr. McNeil stated that he was unsure who owned the furniture, but that he did not think it was his.

Plaintiff argues that we should count the entirety of Unit C as being "used for customary operations" because one room within that unit was being used and those using it had permission to occupy the entire unit. But that interpretation is contrary to the plain language of the contract.

> The court is to interpret a contract according to the intent of the parties to the contract, unless such intent is contrary to law. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties.

Williams v. Habul, ___ N.C. App. ___, ___, 724 S.E.2d 104, 111 (citations and quotation marks omitted).

Subsection (b) of the definitional section defines "building" as the "entire building" and defines "vacancy" in relation to the total square

footage of the building. While plaintiff contends that not considering all of Unit C "occupied" is "like being a little bit pregnant," the plain language of the contract directs us to consider only the portion of the total square footage "used to conduct customary operations." Therefore, the relevant question under the contract is what percentage of the total square footage was actually so used, not what amount *could* have been used.

Here, only 144 square feet of Unit C were used to conduct customary operations of Mr. McNeil's law practice. Combined with the area of Unit A, which was 1344 square feet, the total square footage either rented or used to conduct customary operations was 1488 square feet. Using either measure of the total square footage—8288 square feet or 8177 square feet—this area does not exceed 30%.[3] We conclude that the uncontested facts show that 5415 Friendly was "vacant" for purposes of the insurance contract for more than 60 days prior to the theft.

As a result, under that contract, plaintiff was not entitled to compensation for his loss and defendant did not breach the contract by refusing to pay the $40,000 to replace the stolen heating units. We hold that there are no genuine issues of material fact and defendant is entitled to judgment as a matter of law. Therefore, we affirm the trial court's order allowing defendant's motion for summary judgment and denying plaintiff's motion.

III. Conclusion

For the foregoing reasons, we hold that the trial court correctly determined that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. Therefore, we affirm the trial court's order allowing defendant's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

3. Using either measure of total square footage, the percentage rented or used was approximately 18%.

IN RE ADOPTION OF "BABY BOY" BORN APRIL 10, 2012

No. COA13-912

Filed 15 April 2014

1. Appeal and Error—interlocutory orders and appeals—order voiding birth parent's relinquishment

An interlocutory order voiding a birth mother's relinquishment in an adoption case, which effectively nullified her consent to the adoption, was heard on the merits by the Court of Appeals. The merits of interlocutory appeals concerning a putative father's consent to adoption have been addressed, and there is no reason not to afford the birth mother the same protection.

2. Oaths and Affirmations—birth mother's relinquishment—sworn before notary

The trial court erred in an adoption case by voiding the birth mother's relinquishment on the basis that she did not execute the relinquishment document while "under oath". It was undisputed that the birth mother signed the relinquishment in a notary's presence, the notary testified that she witnessed the birth mother's signature, the birth mother stated in writing that she had been "duly sworn" when she signed the document, and the notary's verification recited that the birth mother had sworn to the document before the notary. Additionally, a social worker read the word "swear" aloud in administering the oath. N.C.G.S. § 10B-3(14)(c) was satisfied.

3. Adoption—grounds for voiding—fraud in obtaining relinquishment—not found

The only applicable grounds for voiding the relinquishment of the birth mother in an adoption case required the birth mother to prove by clear and convincing evidence that her relinquishment was obtained by fraud or duress. The trial court correctly concluded that there was no constructive or actual fraud in the procurement of the relinquishment.

4. Adoption—birth mother's relinquishment—gender omitted—substantial compliance

A birth mother's relinquishment that omitted the baby's gender in an adoption case was in substantial compliance with the law where the gender was omitted based on the mother's request.

IN RE ADOPTION OF BABY BOY

[233 N.C. App. 493 (2014)]

Appeal by respondents from order entered 15 February 2013 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 21 January 2014.

WAKE FAMILY LAW GROUP, by Katherine Hardersen King, for respondent-appellee.

Cheri C. Patrick for petitioner-appellants Laura and Richard Zug, Jr.

MANNING, FULTON & SKINNER, P.A., by Michael S. Harrell, for petitioner-appellant Amazing Grace Adoptions.

ELMORE, Judge.

Laura Catherine Zug and Richard Charles Zug, Jr. (the Zugs) and Amazing Grace Adoptions (the Agency) appeal Judge Sasser's order entered 15 February 2013 declaring Amy Marie Costin's relinquishment void. After careful consideration, we reverse.

I. Background

The facts in this case are largely undisputed. Amy Marie Costin (the birth mother) is the biological mother of a baby boy (Baby Boy) born 10 April 2012 at WakeMed Cary Hospital. The biological father of the minor child signed a relinquishment placing "Baby Boy" in the care of the Agency and has made no attempt to revoke. The birth mother contacted the agency prior to Baby Boy's birth to discuss the possibility of placing the baby for adoption. Her primary contact at the Agency was social worker Hayley Walston (Ms. Walston). On 13 December 2011, approximately halfway through her pregnancy, the birth mother officially contracted for services with the Agency. The birth mother indicated to Ms. Walston that she wanted a closed adoption and did not want the baby to be placed nearby. Thereafter, the birth mother and Ms. Walston were in frequent communication regarding her desire to relinquish the child for adoption. On 6 February 2012, Ms. Walston informed the birth mother that the agency had identified a family who would agree to her terms.

One day after Baby Boy's birth, Ms. Walston went to the hospital to obtain the birth mother's relinquishment of Baby Boy to the Agency. Under N.C. Gen. Stat. § 48-3-701(a), a birth parent "may relinquish all parental rights or guardianship powers, including the right to consent to adoption, to an agency." To complete the relinquishment process, Ms. Walston asked a notary employed by WakeMed, Ms. Darlene Durbin

("Ms. Durbin" or "the notary"), to notarize the "Relinquishment of Minor for Adoption by Parent or Guardian" (the relinquishment). Ms. Durbin had been a notary for approximately three years and agreed to notarize the relinquishment, although she had never notarized an adoption form before and was unfamiliar with the legalities of the adoption process.

Ms. Durbin accompanied Ms. Walston to the birth mother's hospital room to witness the relinquishment. Ms. Durban testified that she stayed for "at least 30 minutes" as Ms. Walston completed the relinquishment procedure. As part of this procedure, Ms. Walston read aloud the relinquishment form and reviewed a twenty-six-question questionnaire with the birth mother that addressed all aspects of the relinquishment. The relinquishment begins, "I, Amy Marie Costin, being duly sworn, declare . . ." It also states, "I understand that my Relinquishment to Adoption of the minor may be revoked within 7 days following the day on which it is executed," and "I understand that to revoke my Relinquishment for Adoption, as provided in G.S. 48-3-706, the revocation must be made by giving written notice to the agency to which the Relinquishment was given."

The questionnaire begins with an acknowledgement: "All forms were read aloud by the staff member and were signed in the presence of Darlene Durbin, notary, and the following questions were asked in their presence." The birth mother's responses to the questions were recorded and included the following:

> Q. Do you feel that your mind is perfectly clear?
>
> A. Yes.
>
> Q Has anyone told you that you must sign these papers?
>
> A. No.
>
> Q. Has anyone coerced you in any way or applied pressure or unduly influenced you to make an adoption plan for your child(ren)?
>
> A. No.
>
> Q. Did I persuade or coerce you in any way to sign a relinquishment, or has any of the Amazing Grace Adoptions staff members done so?
>
> A. No.
>
> Q Do you understand you may revoke your decision within 7 days of signing this document?

A. Yes.

Q. Do you understand that if within 7 days you decide to revoke your release you must make your revocation in writing and deliver it to the director of the agency?

A. Yes.

Q. Do you understand that when you sign these documents you are giving up all legal rights to this child(ren)?

A. Yes.

Q. Have you read and do you fully understand all the documents you are signing?

A. Yes.

Q. Do you need more time to think about your decision?

A. No.

It was not until after all of the forms were read to the birth mother that she signed the relinquishment and the questionnaire. Ms. Durbin then completed the notary certificate. The birth mother received a copy of the relinquishment. Ms. Walston testified that she had previously reviewed the relinquishment form with the birth mother several months prior.

On 18 April 2012, the seventh day after signing her relinquishment, the birth mother testified that she texted Ms. Walston sometime between 10:00 p.m. and 11:00 p.m. and asked, "is today the last day?" Ms. Walston confirmed that it was in fact the last day that she could revoke her relinquishment. The birth mother did not attempt to revoke at that time.

The following morning (day eight), the birth mother texted Ms. Walston to indicate that she had changed her mind. Later that day, the birth mother met with Ms. Walston and the director of the Agency to discuss the situation. There is no record evidence that the birth mother ever provided the Agency with written notice of her intent to revoke her relinquishment. Ultimately, the Agency informed the birth mother that her relinquishment would not be revoked because she did not give notice of her revocation within the statutorily prescribed seven-day period. As such, the Agency proceeded with the adoption and placed Baby Boy with the Zugs on 23 April 2012. The Zugs filed their petition to adopt Baby Boy that same day. Baby Boy has since remained in the Zugs' custody.

On 11 June 2012, the birth mother filed a motion to dismiss the adoption petition and motion to declare her relinquishment void, alleging that the purported relinquishment was void for "lack of compliance with a mandatory statutory requirement[.]" The trial court took the case under advisement and, in an order filed 15 February 2013, made the following pertinent findings of fact:

> 6. Ms. Darlene Durbin, an employee of WakeMed Cary Hospital, was asked to notarize the documents. Ms. Durbin was not familiar with adoption forms and did not review the forms before undertaking to notarize them. Ms. Durbin was present for over a half hour while Ms. Walston went through a twenty-six question questionnaire dealing with various aspects of the relinquishment before having the [the birth mother] sign the purported relinquishment[].
>
> 7. The uncontroverted evidence and Ms. Durbin's own testimony indicates that Ms. Durbin did not put either biological parent under oath before or after signing the relinquishment forms, nor did she ask them to "swear," "affirm" or any words to that effect. No Bible or other Holy Scriptures were used by Ms. Durbin during the notary process, and no oaths or affirmations were administered prior to the purported relinquishments being signed or at any time since.
>
> 11. Pursuant to N.C.G.S. 48-3-702(a) "A relinquishment executed by a parent or guardian must conform substantially to the requirements in this Part and **must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.**" [emphasis in original]
>
> 12. The language regarding "under oath" in N.C.G.S. 48-3-702 is not mere surplus, as language regarding "under oath" is included in some sections of Chapter 48 for types of consents/relinquishments and not in others. It is precise and purposeful language. Being a parent is a fundamental right that must be protected, and while the adoption statutes should be construed liberally in many instances, the biological parents' rights are protected by the U.S. Constitution. The child's rights to be with the biological parent(s) also must be protected. The "under oath" language in N.C.G.S. 48-3-702 is meant to prevent biological

> parents from claiming that they didn't understand what they were signing or didn't know what they were doing to prevent future litigation.

The trial court then made the following conclusions of law:

> 2. Under N.C.G.S. 48-3-702, the sex of the baby was a mandatory provision in the relinquishment but was not completed in the purported relinquishment. Additionally, under 48-3-702, the signature of Movant had to be obtained while she was under oath.
>
> 4. The purported relinquishment signed by Movant on April 11, 2012 is not a valid relinquishment in that it does not conform to the mandatory statutory requirements of a relinquishment as set out in N.C.G.S. 48-3-702 and is void to operate as a relinquishment.
>
> 5. There is no valid relinquishment by the Movant in this matter.
>
> 6. Because there was never a valid relinquishment signed by Movant, no revocation of her relinquishment was required, and the revocation statutes don't apply.
>
> 8. There was no constructive fraud or actual fraud by the [A]gency in the procurement of the relinquishment.
>
> 9. This matter should not be remanded back to the Clerk of Superior Court at this time and should remain with District Court for a later hearing on Movant's request to dismiss the adoption petition.

The trial court thereafter granted the birth mother's petition to declare her relinquishment void. The Zugs and the Agency (collectively petitioners) now appeal.

II. Interlocutory Appeal

[1] In the instant case, the trial court entered an interlocutory order voiding the birth mother's relinquishment, which effectively nullified the birth mother's purported consent to the adoption. As our Courts have previously addressed the merits of interlocutory appeals concerning a putative father's consent to adoption, we see no reason not to afford the birth mother the same protection. *See In re Adoption of Anderson*, 165 N.C. App. 413, 598 S.E.2d 638, 639 (2004), *rev'd on other grounds*,

360 N.C. 271, 624 S.E.2d 626 (2006); *In re Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd sub nom.*, 354 N.C. 188, 552 S.E.2d 142 (2001).

III. Analysis

[2] The primary issue presented on appeal is whether the birth mother's consent to relinquish her parental rights to the Agency was valid. Petitioners argue that the trial court erred in voiding the relinquishment on the basis that the birth mother did not execute it while "under oath" as mandated by N.C. Gen. Stat. § 48-3-702. We agree.

We note that petitioners did not assign error to any of the trial court's findings of fact. As such, all of the trial court's findings of fact are deemed conclusive on appeal. *Fakhoury v. Fakhoury*, 171 N.C. App. 104, 108, 613 S.E.2d 729, 732 (2005). We review the trial court's conclusions of law *de novo*. *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).

The laws governing adoptions in North Carolina are creatures of statutory construction as set forth in Chapter 48 of our general statutes. Our legislature requires that Chapter 48 "be liberally construed and applied to promote its underlying purposes and policies." N.C. Gen. Stat. § 48-1-100(d) (2013). "[T]he needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor." N.C. Gen. Stat. § 48-1-100(c) (2013). Here, the trial court relied on N.C. Gen. Stat. § 48-3-702(a) in voiding the birth mother's relinquishment. The statute provides that "[a] relinquishment executed by a parent or guardian must **conform substantially** to the requirements in this Part **and** must be **signed and acknowledged under oath** before an individual authorized to administer oaths or take acknowledgments." N.C. Gen. Stat. 48-3-702(a) (2013).

This is not a case where the birth mother argues that her consent to relinquish Baby Boy was not given knowingly and voluntarily. In fact, the birth mother admits that she signed her relinquishment before a notary public, that she knew what she was signing, and the consequences, that she signed knowing the time limits for revocation, and that she contacted Ms. Walston to confirm that it was her last day to revoke prior to the expiration of the seven-day period. Further, the birth mother admits that Ms. Walston asked her a series of questions, which she answered truthfully before the notary. In "the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation," we recognize a presumption of regularity to notarial acts. N.C. Gen. Stat. § 10B-99 (2013). This presumption of regularity allows notarial acts to

be upheld, "provided there has been substantial compliance with the law." N.C. Gen. Stat. § 10B-99. Thus, the presumption of regularity acts to impute a "substantial compliance" component to notarial acts, including the administration of oaths.

We turn now to the pertinent issue before us—whether the birth mother was under oath when she signed her relinquishment. *See* N.C. Gen. Stat. § 48-3-702(a). Our Supreme Court has maintained that statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. *State v. Carpenter*, 173 N.C. 767, 92 S.E. 373, 374 (1917). "If the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning[.] . . . This is especially true in the context of adoption, which is purely a creation of statute." *Boseman* at 545, 704 S.E.2d at 500 (citations and quotation marks omitted).

We read N.C. Gen. Stat. 48-3-702(a) to require both (1) substantial performance of the requirements set out in Chapter 48, and (2) that the relinquishment must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments. From its plain language, we hold that the legislature intended for the "substantial compliance" component of N.C. Gen. Stat. 48-3-702(a) to apply only to the requirements set out in Chapter 48. There is no "substantial compliance" component concerning the oath requirement on the face of N.C. Gen. Stat. 48-3-702(a).

An oath is administered to a document signer (the principal) when the principal is required to make a sworn statement about certain facts. An oath is defined as:

> A notarial act which is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred:
>
> a. An individual appeared in person before the notary.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear."

N.C. Gen. Stat. § 10B-3(14) (2013).

An acknowledgment is a notarial act that occurs when a notary certifies that at a single time and place:

> a. An individual appeared in person before the notary and presented a record.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual did either of the following:
>
> i. Indicated to the notary that the signature on the record was the individual's signature.
>
> ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

N.C. Gen. Stat. § 10B-3(1) (2013). There is no oath requirement for an acknowledgment. When an oath is administered in conjunction with a principal's signing, the notarization functions as a verification or proof, not an acknowledgment. N.C. Gen. Stat. § 10B-3(28).

A. Notary to Administer an Oath

In the instant case, there is no real issue about the Agency's compliance with subparagraphs (a) and (b) of N.C. Gen. Stat. § 10B-3(14). However, the trial court found that subparagraph (c) was not satisfied, in part, because Ms. Durbin "did not put [the birth mother] under oath before or after signing the relinquishment forms[.]" By the trial court's reasoning, the notary or certifying officer is the only individual with authority to administer an oath to a document signor. Again, we disagree.

Initially, we would like to discuss the role of a notary when administering oaths and affirmations, particularly given that the case law on this topic is fairly sparse. It is the primary function of a notary to serve as an impartial witness when authenticating legal documents and administering oaths or affirmations. A notarization that requires the signor to be placed under oath begins with the administration of an oath or affirmation. A traditional jurat notarization recites that a document has been "subscribed and sworn to" before a notary. BLACK'S LAW DICTIONARY 866 (8th ed. 2004). By its administration, an oath or affirmation gives weight to the truthfulness of the document's substance. The failure to administer an oath or affirmation as required may result in a defective notarization. Should this occur, the document bearing the defective notarization may be invalidated and the underlying transaction voided. The "consequence of the failure of notaries to [] administer such oaths

or affirmations constitutes a disservice to document signers, to the third parties who rely upon notarized signatures, and to the office of notary public." Michael L. Closen, *To Swear . . . or Not to Swear Document Signers: The Default of Notaries Public and A Proposal to Abolish Oral Notarial Oaths*, 50 Buff. L. Rev. 613, 617 (2002). Accordingly, we cannot stress enough the seriousness of properly administering oaths and affirmations, and we urge notaries to be diligent in performing this duty.

Neither statutory nor common law clearly sets forth the formalities of oath administration. For example, North Carolina's "oath" statute, N.C. Gen. Stat. § 10B-3(14), does not specifically require that the notary orally administer the oath. By its plain language, the notary need only certify that the notary witnessed the signor make a vow of truthfulness by using any form of the word "swear." In fact, none of our notarial statutes specify by their plain language that the notary is required to administer an oral oath to the principal prior to notarization. Nevertheless, the trial court in the instant case voided the birth mother's relinquishment on this basis.

The case law pertaining to this issue supports an alternative outcome. First, we look to *State v. Knight*, an early North Carolina Supreme Court case, for the proposition that a notary (or other authorized individual) may delegate the administration of an oath to a third party who is not vested with authority to administer oaths. 84 N.C. 789 (1881). In *Knight*, the Martin County coroner, J.H. Ellison, had sole authority to administer an oath to certain witnesses. However, he allowed justice of the peace, J.L. Ewell, to place the witnesses under oath in his presence and before the court. *Id.* at 791-92. The defendant moved to arrest judgment on grounds that the witnesses were not properly administered the oath. Our Supreme Court disagreed on the basis that it "sufficiently appear[ed] that the administration of the oath was the act of the coroner." *Id.* at 793. Our Supreme Court concluded that the administration of an oath is a ministerial act and it

> may be administered by any one [sic] in the presence and by the direction of the court[.] . . . It was just as competent for the coroner to have called upon any unofficial bystander to administer the oath for him, as upon a justice of the peace. It was therefore immaterial whether in this case the justice had the authority to administer the oath or not.

Id.

Relying in part on *Knight*, the Alabama Supreme Court addressed a similar issue in *Walker v. State*, 107 Ala. 5, 18 So. 393 (1895). In *Walker*, the defendant was prosecuted for perjury after making a false affidavit attesting to a certain conveyance of land. In executing the affidavit, Elbert Holt, a deputy clerk without authority to administer an oath, "in point of actual, physical fact, administered the oath to the defendant[.]" *Id.* at 9, 18 So. at 394. The Alabama Supreme Court held that Elbert Holt's administration satisfied the oath requirement because E.R. Holt, the clerk with authority, "was present at the time, knew what was going on, and directed or assented to the administering of the oath, which was done in his name as such clerk, and the evidence of which—the jurat—was made out and stands in his name[.]" *Id.* at 9-10, 18 So at 394. The Alabama Supreme Court opined:

> [T]his actual administration by Elbert Holt was, under the circumstances, in legal contemplation the official act of E.R. Holt, the de jure clerk of the court, is fully settled by the authorities (*State v. Knight*, 84 N.C. 789, 793; *Stephens v. State*, 1 Swan, 157; *Oaks v. Rodgers*, 48 Cal. 197); and this upon the general principle that a ministerial act done by one under the authority, and by the direction, or with the knowledge and assent, and especially in the presence, of an officer duly authorized to perform that act, is the act of the officer himself.

Id. at 10, 18 So. at 394.

More recently, in *Gargan v. State*, 805 P.2d 998 (Alaska App. 1991), the Alaska Court of Appeals considered an argument similar to the one advanced by the birth mother in the instant case. *Gargan* concerned the defendant's perjury conviction involving an affidavit that purported on its face to be sworn before a notary. Evidence at trial established that the notary had not actually administered an oath prior to notarizing the affidavit. *Id.* at 1004. Nevertheless, the trial judge allowed the jurors to consider the statement during their deliberations.

The Alaska Court opined that the crucial issue was not whether an oath was actually administered, but whether the signed statement constituted "a verification on its face of the truthfulness of the facts contained therein."[1] *Id.* at 1005. The Alaska Court concluded that the

1. A verification is defined as (1) a formal declaration made under oath by the principal swearing to the truthfulness of the statements in a document, or (2) an oath or affirmation that an authorized officer administers to an affiant or deponent, or (3) any act of notarizing. Black's Law Dictionary 1593 (8th ed. 2004).

document satisfied the substantial requirements of a verification given that the defendant: (1) was properly identified, (2) knowingly signed the document in the notary's presence, (3) the document contained the language "duly sworn," and (4) the notary actually notarized the document. *Id.* As such, the Alaska Court held that the oath requirement was satisfied upon notarization. *Id.*

We find *Gargan* noteworthy for the proposition that an oath is considered administered when an individual signs a document in a notary's presence that contains the language "duly sworn" or its equivalent. The Alaska Court essentially held that the "duly sworn" language in a document is equivalent to the delivery of a verbal oath, provided certain other factors are satisfied. In the instant case, respondents advance the same proposition—they contend that because the birth mother (1) knowingly signed the document in the notary's presence, (2) the document contained the language "duly sworn," and (3) the notary verified the swearing, the "oath was administered by the certifying official at the time [the birth mother] signed the relinquishment." At present we express no opinion on the merits of respondent's argument or the Gargan decision, namely because the facts of the case before us show that an oath was administered to the birth mother by Ms. Walston.

On appeal, counsel for the birth mother argues that the notary herself was required to deliver the oath for it to be effective. Counsel reasons: It "is part of the notary's training to know how to administer an oath" and "if we somehow take away the requirement that the notary have to administer an oath, we have negated the entire notarial act. We have taken away something that the notary is required to do." Counsel applies this logic to the notarization of affidavits—arguing that any party who executes an affidavit should be permitted at a later time to withdraw it on the basis that it was not given under oath. Alternately, petitioners argue that an oath was effectively administered when Ms. Walston read the relinquishment to the birth mother stating, "I, Amy Marie Costin being duly sworn, declare . . . [.]"

We agree with petitioners. In the instant case, the birth mother advances a purely technical argument and has failed to present sufficient evidence to overcome the presumption of regularity created in favor of the validity of notarial acts. *See Moore v. Moore*, 108 N.C. App. 656, 658, 424 S.E.2d 673, 674, *aff'd*, 334 N.C. 684, 435 S.E.2d 71 (1993) (holding that the plaintiff-husband failed to overcome the presumption in favor of the legality of an acknowledgment when it was undisputed that he signed the separation agreement, but advanced the technical argument that the agreement was void because the notary did not witness

his signature since she walked "in and out of the conference room"). Here, it is undisputed that the birth mother signed the relinquishment in the notary's presence. The notary testified that she witnessed the birth mother's signature and verified the document. In doing so, the notary attested by her seal that the document was "sworn to (or affirmed) and subscribed" before her. Nothing in the record impeaches her certification, including the notary's testimony that she did not place the birth mother under oath.

The administration of an oath is a ministerial duty and it may be delivered by persons who lack official authority, provided that a certifying officer is present and directs or assents to the administration. Here, in substance and legal effect, the requirement that the birth mother be placed "under oath" was satisfied when Ms. Walston read the relinquishment to her. The notary was physically present when the oath was administered, aware of the circumstances, and thereby implicitly assented to its administration, which was done in her name. By these facts, it sufficiently appears that the administration of the oath was the act of the notary. *See Knight*, *supra*.

Further, the plain language of N.C. Gen. Stat. § 10B-3(14)(c) requires the principal to make a vow of truthfulness "while invoking a deity or using any form of the word 'swear.' " Again, "any form" of the word "swear" may be utilized—the statute does not mandate that the signor orally repeat the word "swear." Here, the birth mother stated in writing that she had been "duly sworn" when she signed the document. The notary's verification recites that the birth mother had sworn to the document before the notary. Additionally, Ms. Walston read the word "swear" aloud in administering the oath. We hold that N.C. Gen. Stat. § 10B-3(14)(c) was satisfied. Accordingly, we conclude that the trial court erred in entering an order declaring the birth mother's relinquishment void. There was a valid relinquishment in this matter, which the birth mother failed to timely revoke.

B. Statutory Grounds to Void Relinquishment

[3] As we have held that the relinquishment was not void *ab initio*, the birth mother was limited to challenging her relinquishment on the express grounds established by the legislature to void relinquishments. N.C. Gen. Stat. § 48-3-707. Absent the consent of the parties, the only applicable grounds for voiding the relinquishment in the instant case requires the birth mother to prove by clear and convincing evidence that her relinquishment was obtained by fraud or duress. N.C. Gen. Stat. § 48-3-707(a)(1).

In its order, the trial court concluded: "There was no constructive fraud or actual fraud by the [A]gency in the procurement of the relinquishment." Upon conducting a *de novo* review of the record, we agree. The Agency made every effort to ensure that the birth mother was apprised of the complexity of the situation and the legalities of the adoption process. Ms. Walston testified that she reviewed the relinquishment with the birth mother prior to Baby Boy's birth, she read the relinquishment aloud, and the birth mother was given a copy of the form. Again, this is not a case where the birth mother argues that her consent to relinquish Baby Boy was not given knowingly and voluntarily.

C. Designation of Baby Boy's Sex on Relinquishment Form

[4] Finally, we recognize that for a relinquishment to be complete, it must disclose the "date of birth or the expected delivery date, the sex, and the name of the minor, if known[.]" N.C. Gen. Stat. 48-3-703. Here, the relinquishment omitted Baby Boy's gender. In Finding #4, the trial court found: "There was no evidence that [the birth mother] requested this omission or why this information was omitted." We disagree. Ms. Walston testified that the birth mother requested a closed adoption and "did not plan to see the child or even want to know the sex of the child[.]" The birth mother testified: "I never wanted an open adoption. . . . We never discussed an open adoption." Accordingly, there is evidence that the Agency omitted the sex of Baby Boy based on what it perceived to be the birth mother's request. Regardless, N.C. Gen. Stat. § 48-3-702(a) provides that a relinquishment only needs to be executed in substantial compliance with the law, and this was accomplished.

IV. Conclusion

In sum, the trial court erred in entering an order voiding the birth mother's relinquishment. The relinquishment is valid and conforms to the mandatory statutory requirements as set out in N.C. Gen. Stat. § 48-3-702. Accordingly, we reverse the trial court's order.

Reversed.

Judges McGEE and HUNTER, Robert C., concur.

STATE v. ALLEN

[233 N.C. App. 507 (2014)]

STATE OF NORTH CAROLINA
v.
HUBERT ALLEN, DEFENDANT

No. COA13-1100

Filed 15 April 2014

1. Constitutional Law—effective assistance of counsel—failure to object—no prejudice shown

Trial counsel did not provide defendant with ineffective assistance of counsel in an assault with a deadly weapon case. Even assuming arguendo that defense counsel was deficient in failing to object to testimony regarding defendant selling drugs, defendant failed to show how this testimony prejudiced him.

2. Criminal Law—jury instructions—self-defense—sufficient

The trial court did not commit plain error by failing to instruct the jury on self-defense for the charge of discharging a firearm into an occupied vehicle. The trial court gave jury instructions as to self-defense on four out of five charges and where defendant agreed that he was satisfied with the jury instructions, defendant could not show plain error.

Appeal by defendant from judgments entered 18 April 2013 by Judge Michael R. Morgan in Person County Superior Court. Heard in the Court of Appeals 5 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Laura Edwards Parker, for the State.

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

BRYANT, Judge.

A claim of ineffective assistance of counsel will be denied where defendant cannot show how his counsel's error prejudiced him. Where the trial court gave jury instructions as to self-defense on four out of five charges and where defendant agreed that he was satisfied with the jury instructions, defendant cannot show plain error.

At 7:00 p.m. on 15 June 2012, the Roxboro Police Department received a call about a shooting on Highway 501. When officers arrived

at the scene, they saw a car with shattered front and back windows on the passenger's side and multiple bullet holes in the front driver's and passenger's doors, in the head rest on the front passenger side, and inside the car. The driver of the car, Crystal Barker, had a bullet graze wound to her shoulder. Barker's boyfriend, Bryant Richardson, had also been in the car at the time of the shooting but was not hurt. Barker told Officer Mills that a red SUV pulled alongside her while she was driving and the SUV's driver fired multiple shots into her car before speeding away. Police searched Barker and Richardson, then searched Barker's car where they found bullets and bullet fragments but no weapons.

After receiving information from a confidential informant regarding the shooting, the Roxboro police responded to a residence on Holeman Ashley Road. A burgundy SUV was found parked behind the residence. Upon entering the residence, the police encountered defendant Hubert Allen. Defendant was taken into custody, and a loaded handgun was recovered from a table next to him.

At the police station, defendant waived his Miranda rights and gave a statement to Detective Shull in which he admitted to shooting at Barker's car. Defendant stated that while driving down Highway 501, he received threatening messages, then saw a man leaning out of a car making a hand gesture towards him in imitation of a gun. Defendant told Detective Shull that this man, later identified as Richardson, then fired shots towards defendant. Defendant stated that he returned fire at Barker's car because he felt threatened.

On 15 June 2012, a Person County grand jury indicted defendant on one count each of assaulting Richardson with a deadly weapon with intent to kill, assaulting Barker with a deadly weapon with intent to kill and inflicting serious injury, discharging a firearm into an occupied vehicle, attempted first-degree murder of Barker, and attempted first-degree murder of Richardson. On 18 April 2013, a jury convicted defendant on all charges. The jury also found the existence of an aggravating factor, that "defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person." The trial court found the aggravating factor outweighed three mitigating factors and entered two judgments, each sentencing defendant to a term of 157 to 201 months, to be served consecutively. Defendant appeals.

On appeal, defendant raises two issues: (I) whether trial counsel provided defendant with ineffective assistance of counsel; and (II) whether the trial court committed plain error with regard to jury instructions.

I.

[1] Defendant first argues that trial counsel provided him with ineffective assistance of counsel. We disagree.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted).

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant[s] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524–25 (2001)).

> Criminal defendants are entitled to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [the] defendant must satisfy a two part test.
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> In considering [ineffective assistance of counsel] claims, 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. Boozer, 210 N.C. App. 371, 382–83, 707 S.E.2d 756, 765 (2011) (citations and quotation omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "Trial counsel are necessarily given wide latitude in these matters [of trial strategy]. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness." *State v. Milano*, 297 N.C. 485, 495–96, 256 S.E.2d 154, 160 (1979) (citation and quotation omitted), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

Strickland, 466 U.S. at 689 (citation omitted).

Defendant contends that his counsel was ineffective because: she "pro-actively elicited a hearsay statement" that conflicted with his claim of self-defense; she failed to object to evidence that he sold drugs on a prior occasion; and she failed to move to dismiss the charges at the close of the evidence. Because the record reveals no further investigation is required, we review defendant's ineffective assistance of counsel claims.

Defendant pursued a self-defense strategy at trial and now argues on appeal that his counsel elicited hearsay testimony that contradicted his self-defense claim. The testimony in question concerned the statements of a confidential informant that were included in Officer Williams' police report. The State questioned Officer Williams as to his role in the investigation, to which Officer Williams responded that his job was to find the shooter and that he solicited information to that effect. On cross-examination, defense counsel asked "follow-up" questions seeking further explanation of what Officer Williams had done to "find the shooter," and specifically, what the confidential informant had told him. Officer Williams testified that the confidential informant said that the shooting was a result of a "drug deal that went bad" and that Richardson

had been "in Roxboro in a silver and gray vehicle, just like the victim's vehicle, looking for [defendant]" because defendant owed him money, and that Richardson had told defendant "to have his money or there would be war."

Defendant's self-defense theory was that Richardson believed defendant owed him money for drugs, that Richardson threatened defendant and that Richardson came looking for defendant. Richardson started shooting at defendant when he saw him, at which point defendant shot back in self-defense. Therefore, it appears from the record that defense counsel elicited the hearsay testimony as part of defendant's self-defense trial strategy, as the confidential informant's statements bolstered defendant's self-defense strategy by showing why defendant felt threatened by Richardson and fired at Barker's car. Such evidence does not contradict defendant's self-defense strategy. Further, even without the admission of the confidential informant's statement concerning a "drug deal that went bad," there was sufficient evidence presented by which a jury could determine if defendant fired at Barker's car in self-defense, regardless of whether the shooting was drug-related.

Defendant next contends he received ineffective assistance of counsel because his counsel failed to object to evidence concerning defendant's selling of drugs on a prior occasion. When defendant testified on his own behalf, his counsel asked him questions regarding when he purchased a handgun and why; defendant responded that he purchased the gun in March 2012 after he began receiving threatening messages. Defendant further testified that he had "never been convicted of nothing." On cross-examination, the State asked defendant to further clarify his statements concerning the handgun, the threatening messages, and his record. Perhaps, as defendant alleges, his counsel may have been deficient in failing to object to evidence of defendant selling drugs. However, as we discuss infra, even if defense counsel was deficient in that one instance, there is no reasonable possibility that this error affected the outcome of the case.

Defendant further argues that he received ineffective assistance of counsel because his counsel failed to move to dismiss the charges at the close of the evidence. Specifically, defendant contends that had defense counsel moved to dismiss the charges at the close of the evidence, the trial court "likely would have dismissed" the attempted murder and assault charges because the evidence was insufficient to show an intent to kill. Likewise, defendant contends, the trial court "likely would have dismissed" the charge of assault on Barker with a deadly weapon

with intent to kill inflicting serious injury because Barker's bullet graze wound was not serious.

> In weighing the sufficiency of the evidence, the trial court considers all evidence admitted at trial, whether competent or incompetent: . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Cox, 190 N.C. App. 714, 720, 661 S.E.2d 294, 299 (2008) (citations omitted). The trial judge must merely ensure that there exists substantial evidence as to each element of the offense; the jury's job is to determine beyond a reasonable doubt whether the evidence proves the defendant was guilty of the offense. *State v. Matias*, 354 N.C. 549, 551–52, 556 S.E.2d 269, 270 (2001) (citations omitted).

"The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citations omitted). "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *Id.* "The requisite 'intent to kill' may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E.2d 181, 184 (1982) (citation omitted).

To show defendant had intent to kill Barker and Richardson, the State presented evidence that: defendant admitted he sped up to reach Barker's car before firing into it; defendant fired directly into Barker's car at close range; defendant's multiple shots fired directly at the car resulted in bullet holes in the front driver and passenger doors, the front passenger seat, and the front passenger's seat headrest; bullets shattered both windows on the passenger's side; and Barker sustained a bullet wound to her shoulder. Defendant admitted that he could have, but

did not, call 911 at any time between when he received the threats and the shooting. This evidence, viewed in the light most favorable to the State, is sufficient to establish the element of intent for the charges of attempted murder and assault. *See id.; see also State v. Davis*, 349 N.C. 1, 37, 506 S.E.2d 455, 475 (1998) (holding that to show intent where a firearm is used against a victim, "[t]he malice or intent follows the bullet." (citations omitted)).

Defendant also contends that because Barker's bullet graze wound was not serious the trial court would have dismissed the offense of assault with a deadly weapon with intent to kill inflicting serious injury upon a proper motion to dismiss. Defendant contends Barker's injury was not serious because its treatment did not require hospitalization or medication, nor did it cause Barker to miss work. "Serious injury" means physical or bodily injury, but not death, resulting from an assault with a deadly weapon. *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373—74 (1978) (citations omitted). Whether serious injury has been inflicted depends on the particular facts of each case and is a question for the jury. *State v. Ferguson*, 261 N.C. 558, 560, 135 S.E.2d 626, 628 (1964). "[A]s long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994) (citation omitted). "The trial court is required to submit lesser included degrees of the crime charged in the indictment when . . . there is evidence of guilt of the lesser degrees." *State v. Simpson*, 299 N.C. 377, 381, 261 S.E.2d 661, 663 (1980) (citations omitted).

The trial court, at the request of defense counsel and in light of the evidence presented as to the seriousness of Barker's injury, instructed the jury as to all lesser-included charges for the offense of assault with a deadly weapon with intent to kill inflicting serious injury: assault with a deadly weapon with intent to kill, assault with a deadly weapon inflicting serious injury, and assault with a deadly weapon. The trial court also defined "serious injury" in its instructions to the jury. As such, "[w]hether serious injury ha[d] been inflicted" to Barker was a question for the jury to decide based upon the evidence presented. *Ferguson*, 261 N.C. at 560, 135 S.E.2d at 628; *see also State v. Stephens*, 347 N.C. 352, 493 S.E.2d 435 (1997) (bullet graze wound to the face was a serious injury); *Alexander*, 337 N.C. 182, 446 S.E.2d 83 (cuts to the victim's arm from glass shattered by a bullet constituted a serious injury); *State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987) (bullet graze wound above the eye was a serious injury). Where "the evidence is sufficient to support a conviction, the

defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence." *State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 (2010) (citation omitted). Given the record in this case and the case law noted above regarding what facts may constitute serious injury, there is no likelihood the trial court would have dismissed the charge of assault with a deadly weapon with intent to kill inflicting serious injury had defense counsel made a motion to dismiss.

Reviewing the record in its entirety, plaintiff's ineffective assistance of counsel claim must fail. Even assuming *arguendo* that defense counsel was deficient in failing to object to testimony regarding defendant selling drugs, defendant has failed to show how this testimony prejudiced him. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted). "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. Accordingly, defendant's arguments are overruled, and his claim of ineffective assistance of counsel denied.

II.

[2] Defendant next argues that the trial court committed plain error in failing to instruct the jury on self-defense for the charge of discharging a firearm into an occupied vehicle. We disagree.

> 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.

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

Defendant contends the trial court committed plain error in failing to instruct the jury on self-defense as it related to the charge of discharging a firearm into an occupied vehicle. Specifically, defendant argues that "the trial court acted under a misapprehension of the law" in its decision not to give a self-defense instruction. Defendant's argument lacks merit, as a review of the record indicates that the trial court gave sufficient instruction to the jury on self-defense.

In its instructions to the jury on the charges of attempted first-degree murder and assault, the trial court instructed the jury as to self-defense for each charge. For the charge of discharging a firearm into an occupied vehicle, the trial court did not give the full instruction on self-defense, but rather stated that the jury must find whether defendant committed this offense without justification or excuse. In a jury instruction conference held outside of the jury's presence, defendant agreed to this instruction, stating that: "Your Honor, the defendant agrees that the self-defense instruction has been given multiple, multiple times here, and also that your Honor gave within his instructions on this particular charge, added without justification qualifications. The defendant is satisfied, your Honor."

This Court has held that "a charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct." *State v. Gaines*, 283 N.C. 33, 43, 194 S.E.2d 839, 846 (1973) (citations omitted).

> Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal. Technical errors which are not substantial and which could not have affected the result will not be held prejudicial.

State v. Jones, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978) (citations omitted).

Here, it is clear from the record that "the trial court unmistakably placed the burden of proof upon the State to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense" when he shot at Barker's car. *See id.* at 654, 243 S.E.2d at 125. Furthermore, as the jury convicted defendant of the attempted first-degree murder and assault charges even though each of these offenses was given with a self-defense instruction, it seems unlikely that the jury would have reached a different result had the trial court given a full instruction on self-defense for the charge of discharging a firearm into an occupied vehicle. Moreover, defendant accepted the trial court's proposed instruction, stating that the repetition of the self-defense instruction for the other four charges, coupled with a clear instruction that the jury must determine whether defendant discharged a firearm into an occupied vehicle without justification or excuse, was sufficient. As defendant has failed to show fundamental error or prejudice, his argument is accordingly overruled. *See id.* at 654, 243 S.E.2d at 125. ("We think the jury clearly

understood that the burden was upon the State to satisfy it beyond a reasonable doubt that defendant did not act in self-defense and clearly understood the circumstances under which it should return a verdict of not guilty by reason of self-defense."); *see also State v. Creasman*, No. COA02-1498, 2003 N.C. App. LEXIS 1249 (July 1, 2003) (holding that where the trial court gave full self-defense instructions for the first two charges against the defendant, the defendant was not prejudiced where the trial court did not give a full self-defense instruction as to a third charge). We find no error in the judgment of the trial court. Defendant's claim of ineffective assistance is denied.

No error.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LEON BLAKNEY, DEFENDANT

No. COA13-1088

Filed 15 April 2014

1. Drugs—marijuana—intent to sell or deliver—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. Although defendant contended that the amount of marijuana found in his car was too small for intent to sell or deliver as opposed to mere possession for personal use, the circumstances provided sufficient evidence to survive defendant's motion to dismiss.

2. Sentencing—habitual felon proceeding—evidence of consolidated offense

There was no error at a habitual felon proceeding where a judgment offered into evidence contained an additional, consolidated, felony offense. The trial court gave jury instructions which directed and limited the jury's consideration of the evidence to three specific felony convictions only and, given the overwhelming and uncontradicted evidence of the three convictions, there was essentially no likelihood of a different result if the trial court had redacted the additional conviction.

STATE v. BLAKNEY

[233 N.C. App. 516 (2014)]

Appeal by defendant from judgment entered 13 February 2013 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

BRYANT, Judge.

Where the State presents sufficient evidence of each element of an offense, a motion to dismiss is properly denied. Where defendant can show no prejudice from irrelevant evidence admitted during an habitual felon proceeding, any error therefrom is harmless.

On 23 February 2011, Officer Neff of the Winston-Salem Police Department observed a car speeding and crossing the double-yellow center line while driving on Silas Creek Parkway around 10:00 p.m. Officer Neff initiated a traffic stop of the car and noticed that the driver, defendant Christopher Leon Blakney, smelled of alcohol and had glassy, bloodshot eyes. Officer Neff arrested defendant under suspicion of driving while impaired and called for assistance; Officer Allen responded.

While searching defendant's car, Officer Allen found marijuana under the center armrest. A large amount of cash was found on the car's front floorboard along with a glass Mason jar containing marijuana residue. A digital scale and batteries were also found underneath the front seats. A white shopping bag containing a box of sandwich baggies and a glass Mason jar of marijuana was found in the trunk,along with a second bag containing additional marijuana packaging supplies. Four "dime bags" of marijuana were also found in the trunk.[1] A total of 84.8 grams (2.99 ounces) of marijuana was recovered from defendant's car.

On 16 May 2011, a Forsyth County Grand Jury indicted defendant for possession with intent to sell or deliver marijuana, possession of drug paraphernalia, driving while impaired, and driving while license revoked. Defendant was also indicted as an habitual felon.

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1. When asked to clarify what he meant when he said "dime bag," Officer Allen testified that a "dime bag" is "a small plastic bag often used in the packaging for sale of illegal narcotics. So those who sell these -- sell narcotics break their product down to get it – they get it in large shipments and break it down into the smaller sellable items, packages for easy transactions, very small scale and discrete transactions."

On 13 February 2013, a jury found defendant guilty of possession with intent to sell or deliver marijuana, possession of drug paraphernalia, and driving while license revoked. Defendant was found not guilty of driving while impaired. The jury also found defendant guilty of having attained the status of an habitual felon. The trial court sentenced defendant to 88 to 115 months in prison. Defendant appeals.

On appeal, defendant argues that the trial court erred in: (I) denying defendant's motion to dismiss; and (II) admitting evidence of an additional felony conviction during defendant's habitual felon proceeding.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss at the close of all the evidence. We disagree.

> We review the trial court's denial of a motion to dismiss *de novo*. A motion to dismiss for insufficient evidence is properly denied if 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

State v. Burton, ___ N.C. App. ___, ___, 735 S.E.2d 400, 404 (2012) (citations and quotations omitted). "The State is entitled to every reasonable inference to be drawn from the evidence. 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." *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990) (citations omitted).

Defendant argues that the trial court erred in denying his motion to dismiss because the State failed to prove that defendant intended to sell or deliver marijuana. Specifically, defendant contends the State failed to

prove defendant's intent to sell or deliver marijuana because the amount of marijuana found in defendant's car was too small to be the "substantial amount" required for a possession with intent to sell or deliver marijuana conviction.

Pursuant to North Carolina General Statutes, section 90-95, the offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2013). The State may demonstrate intent through direct or circumstantial evidence. *State v. Jackson*, 145 N.C. App. 86, 89–90, 550 S.E.2d 225, 229 (2001). Although the "quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver," it must be a substantial amount. *State v. Morgan*, 329 N.C. 654, 659–60, 406 S.E.2d 833, 835–36 (1991). "[T]he intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005).

The State concedes that lab testing was not completed on the marijuana collected from defendant's car. Defendant argues that because no testing was done, the total amount of marijuana collected (84.8 grams) is not accurate because this weight included marijuana seeds, stems, and other material that should have been excluded before weighing. Defendant further argues that even if the weight of the marijuana (84.8 grams) is accurate, such a small amount is consistent with personal use, rather than for sale or delivery. Defendant cites *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977), and *State v. Wilkins*, 208 N.C. App. 729, 703 S.E.2d 807 (2010), in support of his argument.

In *Wiggins*, the defendant was convicted of possession with intent to sell or deliver marijuana after a total of 215.5 grams of marijuana was found growing in and around his home. This Court found that "this quantity alone, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution." *Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268 (citations omitted).

In *Wilkins*, the defendant was stopped and arrested on several outstanding warrants. During a pat-down of the defendant, officers found three small bags of marijuana weighing a total of 1.89 grams and $1264.00 cash in small denominations. The defendant was convicted of possession with intent to sell or deliver marijuana and manufacturing marijuana. On appeal, this Court reversed the defendant's conviction for possession with intent to sell or deliver marijuana, noting that

"[t]he evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller." *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811.

We find *Wiggins* and *Wilkins* to be inapposite to the instant case. The State presented evidence that defendant's car contained a total of 84.8 grams of marijuana found in the body and trunk of the car, and the marijuana was found in multiple containers including two "previously vacuum sealed bags," two sandwich bags, four "dime bags," and five other types of bags. Marijuana was also found in two glass Mason jars. A box of sandwich bags was found in the trunk, and digital scales were found underneath the front seats of the car. This evidence showed not only a significant quantity of marijuana, but the manner in which the marijuana was packaged (such as four "dime bags") raised more than an inference that defendant intended to sell or deliver the marijuana. Further, the presence of items commonly used in packaging and weighing drugs for sale — a box of sandwich bags and digital scales — along with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana, as opposed to merely possessing it for his own personal use as was determined to be the case in *Wiggins* and *Wilkins*. Therefore, taking the evidence in the light most favorable to the State, sufficient evidence of possession with intent to sell or deliver marijuana was presented to survive defendant's motion to dismiss. *See State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974) ("The jury could reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged and the presence of other packaging materials."), *overruled in part on other grounds by State v. Childers*, 41 N.C. App. 729, 255 S.E.2d 654 (1979). Defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred in admitting evidence of an additional felony conviction at defendant's habitual felon proceeding. Specifically, defendant contends that by not redacting a second consolidated felony offense contained within a judgment offered into evidence by the State, the trial court committed error pursuant to Rules 401, 403, 404(b), and 609. We disagree.

On appeal, in reviewing a trial court's rulings under Rule 401 and 403, this Court has held that:

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403,

> such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

State v. Tadeja, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008) (citation omitted). 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 (2013). "[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984) (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

North Carolina General Statutes, section 14-7.1, states that a person may be charged as an habitual felon if he "has been convicted of or pled guilty to three felony offenses." N.C. Gen. Stat. § 14-7.1 (2013). For an habitual felon charge, the prior felony convictions of a defendant may be proven by "stipulation of the parties or by the original or a certified copy of the court record of the prior [felony] conviction [pursuant to] N.C. Gen. Stat. § 14-7.4." *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (2002). "[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984) (citation omitted).

The State, in prosecuting the habitual felon charge against defendant, introduced into evidence certified copies of three prior judgments: judgment for possession with intent to sell/deliver cocaine entered on 8 May 1997; judgment for possession with intent to manufacture, sell and deliver cocaine entered on 8 October 1998; and judgment for possession with intent to sell or deliver marijuana entered on 8 May 2003. Each judgment included a copy of the corresponding plea transcript. The judgment which defendant challenges, entered 8 May 1997, involved two felony convictions, each for possession with intent to sell or deliver cocaine, which had been consolidated into one judgment. Defendant argues that the trial court's refusal to redact one of the two felony

convictions attached to the judgment was highly prejudicial to him. We disagree. While the additional felony conviction was irrelevant in determining whether defendant was an habitual felon, defendant has not demonstrated how this evidence prejudiced him.

> Defendant bears the burden of proving the testimony was erroneously admitted and he was prejudiced by the erroneous admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

State v. Moses, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999) (citations and quotation omitted).

In admitting the judgments into evidence, the trial court denied defendant's redaction request as to the consolidated judgment, noting that "[defendant] pled to whatever he pled to. It was just consolidated." The trial court then gave jury instructions as to the habitual felon charge which directed and limited the jury's consideration of the evidence to three specific felony convictions only. As such, the record reflects nothing to indicate that defendant was prejudiced by the inclusion of the additional conviction. Moreover, defendant has not challenged the validity of the prior convictions, the plea transcripts, or the resulting judgments. "Given the overwhelming and uncontradicted evidence of the three felony convictions, there is essentially no likelihood that a different result . . . would have ensued if the trial court had redacted [the additional conviction]." *State v. Ross*, 207 N.C. App. 379, 400, 700 S.E.2d 412, 426 (2010) (citation, quotation and bracket omitted). Accordingly, defendant's argument is overruled.

No error.

Judges STEPHENS and DILLON concur.

STATE v. COUSIN

[233 N.C. App. 523 (2014)]

STATE OF NORTH CAROLINA
v.
DONNELL TRACY COUSIN, DEFENDANT

No. COA13-543

Filed 15 April 2014

1. Evidence—hearsay—questioning investigator about other murder suspects—truth of matter asserted—harmless error

The trial court did not abuse its discretion in a felonious obstruction of justice and accessory after the fact case by denying defendant the opportunity to question an investigator about other murder suspects. By defendant's own admission, he sought to offer this testimony at least in part for the purpose of demonstrating the truth of the matter asserted. Further, any error was harmless since defendant was still able to elicit similar evidence by alternative means. Finally, constitutional arguments that were not raised at trial were dismissed.

2. Obstruction of Justice—felonious—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious obstruction of justice. Viewed in the light most favorable to the State, a jury question existed as to whether defendant unlawfully and willfully obstructed justice by providing false statements to law enforcement officers investigating the death with deceit and intent to defraud.

3. Accomplices and Accessories—accessory after the fact—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact. The jury could rationally have concluded that the purpose of defendant's actions was to prevent the officers from learning the identity of the actual killer.

4. Criminal Law—prosecutor's arguments—jurors are voice and conscience of community

The trial court did not abuse its discretion in a felonious obstruction of justice and accessory after the fact case by allowing the State to make a closing argument that allegedly appealed to the jury's passion and prejudice without intervening *ex mero motu*. Our Supreme Court has held that it is not improper for the State to remind the jurors that they are the voice and conscience of the community.

5. Constitutional Law—double jeopardy—sentencing for both felonious obstruction of justice and accessory after the fact

The trial court did not subject defendant to double jeopardy by sentencing him for both felonious obstruction of justice and accessory after the fact. The two offenses are distinct, and neither is a lesser-included offense of the other.

Appeal by defendant from judgments entered 2 November 2012 by Judge W. Osmond Smith, III in Caswell County Superior Court. Heard in the Court of Appeals 23 October 2013.

Roy Cooper, Attorney General, by Ryan Haigh, Special Deputy Attorney General, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III for defendant-appellant.

DAVIS, Judge.

Defendant Donnell Tracy Cousin ("Defendant") appeals from his convictions of felonious obstruction of justice and accessory after the fact. His primary contentions on appeal are that the trial court erred in (1) denying him the opportunity to question and cross-examine an investigator about suspects in the murder out of which Defendant's charges arose; (2) denying his motions to dismiss; (3) allowing the prosecution to make statements during closing argument that appealed to the passion and prejudice of the jury; and (4) imposing multiple consecutive sentences for the same acts and offenses in violation of his constitutional rights. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 8 July 2005, Larry Mebane ("Mebane") was found mortally wounded in his car in Caswell County with three gunshot wounds to his head. Lieutenant Michael Adkins ("Lt. Adkins") of the Caswell County Sheriff's Office was one of the first officers to arrive on the scene after emergency services had been contacted via a 911 call. He found a handgun wedged between the driver's seat and the center console of the car. Lt. Adkins also noticed that the front passenger window of Mebane's car was "busted out" and that a beer can was lying near the car. The car was running with loud music playing on the radio.

Law enforcement officers first became aware of Defendant on 15 July 2005 when he was stopped at a checkpoint set up in the area of the shooting, which led to a subsequent interview of Defendant 11 days later at the Caswell County Sheriff's Office. When Defendant arrived at the Sheriff's Office on 26 July 2005, he gave a written statement to Investigator Jerald Brown ("Investigator Brown"), who was heading the investigation into the Mebane shooting along with State Bureau of Investigation ("SBI") Special Agent Brian Norman ("Agent Norman"). In this statement, Defendant indicated to Investigator Brown that he had seen Mebane around 10:30 p.m. on the night of the shooting. Defendant also named three specific individuals, Josh Anderson, Hugh Anderson, and Terrance Jackson, as having been with Mebane at the time of the shooting.

Defendant then voluntarily returned to the Caswell County Sheriff's Office on 30 March 2006 and provided additional information to Investigator Brown. During this meeting, Defendant stated that Mebane had been stopped earlier in the day by a man named Jeffrey Murdock and that Murdock had demanded money from Mebane. However, Defendant did not directly implicate Jeffrey Murdock in the shooting.

Defendant gave his next statement on 22 June 2006 at the Alamance County Sheriff's Office where he was being questioned in regard to unrelated felony charges in Alamance County. Defendant told investigators that "I know who the damn shooter is and I ain't going to tell him [referring to Agent Norman] nothing." Defendant proceeded to say that "Tego[1] [sic] Anderson is your shooter." Defendant added that "Josh and Hugh (Anderson) were on [sic] Josh's car and the two of them pulled over in front of Larry and got out." He then stated that "Tego [sic] pulled up behind Larry on [sic] the white truck and boxed him in so Larry couldn't go forwards or backwards. Larry got out of his car and was arguing with Josh and Hugh when Tego [sic] walked up from behind and shot Larry in the head!"

On 26 June 2006, Defendant gave another statement to Investigator Brown in which — this time — he stated that he was actually with Mebane when he was shot. Defendant stated that Mebane was being chased by Josh Anderson, Hugh Anderson, and Tino Anderson. He further related that Hugh Anderson "took a pistol and smacked Larry upside the face with it." He also said that "Hugh was the only one I saw with my own eyes with a gun."

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1. Tino Anderson's name is spelled in various places in the record as "Tego" Anderson. Both spellings refer to the same individual.

Defendant subsequently gave a different statement on 6 July 2006 to the Alamance County Sheriff's Office. On this occasion he stated that "[t]he night of the shooting I saw the man who shot Larry. It was Tino."

On 17 October 2006, Defendant was interviewed by Sheriff Michael Welch ("Sheriff Welch") of the Caswell County Sheriff's Office. During this interview, Defendant stated that "Tino was there, but he didn't shoot Larry."

On 14 November 2006, Defendant requested to speak with the "sheriff or someone in charge" about Mebane's murder. Chief Deputy Tim Britt ("Chief Deputy Britt") of the Alamance County Sheriff's Office was notified of Defendant's request and conducted an interview with him that was observed by Investigator Brown and Sheriff Welch. Defendant proceeded to give the following statement to Chief Deputy Britt:

> We [Defendant and Mebane] then turned right onto Dailey Store Road. . . . Sylvester Harris was in the middle of the road waving his hands. Larry Mebane stopped and got out. . . . As I was getting out of the car, I heard Sylvester Harris say to Larry Mebane, "Where is the drugs and money at, I know you got it!" . . . Sylvester's brother was standing beside the car they had been in. His name is Maurice Harris. . . . The next thing I saw as I got out of the car was Sylvester Harris shoot Larry Mebane in the back of the head.

The last statement that Defendant gave investigators occurred on 14 April 2008. Defendant claimed he had information regarding the gun used in the Mebane murder, and Investigator Brown and Sheriff Welch conducted an interview with him. Defendant denied knowing the location of the weapon but stated he could point them "in the right direction of that." He stated that Josh Anderson was Mebane's killer and admitted that his prior statements naming Tino Anderson as the shooter were deliberate falsehoods designed to mislead and misdirect law enforcement in their ongoing investigation into the murder. He admitted that "I put Tino in the middle as a block one time" and that in his earlier statements he had been "making you waste your time and gas and your ink pen." Defendant then stated that "I wasn't there on the scene period. Never was." At the end of the interview, Investigator Brown asked if everything he had told the officers was truthful, and Defendant replied "nope."

On 15 November 2011, Defendant was indicted on one count of accessory after the fact to first degree murder and seven counts of felonious obstruction of justice. A jury trial was held in Caswell County Superior Court on 29 October 2012. At the conclusion of the State's evidence,

Defendant moved to dismiss all of the charges against him. The motion was denied. Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court once again denied the motion.

Defendant was convicted of all charges. He was sentenced consecutively to: (1) 168 to 211 months on the accessory after the fact charge; and (2) 168 to 211 months on the seven counts of obstruction of justice charges after the charges were consolidated. Defendant gave notice of appeal in open court.

Analysis

I. Denial of Defendant's Opportunity to Question Investigator Brown Regarding Other Suspects.

[1] Defendant first argues that the trial court erred by denying him the opportunity to question Investigator Brown about other suspects in the Mebane murder. At trial, Defendant's counsel sought to elicit from Investigator Brown during cross-examination information about his interviews with persons involved in the Mebane murder investigation. Specifically, she inquired whether during his interviews with Oscar Jackson and Terrence Jackson, either of those individuals had discussed or divulged any information relating to the identity of the shooter. The State objected to this entire line of questioning on the ground that the questions sought inadmissible hearsay because the statements sought were being offered to prove the truth of the matter asserted. The trial court sustained the State's objections. As an alternative basis, the trial court excluded the evidence under Rule 403 of the North Carolina Rules of Evidence based on the danger of unfair prejudice, confusion of the issues, and the possibility of confusing the jury.

Defendant argues the trial court's exclusion of the statements as inadmissible hearsay and under Rule 403 was erroneous. Defendant contends that this evidence was directly relevant to the issues presented and that its exclusion violated his constitutional right to present a defense.

Rule 801(c) of the North Carolina Rules of Evidence defines "hearsay" as "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. R. Evid. 801(c).

Defendant asserts that in pursuing this line of questioning, he sought to "show how the investigation of Larry Mebane unfolded. More importantly, these questions were designed to determine if any of Cousin's statements to law enforcement were true and/or corroborated."

We rejected a similar argument in *State v. Hairston*, 190 N.C. App. 620, 625, 661 S.E.2d 39, 42 (2008), *disc. review denied*, 363 N.C. 133, 676 S.E.2d 47 (2009). In *Hairston*, this Court found no error in the trial court's ruling that testimony by a detective about a third party's statements indicating that the third party did not know the defendant would constitute inadmissible hearsay:

> Defendant contends that the statement was not offered for the truth of the matter asserted, but instead was offered as a historical fact — that is, whether Hicks knew defendant or not. Defendant, however, goes on to argue that the trial court's ruling requires reversal because, according to defendant, such evidence would have aided defendant's arguments concerning his alibi defense. According to defendant, had the testimony been admitted, the jury could have used the information as "proof" that Brown and another person, not defendant, committed the robbery. In essence, defendant argues that the testimony was not elicited for its truth, but had it been admitted, the jury could have used the statement for the truth of the matter asserted, that Hicks, who had used the stolen credit cards, did not know defendant — thus making it less likely that defendant participated in the robbery of Moore. Accordingly, the trial court did not err in sustaining the State's objection as the testimony was offered for the truth of the matter asserted.

Id.

We believe the same is true here. By Defendant's own admission, he sought to offer this testimony at least in part for the purpose of demonstrating the truth of the matter asserted. As such, the trial court did not abuse its discretion in sustaining the State's objections to this line of questioning on hearsay grounds. *See State v. Waring*, 364 N.C. 443, 498, 701 S.E.2d 615, 649 (2010) (holding that "[t]he range of cross-examination, though broad, is subject to the trial judge's discretionary powers to keep it within reasonable bounds. The trial court's rulings on cross-examination will not be held in error absent a showing that the verdict was improperly influenced thereby.") (internal quotation marks and citations omitted), *cert. denied*, ___ U.S. ___, 181 L.Ed.2d 53 (2011).[2]

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2. Because we conclude the trial court's exclusion of the evidence on hearsay grounds did not constitute an abuse of discretion, we elect not to address the trial court's alternative basis for exclusion based on Rule 403.

Even assuming *arguendo* that the trial court erred in excluding the evidence, we believe any such error was harmless. *See State v. Augustine*, 359 N.C. 709, 731, 616 S.E.2d 515, 531 (2005) (holding that to establish prejudice resulting from an evidentiary ruling by the trial court, a defendant must show a reasonable possibility that a different result would have been reached had an evidentiary ruling not been made), *cert. denied*, 548 U.S. 925, 165 L.Ed.2d 988 (2006).

Here, no prejudice to Defendant occurred as a result of the trial court's ruling. Our review of the record reveals that Defendant was still able to elicit similar evidence concerning the Mebane murder investigation by alternative means. *See State v. Rinck*, 303 N.C. 551, 572, 280 S.E.2d 912, 927 (1981) (holding that "any error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection."). At trial, evidence concerning persons of interest in Investigator Brown's investigation was elicited through Defendant's subsequent line of questioning to Investigator Brown. Therefore, any error in the exclusion of this evidence was harmless.

Defendant also contends that the exclusion of this evidence violated his constitutional rights but concedes that no constitutional argument was asserted by him at trial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Jones*, 216 N.C. App. 225, 230, 715 S.E.2d 896, 900-01 (2011) (citation and quotation marks omitted). Therefore this claim is not properly before us.

II. Denial of Motions to Dismiss

Defendant next contends that the trial court erred in denying his motions to dismiss the charges of felonious obstruction of justice and accessory after the fact based on the insufficiency of the evidence. A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). 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). Evidence must be viewed in the light most favorable to the State with every reasonable inference

drawn in the State's 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).

A. Felonious Obstruction of Justice

[2] [I]n order to convict [a] Defendant of the common law offense of obstruction of justice, the State [is] required to demonstrate that Defendant ha[s] committed an act that prevented, obstructed, impeded or hindered public or legal justice. Although obstruction of justice is ordinarily a common law misdemeanor, N.C. Gen. Stat. § 14-3(b) provides that "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony." For that reason, [u]nder N.C. Gen. Stat. § 14-3(b) (1979), for a misdemeanor at common law to be raised to a Class H felony, it must be infamous, or done in secret and with malice, or committed with deceit and intent to defraud. If the offense falls within any of these categories, it becomes a Class H felony and is punishable as such.

State v. Taylor, 212 N.C. App. 238, 246, 713 S.E.2d 82, 88 (2011) (internal citations and quotation marks omitted). We have previously noted that "this State has a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about their claims. . . ." *State v. Wright*, 206 N.C. App. 239, 242, 696 S.E.2d 832, 835 (2010).

In the present case, Defendant gave eight written statements to law enforcement officers concerning the events surrounding the murder of Mebane. In his first two written statements on 26 July 2005 and 30 March 2006, he denied being at the scene of Mebane's murder but identified individuals who may have been involved with Mebane's death.

In his next six statements on 22 June 2006, 26 June 2006, 6 July 2006, 17 October 2006, 14 November 2006, and 14 April 2008, Defendant admitted being present at the scene of the crime. In these statements, Defendant identified various alternating persons as the killer. On 22 June 2006, Defendant named Tino Anderson as the shooter and stated that Hugh Anderson and Josh Anderson were also involved. On 26 June 2006, Defendant named Hugh Anderson as the killer as he was "the only one I saw with my own eyes with a gun."

On 17 October 2006, Defendant did not identify any specific individual as the shooter but placed Tino, Hugh, and Josh Anderson at the scene

and stated: "Tino was there, but he didn't shoot Larry." On 14 November 2006, Defendant gave a different story, indicating that Maurice Harris and Sylvester Harris tried to rob Mebane and that Sylvester Harris was the shooter and then stated that "the next thing I saw as I got out of the car was Sylvester Harris shoot Larry Mebane in the back of the head."

On 15 April 2008, Defendant changed his story once again, stating that "I done already gave [sic] told you the name of who killed him already . . . Josh Anderson." Defendant also claimed in that statement that he was not at the scene when Mebane was murdered. Defendant then admitted that he had named Tino Anderson as the shooter in a previous statement as a "block." At the end of the interview, Defendant was asked if he was telling the truth and he responded "nope."

Defendant argues that the State offered no evidence that any of his statements were false or misleading and instead simply relied on the contradictory nature of Defendant's statements. We disagree.

Agent Norman of the SBI testified as to the significant burden imposed on the investigation of Mebane's murder resulting from Defendant's various conflicting statements. Agent Norman further explained that each lead was "followed up" and that the SBI ultimately determined that each person identified by Defendant had an alibi and was not present at the scene when the shooting occurred.

Clearly, when viewed in the light most favorable to the State, a jury question existed as to whether Defendant (1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating the death of Larry Mebane (3) with deceit and intent to defraud. Therefore, the trial court properly denied Defendant's motion to dismiss the felonious obstruction of justice charges.

B. Accessory After the Fact

[3] Defendant also asserts the trial court should have granted his motion to dismiss the charge of accessory after the fact because the State failed to produce substantial evidence that Defendant made false statements with the intent to help the actual perpetrator escape detection, arrest, or punishment.

The elements of accessory after the fact are as follows: "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *State v. Duvall*, 50 N.C. App. 684, 691, 275 S.E.2d 842, 849, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981); *see*

also N.C. Gen Stat. § 14-7; *State v. Barnes*, 116 N.C. App. 311, 316, 447 S.E.2d 478, 480 (1994). We note that N.C. Gen. Stat. § 14-7 permits the conviction of an accessory after the fact "whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. . . ." N.C. Gen. Stat. § 14-7 (2013). Furthermore,

> [t]his Court has recognized that an indictment may properly allege unknown conspirators in charging a criminal conspiracy. It rationally follows that an indictment is valid which alleges the existence of an unknown co-principal in charging a crime. Here the bills of indictment do not allege that [the defendant's co-conspirator] was the person who actually perpetrated the offenses. The indictments charged that a crime was committed by an unknown person and that defendant was present, aiding and abetting in the deed. Thus the acquittal of [the defendant's co-conspirator] was not a sufficient basis for dismissal of the charges.

State v. Beach, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973) (internal citations omitted), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 33, 310 S.E.2d 587, 605-06 (1981). Moreover, Defendant concedes in his brief that "[t]he State does not have to identify the killer of Larry Mebane, in order to convict [Defendant] of Accessory After the Fact of First Degree Murder."

Here, as discussed above, the evidence — when viewed in the light most favorable to the State — tended to show that Defendant gave eight different written statements to authorities on his own volition providing a wide array of scenarios surrounding the death of Mebane. In these various statements, Defendant identified four different individuals as being the person who shot Mebane. Furthermore, he admitted near the end of his 14 April 2008 interview with Investigator Brown and Sheriff Welch that he had not been truthful to investigators. The jury could rationally have concluded that his false statements were made in an effort to shield the identity of the actual shooter.

There was competent evidence introduced at trial that allowed the jury to rationally conclude that Defendant knew the identity of Mebane's shooter and was protecting that person. First, Defendant's statements to investigators suggested that he had, in fact, been present at the murder scene as his statements revealed his knowledge of information that could only have been obtained by someone physically present at the scene. In addition to knowing the location of the shooting, he also knew

that (1) Mebane had been left for dead in the passenger seat of the car; (2) a handgun was found wedged in between the seat and the console of the car; (3) a beer can was left beside the car; (4) Mebane had been shot in the head; (5) the car radio was on and playing loud music following the shooting; and (6) Mebane's jaw was broken.

Second, the fact that Defendant knew the true identity of the shooter was demonstrated by the testimony of his former girlfriend, Sheila Satterfield, who testified as follows:

> Q. Sheila, the question is, did Tracy tell you he was with Larry when he got shot?
>
> A. He did. He did.
>
> Q. And did Tracy tell you how the shooting occurred?
>
> A. He said he jumped out the car and ran. All I know somebody was shooting guns. That's all I know.
>
> Q. Did Tracy eventually tell you who that shooter was?
>
> A. I can't remember the name, but we was at a store one day, and he told me it was a guy that was in a brown Honda.
>
> Q. Did he actually point out the person in the store?
>
> A. I -- see I wasn't in the store. I was in the car, and um, when he came back, he said that's the guy that killed Little Larry. Look. Look. Look. I said, Oh, I ain't looking. Get in this car, and let's go.

Finally, Defendant admitted in his 14 April 2008 statement that "I put Tino [Anderson] in the middle as a block one time," thereby raising the inference that he was deliberately thwarting the investigators' attempts to apprehend Mebane's killer. In that same statement, Defendant further acknowledged that his false statements had made "you waste your time and gas and your ink pen," indicating that he was fully aware his false statements were resulting in a misuse of law enforcement time and resources by causing the investigators to chase false leads. The jury could rationally have concluded that the purpose of his actions was to prevent the officers from learning the identity of the actual killer.

We conclude that the evidence presented by the State was sufficient to raise a jury question as to the accessory after the fact charge. Accordingly, Defendant's argument is overruled.

III. State's Closing Argument

[4] Defendant next argues that the trial court abused its discretion by improperly allowing the State to make a closing argument that appealed to the jury's passion and prejudice without intervening *ex mero motu*. This argument likewise lacks merit.

"The standard of review when a defendant fails to object at trial [to statements in a closing argument] is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L.Ed.2d 80 (1999).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Id. "Statements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (citation and internal quotation marks omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012).

Consequently, "statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal." *State v. Murrell*, 362 N.C. 375, 394 665 S.E.2d 61, 74 (2008) (citations and internal quotation marks omitted). Our Supreme Court has further held that "[t]o merit a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair." *Phillips*, 365 N.C. at 136, 711 S.E.2d at 146.

Here, Defendant contends that the State's closing argument was improper because it "sought pity and passion for victim's family, tried to make the jury share the responsibility of the prosecutor for prosecuting this case, and sought to convict Defendant for not cooperating with law enforcement." Specifically, he appears to be challenging the prosecutor's statement that "[t]his community deserves to be safe from a murderer."

Our Supreme Court has held that "it is not improper for the State to remind the jurors that they are the voice and conscience of the community." *State v. Garcell*, 363 N.C. 10, 63, 678 S.E.2d 618, 651 (2009) (citation

and internal quotation marks omitted). Therefore, we do not believe that this statement when viewed in the overall context of the closing argument in its totality required intervention *ex mero motu* by the trial court.

Defendant also appears to be contending the trial court should have intervened when the prosecutor made a comment that

> this is still somebody's child, and he didn't deserve to die like that, and his Momma didn't deserve to endure that loss, and his son from last night all the way for the rest of his life will not have his father to take him trick-or-treating, to buy his Christmas or be there for Easter or spend summer vacations, and that matters, and the State values that life, and you, the jury, values (sic) that life, and justice cries out that the person who did it be prosecuted. How many times could you have ever imagined that this case, the person who pulled the trigger and killed this young man, this father, in this room right now, in this moment there is one person in here who knows who did it, and it's the defendant. Right now. The pain and suffering that could be released. The justice that could be done, but instead of that, not once, not twice, not three times, not four times, 5, 6, 7 times over the span of seven years this man chose to lie about it in detail.

This portion of the State's argument sought to convey the notion that Defendant's pattern of false and misleading statements to investigators had prevented Mebane's family from learning the identity of his killer. "The admissibility of victim impact testimony is limited by the requirement that the evidence not be so prejudicial it renders the proceeding fundamentally unfair. Victim impact testimony is admissible to show the effect the victim's death had on friends and family members." *State v. Raines*, 362 N.C. 1, 15, 653 S.E.2d 126, 135 (2007) (internal citations and quotation marks omitted), *cert. denied*, 557 U.S. 934, 174 L.Ed.2d 601 (2009).

After reviewing the entirety of the State's closing argument and considering the context in which the challenged statements were made, we hold once again that Defendant has failed to carry his burden of demonstrating that the trial court had a duty to intervene *ex mero motu*. Therefore, we reject Defendant's arguments on this issue.

IV. Double Jeopardy

[5] Defendant's final argument is that the trial court erred in sentencing Defendant for two crimes — felonious obstruction of justice and

accessory after the fact — arising out of the same transaction, thereby violating his constitutional rights by subjecting him to double jeopardy. This argument likewise lacks merit.

Our Supreme Court has stated that "[b]oth the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution prohibit multiple punishments for the same offense absent clear legislative intent to the contrary." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

> Where, as here, a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306 (1932); *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then, a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes. *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187 (1977); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). If neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy. *See State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982).

Id.

The Supreme Court further clarified the double jeopardy analysis in *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom. Queen v. N.C.*, 544 U.S. 909, 161 L.Ed.2d 285 (2005):

> Even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Id. at 579, 599 S.E.2d at 534, (internal citation and brackets omitted).

In *Tirado*, the Supreme Court determined that the charges of attempted first-degree murder and assault with a deadly weapon with

intent to kill inflicting serious injury are not comprised of the same elements in that each requires an additional element not included in the other offense. *Id.* at 579, 599 S.E.2d at 534. Therefore, even though the crimes charged in *Tirado* arose from the exact same underlying transaction, the Court held that "[b]ecause each offense contains at least one element not included in the other, defendants have not been subjected to double jeopardy." *Id. See State v. Mulder*, No. COA13-672, ___ N.C. App. ___, ___, ___ S.E.2d. ___, ___ (filed Mar. 18, 2014) ("[A] defendant convicted of multiple criminal offenses in the same trial is only protected by double jeopardy principles if (1) those criminal offenses constitute the same offense . . . ; and (2) the legislature did not intend for the offenses to be punished separately. . . . [T]he applicable test to determine whether double jeopardy attaches in a single prosecution is whether each statute requires proof of a fact which the others do not." (internal citations and quotation marks omitted)).

The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud. *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983); *State v. Clemmons*, 100 N.C. App. 286, 292-93, 396 S.E.2d 616, 619 (1990). The elements of accessory after the fact are: "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *Duvall*, 50 N.C. App. at 691, 275 S.E.2d at 849.

Therefore, the elements of these two crimes are clearly not identical. Obstruction of justice, unlike accessory after the fact, requires deceit and intent to defraud. Accessory after the fact, unlike obstruction of justice, requires that the defendant personally assisted the principal who committed the crime in escaping detection, arrest, or punishment. The two offenses are distinct, and neither is a lesser included offense of the other. Consequently, because the charges of felonious obstruction of justice and accessory after the fact contain separate and distinct legal elements, Defendant has failed to show a double jeopardy violation.

Conclusion

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

NO PREJUDICIAL ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
KEVIN McDONALD HENDERSON

No. COA13-1228

Filed 15 April 2014

Sexual Offenses—second-degree—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree sexual offense. The evidence was sufficient to show that defendant acted by force and against the will of the victim, a necessary element of second-degree sexual offense.

Appeal by Defendant from Judgment entered 28 February 2013 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Daphne D. Edwards, for the State.

Jon W. Myers for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

Defendant Kevin McDonald Henderson was charged with second degree sexual offense on 19 January 2012. The trial began on 20 February 2013 and concluded the following day. The evidence at trial tended to show the following:

Sandra[1] was walking through a Target store in Raleigh on 17 September 2011 with her young child. She was wearing a knee-length denim skirt with a slit in the back. While perusing the candle section, Sandra noticed a man, who was later determined to be Defendant, standing nearby. Sandra moved on to the cosmetics area and gave her child permission to explore the candy section, which was located "a few aisles down."

1. Defendant notes in his brief that, while N.C.R. App. P. 3.1(b) does not apply to adults, it is the policy of the North Carolina Indigent Defense Services "[to shield] the identities of victims of sexual crimes in appellate filings" regardless of age. We commend the policy of Indigent Defense Services and use a pseudonym for that purpose here. We recommend that the State also observe such a policy.

Sandra began looking at makeup. Another woman was standing about two feet away. As Sandra bent down to pick something off the bottom shelf, she felt fingers "coming up between the slit in my skirt, parting between my buttocks, and touching in between my vaginal lips."

> And I was, like — [the] first thing I thought was, like, my brain was trying to process something. And I don't know if anyone's ever had the experience of being in a grocery store aisle and, like, a three-year-old kid reaches up your skirt, but they don't mean it, you know, when a little kid does it. So the first thing my brain is trying to process is what was happening, was there a kid? And, like, my brain is, "Okay. No kid is going to do that." It was almost that feeling of, like, you know, something inappropriate. And I guess my brain was just grasping for it being a kid or something.

At that point, Sandra turned around and saw Defendant. "He was very close to me. His face was there. I saw him. He looked at me, and he ran. He ran right away." As Defendant left, Sandra heard the other woman say, "What did he do to you? What did he do to you?"

Sandra reported the incident to Target, and the police were called. In the meantime, Sandra met with a Target employee and explained the situation. According to the employee, Sandra was "very startled, shaken, not to the point she was in tears, but she was very upset. You could tell she was angry."

Testifying in his own defense, Defendant admitted "plac[ing his] right hand . . . on the top of [Sandra's] backside, her butt — buttocks . . . two inches above the split [in her skirt]." According to Defendant, he noticed her skirt "and was enticed by looking at that." When he saw her bend over to get something from a lower shelf, Defendant "wanted to touch her . . . backside because . . . the skirt was form fitting." Hoping to make it appear as if he accidentally brushed her, Defendant touched Sandra on the buttocks. When Sandra stood up, Defendant realized he had gone too far and left.

Defendant moved to dismiss the charges against him at the close of the State's evidence. That motion was denied, and Defendant renewed his motion to dismiss at the close of all the evidence. The motion was again denied, and Defendant was found guilty by unanimous jury verdict on 21 February 2013. One week later, on 28 February 2013, the trial court sentenced Defendant to 69 to 92 months in prison with credit for 264 days served. Defendant appeals.

Standard of Review

> Upon [the] defendant's motion for dismissal, the question for the [appellate c]ourt 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 [the] 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 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Discussion

On appeal, Defendant contends that the trial court erred in denying his motion to dismiss because the evidence is insufficient to show that he acted "by force and against the will of [Sandra]," a necessary element of second-degree sexual offense. Specifically, Defendant argues that the touching occurred by surprise and, thus, did not "afford[Sandra] the opportunity to consent" or resist. This argument is entirely without merit.

Under section 14-27.5 of the North Carolina General Statutes, a person may be found guilty of a sexual offense in the second degree if that person engages in a sexual act with another person "[b]y force and against the will of the other person[.]" N.C. Gen. Stat. § 14-27.5 (2013).

> The statutory requirement that the act be committed by force and against the will of the victim may be established by either actual, physical force, or by constructive force in the form of fear, fright, or coercion. . . . "Physical force" means force applied to the body.

In re Clapp, 137 N.C. App. 14, 24, 526 S.E.2d 689, 696–97 (2000) (citations and certain internal quotation marks omitted). The actual force element "is present if the defendant uses force sufficient to overcome any resistance the victim *might* make." *State v. Brown*, 332 N.C. 262, 267, 420 S.E.2d 147, 150 (1992) (citations omitted; emphasis added).

With regard to the offense of rape, our courts have historically

> implied in law the elements of force and lack of consent so as to make the crime of rape complete upon the mere showing of sexual intercourse with a person who is asleep and therefore could not resist or give consent. The phrase "by force and against the will" used in the first and second-degree rape statutes and the first and second-degree sexual

> offense statutes means the same as it did at common law when it was used to describe some of the elements of rape. *It makes no difference* in the case of a sleeping *or similarly incapacitated* victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; *force and lack of consent are implied in law.*

State v. Dillard, 90 N.C. App. 318, 322, 368 S.E.2d 442, 445 (1988) (citations, certain internal quotation marks, certain brackets, and ellipsis omitted; emphasis added).

Here, as discussed above, Defendant argues that the State failed to present sufficient evidence that he acted by force and against Sandra's will because she did not have time to decide whether to consent or object to the touching.[2] Thus, Defendant suggests that individuals may lawfully commit acts similar to the one committed here as long as they do so by surprise. This argument borders on the absurd. As quoted above, we have already stated that an individual may be guilty of second-degree sexual offense when the victim is *sleeping* or *similarly incapacitated. Id.*

The touching in this case was clearly against Sandra's will. To the extent that Sandra was not aware of the touching before it occurred or did not understand the exact nature of the touching at the moment it occurred, lack of consent is implied in law. *See, e.g.*, *Brown*, 332 N.C. at 274, 420 S.E.2d at 154 (holding that the State introduced substantial evidence of the defendant's use of force, even though the victim initially believed the assailant was a nurse, when the defendant entered the victim's hospital room, pulled away her bed clothing and gown, pushed her panties aside, and touched her vagina). Whether Sandra was "surprised" by Defendant's actions has no bearing on the applicability of the second-degree sexual offense statute. Defendant's argument is overruled.

NO ERROR.

Judges GEER and ERVIN concur.

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2. Defendant's argument appears to be rooted in a misreading of the *Brown* case, cited above. In that case, Justice Frye wrote a concurring opinion expressing his wish that the Court had taken more time to "say explicitly what I believe is already implicit in our law: the elements of force and lack of consent in rape and sexual offense cases may be satisfied when the [State] demonstrates, as in this case, that the attack was carried out by surprise." *Brown*, 332 N.C. at 274, 420 S.E.2d at 154 (Frye, J., concurring). Defendant's brief indicates that he erroneously believes Justice Frye was *dissenting* and not concurring in that opinion. As a result, Defendant inaccurately argues that the trial court incorrectly "followed Justice Frye's dissent in *Brown* and applied the law as he wanted it to be." In fact, the trial court applied the law as it is.

STATE OF NORTH CAROLINA
v.
KENNETH CARROLL MEE

No. COA13-1035

Filed 15 April 2014

Constitutional Law—right to counsel—forfeited—defendant's behavior

Defendant forfeited his right to the assistance of counsel where he first waived his right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, and refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction and would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial.

Appeal by defendant from judgments entered 27 March 2013 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 4 February 2014.

Attorney General Roy Cooper by Special Deputy Attorney General David Efird for the State.

W. Michael Spivey for defendant-appellant.

STEELMAN, Judge.

Where defendant waived the right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, and refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction and would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial, defendant forfeited his right to the assistance of counsel.

I. Factual and Procedural Background

On 5 January 2012 defendant was arrested for trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of 573 grams of marijuana, and maintaining a dwelling for keeping and selling controlled substances. He was indicted for these offenses on 9 July 2012. Defendant appeared before at least four superior court

judges for pretrial proceedings and made inconsistent statements regarding his representation by counsel, including waiver of appointed counsel, hiring and then discharging counsel on two occasions, representation by an assistant public defender, and asserting an unsupported legal theory that he was not subject to the court's jurisdiction.

On 25 March 2013, defendant was before the trial court for trial. He refused to state a clear position regarding counsel and told the trial court that he did not want his retained counsel to represent him at trial, did not want to represent himself at trial, did not want standby counsel to take any role in the trial, and would not remain in the courtroom or otherwise "participate" in his trial. Defendant refused to remain in the courtroom and was confined to a holding cell near the courtroom during trial.

The State's evidence generally showed that law enforcement officers arrested defendant at his home on 5 January 2012 for possession of cocaine, marijuana, drug paraphernalia, and firearms. Defendant waived his *Miranda* rights, and gave a statement confessing to the charged offenses.[1] Defendant did not question the State's witnesses or offer any evidence. On 26 March 2013 the jury returned verdicts finding him guilty of trafficking in cocaine by possession of more than 28 but less than 200 grams of cocaine, possession of 573 grams of marijuana, and maintaining a dwelling for keeping and selling controlled substances.

The trial court sentenced defendant to a term of 35 to 51 months imprisonment for trafficking in cocaine, to begin at the expiration of three consecutive sentences of thirty days for contempt of court. The trial court imposed concurrent sentences of 6 to 17 months for the remaining offenses, and suspended each sentence, with concurrent terms of 30 months' probation to begin when defendant was released from prison. On 30 April 2013 the trial court corrected defendant's sentence for trafficking in cocaine to a term of 35 to 42 months in prison.

Defendant appeals.

II. Standard of Review

Defendant argues on appeal that his constitutional right to the assistance of counsel was violated. "The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution." *State v. Montgomery*,

1. The sole issue raised on appeal concerns the circumstances under which defendant proceeded to trial *pro se*. Given that defendant does not otherwise challenge the conduct of the trial or the factual basis for the charges, we find it unnecessary to set out further facts of the case in detail.

138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000) (citing *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977)). The "standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

III. Forfeiture of the Right to Counsel

A. Standard of Review

" '[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial.' " *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (quoting *McFadden* 292 N.C. at 616, 234 S.E.2d at 747).

> Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right."

Montgomery at 524-25, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)). In Montgomery, this Court held that the defendant's "purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. Defendant, by his own conduct, forfeited his right to counsel[.]" *Id.* at 525, 530 S.E.2d at 69 (citation omitted).

B. Analysis

Review of the defendant's actions during the fourteen months between his arrest and trial reveals that he engaged in behavior which resulted in the forfeiture of the right to counsel. At his first appearance in district court on 6 January 2012, defendant signed a waiver of appointed counsel. On 6 June 2012 defendant was again in district court, where he refused to check any of the options on a waiver of counsel form and signed the form "All rights reserved UCC-1-300 Kenneth Mee Bey." Handwritten notes on the waiver form indicate that defendant "refused to address [the] court about counsel," and stated that "he did not recognize the Court." The notes also indicate that defendant previously had retained attorney Alton Williams to represent him, but that Mr. Williams

was allowed to withdraw because he "could not ethically proceed" to pursue motions that defendant had filed.

On 30 July 2012 defendant appeared in superior court for arraignment before Judge Donald W. Stephens. Initially, he denied being Kenneth Mee, and stated that he was "Kenneth Mee Bey, a prior person" who was a "sovereign from [Moorish] descent" and was "not a Fourteenth Amendment citizen." However, Judge Stephens ruled that if defendant would not acknowledge his identity his bond would be revoked. Defendant then verified for the court that he was Kenneth Mee. Defendant told the court that he did not have an attorney, did not intend to hire one, and did not want the court to appoint a lawyer, but that he did not intend to proceed *pro se* because he was "improper personnel." Defendant refused to enter a plea and Judge Stephens entered a plea of not guilty on his behalf, prompting defendant to ask for the judge's "oath of office" and "bonding number" so that he could file "a counterclaim in Federal Court." When defendant continued to argue with Judge Stephens, the judge revoked his bond and ruled that, because defendant would not sign a waiver of the right to counsel, he was appointing the public defender's office to represent him.

On 22 August 2012, defendant was again before Judge Donald Stephens. At this hearing he was represented by Stephanie Davis, an assistant public defender, who asked Judge Stephens to reconsider defendant's bond. However, the court ruled that, after reading defendant's *pro se* filings, he was concerned that, given defendant's contention that the laws of North Carolina and of the United States did not apply to him, defendant would not appear for trial. Defendant would not allow his attorney to enter a plea on his behalf and informed the court that he objected to the court's jurisdiction. When defendant refused to enter a plea, Judge Stephens entered a plea of not guilty on his behalf, and denied defendant's request to modify the conditions of release.

On 25 October 2012, Mr. Williams filed a notice of representation indicating that defendant had again retained him as counsel, and Ms. Davis was permitted to withdraw. On 29 October 2012 defendant was in court before Judge Paul Gessner, at which time Mr. Williams entered "a general appearance on [defendant's] behalf[.]" The prosecutor informed Judge Gessner that defendant had previously submitted "filings where the defendant was invoking the UCC and claiming he was not a citizen of the State of North Carolina and not subject to the laws of this state and the jurisdiction of the court." Mr. Williams responded that defendant was "submitting himself to the jurisdiction of the court" and would withdraw

his motions challenging the court's jurisdiction. Judge Gessner declined to modify the conditions of defendant's bond.

Mr. Williams filed a motion for continuance on 30 November 2012, which was granted by Judge Howard E. Manning, Jr., on 12 December 2012. However, when defendant was next in court on 4 February 2013, before Judge G. Wayne Abernathy, the prosecutor informed the court that defendant had revived his challenge to the court's jurisdiction. When Mr. Williams stated that he was "ready to proceed" and "prepared to represent" defendant at trial, defendant objected:

> THE COURT: What's the objection?
>
> DEFENDANT: I'm the proper person. I'm defending myself. He is not my attorney. I'm a sovereign nation. He is not my attorney.
>
> THE COURT: So you're telling me that you do not want Mr. Williams to represent you in this matter?
>
> DEFENDANT: I'm telling you the only issue for me today is my personal jurisdiction. I'm making a special appearance. I'm showing the Court the sole reason for my appearance is to establish personal jurisdiction. . . .
>
> . . .
>
> THE COURT: . . . The first question is are you representing to me that Mr. Williams is not your lawyer?
>
> DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: So that means that you are discharging Mr. Williams?
>
> DEFENDANT: I am not contracting with the State of North Carolina. He's an agent of the State so he's not –
>
> THE COURT: He's your attorney right now.
>
> DEFENDANT: No, sir, he's not.
>
> . . .
>
> THE COURT: . . . Anyway, you understand you're charged with trafficking in cocaine by possession?

DEFENDANT: No, sir, I do not understand that charge. No, sir, I do not.

THE COURT: What is it you do not understand?

DEFENDANT: I do not understand what you're trying to charge me with. The only reason I'm here for is the jurisdiction.

THE COURT: I'm going to get to the jurisdiction.

DEFENDANT: I don't understand none of the charges . . . Nothing you're saying to me that pertains to whatever you're trying to pertain to, I'm not in that jurisdiction so, no, sir, I don't understand none of that.

THE COURT: Well, sir, the charge is of trafficking cocaine by possession –

DEFENDANT: I don't know what you're talking about.

THE COURT: You're charged with possession and intent to sell and deliver marijuana.

DEFENDANT: The only thing I'm here for is the jurisdiction.

THE COURT: You're also charged with maintaining a dwelling place for keeping and selling of a controlled substance. And, apparently, you have confessed to those crimes or there's certainly evidence that you have–

DEFENDANT: No, sir. It wasn't me.

. . .

THE COURT: So you're charged with three felonies. And one of them is extraordinarily serious because there's a minimum sentence that I cannot go below. And I will tell you that most people who choose to represent themselves make a serious mistake. Very rarely are they found not guilty. I just want you to be aware of that. You don't have to agree with that. I just want you to be aware of that. So it's your position you want to represent yourself, and I will allow you to do that. Are you willing to sign a waiver of counsel?

DEFENDANT: No, sir. I will not sign any contracts. I will not take any oaths.

THE COURT: All right. I'm going to appoint Mr. Williams as standby counsel just in case you have any questions, but you're responsible for your own case. . . .

DEFENDANT: I'm only here for jurisdiction. I don't know what you're talking about when you say trial.

THE COURT: Your trial.

DEFENDANT: No, sir.

THE COURT: But I will entertain your motion . . . to dismiss for lack of jurisdiction.

DEFENDANT: . . . I filed three motions that were never answered. Are you answering here in the courtroom? They have to be answered in writing. . . . I object to this whole proceeding, sir. . . . [T]he only reason I'm here is, like I said, the jurisdiction. . . . Anything else you say, I object.

THE COURT: Well, you can object. I note your objection. I want you to understand that if you're not ready to participate we can send you back to jail and sit there until you're ready.

DEFENDANT: Well, send me back to jail because I'm not - I will never participate in this - what is your status? Who are you? What is your nationality?

THE COURT: Do you want to argue a motion on lack of jurisdiction?

DEFENDANT: No. . . . I would like to get that information.

THE COURT: I've asked you –

DEFENDANT: No, sir, . . . [O]n the record and for the record I have asked for the judge – What'd say your name was?

THE COURT: Abernathy.

DEFENDANT: - for his oath of office, his bonding license, and what nationality he is. And you're saying now you're not going to tell me?

THE COURT: I'm saying that you don't get to ask me questions.

. . .

DEFENDANT: . . . [A]s far as your proceedings go, you're talking about sending me back to jail. That's what you will have to do because I will object, and I will not contract under UCC 1-308-1. I will not contract. And all law is contract. . . . I object on the grounds I am Alique Mee Bey, executive beneficiary on behalf of Kenneth Mee. I am a free indigenous man in full life and peacefully inhabited which duly arise under the United Nations Declaration of Rights of Indigenous People . . . Once jurisdiction is challenged, the Court cannot proceed when it clearly appears that the court lacks jurisdiction[.] . . .

THE COURT: All right. You have argued I do not have jurisdiction over you[.] . . . U.C.C. law is a civil contract issue. It does not apply in criminal court. I have read all of your motions, and, sir, each and every one of them is denied. . . . Are you prepared to go forward with your trial?

THE DEFENDANT: No, sir. We will not go forward. I told you I understand no trial. I'm only here for jurisdiction. That's the only reason I'm here. I'm not here to try no case. I'm not here for no understanding, no charges. I don't even know what you're talking about. I'm here for one reason.

THE COURT: Mr. Williams, have you presented copies of his indictments to him?

MR. WILLIAMS: He's seen everything.

THE COURT: He's informed of the charges?

DEFENDANT: No, sir. I object.

THE COURT: . . . [Y]our objection is noted.

DEFENDANT: I will keep objecting. Sir, I'm only here for jurisdiction. That's it.

THE COURT: And your motion to deny jurisdiction is denied.

. . .

DEFENDANT: Like I said, I object to anything you say about a charge. I don't know what you're talking about.

THE COURT: That's fine. Your objection's in the record. Now we're going to move on.

DEFENDANT: We ain't going to move on. I'm not going to proceed.

THE COURT: You understand you'll sit in jail until you're ready to proceed?

DEFENDANT: You do what you have to.

. . .

PROSECUTOR: Just so we're clear, Judge, the case is continued off this calendar. Mr. Mee has fired his attorney, Mr. Williams, and is proceeding *pro se*.

THE COURT: He's proceeding *pro se*. The Court makes a finding of fact that the Court tried to get Mr. Mee to sign a waiver of counsel. He refused to do so, and he is now proceeding *pro se*. The Court appointed Mr. Williams as standby counsel. The Court explained to him that Mr. Williams does not conduct the trial but would be available for questions or advice from him. And the Court therefore orders that Mr. Williams is relieved as counsel of record, but he is reserved as standby counsel and that the - the Court finds that the defendant has knowingly and intelligently waived his right to counsel, chooses not to use counsel, and has stated a number of times that he represents himself and he contests the jurisdiction of the Court. The Court also notes that the defendant's conduct is somewhat contemptuous, but the Court took no action on that at this time.

. . .

THE COURT: We're back on the record in the matter of the State versus Kenneth Carroll Mee[.] . . . [A]ny time from today until the defendant is ready to be tried is to be excluded . . . in calculating any times for a speedy trial motion because the State was ready to proceed, his lawyer was ready to proceed, and the defendant prohibited the trial of this case by refusing to accede to the jurisdiction

> of the Court and stated unequivocally that he was going to keep objecting and made it impossible for the Court to try the case.

Defendant appeared for trial on 25 March 2013, before Judge Michael J. O'Foghludha. The prosecutor summarized the procedural history of the case and informed the trial court that the State was prepared to proceed. The trial court tried unsuccessfully to determine whether defendant wished to appear *pro se* or with the assistance of counsel:

> THE COURT: . . . Mr. Mee, what's the status of your attorney situation right now, sir, are you representing yourself?
>
> DEFENDANT: I am myself. I'm an improper person, sir, so I have no attorney. I'm talking for myself.
>
> THE COURT: Thank you. So you're representing yourself as far as this proceeding.
>
> DEFENDANT: I'm an improper person. I am myself. I don't have to represent myself. I'm talking for myself.
>
> THE COURT: . . . Mr. Williams, let me ask you, sir. I just noted in the file that you have a general appearance back in October 15th of 2012.
>
> MR. WILLIAMS: That's correct.
>
> THE COURT: But you are not representing Mr. Mee at the moment; is that correct?
>
> MR. WILLIAMS: No, Judge. I was appointed standby counsel by Judge Abernathy.
>
> . . .
>
> DEFENDANT: I want to object to the charges that Mr. Wilson has brung against me. The only reason I'm here, sir, is for a special appearance for jurisdiction, showing up for this Court for the sole purpose of contesting the Court's jurisdiction over me. My status shows evidence contrary to this Court's presumption, therefore, this Court's presumption of assertion of jurisdiction over me disappears[.] . . .
>
> . . .
>
> DEFENDANT: For the record and on the record, the only reason why I'm here is for personal jurisdiction. . . . This

Court has no jurisdiction. . . . Furthermore for the record and on the record, I am . . . Malik Bey, executive beneficiary on behalf of the trust of Kenneth Mee. I am an indigenous man in full light. I will not participate in any proceedings brought against me by this fictitious corporation which is the State of North Carolina. . . . [N]or will I stand under any fictitious contracts forced against me. I will not take any oaths, but I will affirm the truth. . . .

. . .

THE COURT: Yes, sir. Mr. Wilson, I was looking at the indictment, and it appears that Mr. Mee is indicted under 90 -

DEFENDANT: I object.

THE COURT: I understand, sir, overruled. . . . If you wouldn't mind, just let me talk, and I'll be happy to let you talk.

DEFENDANT: I'm going to object to anything that doesn't perceive jurisdiction. So I'm not going to participate in anything. . . . I have a writ of *habeas corpus* claim on the State, and he has a copy there. . . . [Y]ou might as well send me back to jail. Because what I'm going to do is just include you . . . in the federal claim that I'm going to file against Mr. Williams.

THE COURT: That's fine. Let me just stop you. Mr. Mee appears to be indicted under 90-95(h)(3) for 28 grams or more, but less than 200 grams –

DEFENDANT: I object.

THE COURT: Sir, I'm going to give you a little warning here. I don't mind listening to you, and I will let you talk, but please don't interrupt me, because I'm trying to talk. . . . Mr. Wilson, Mr. Mee appears to be indicted under 90-95(h)(3)(a), more than 28 grams, less than 200, punished as a class G felon, sentenced to a minimum term of 35 and a maximum of 42, with a fine of $50,000 as a minimum maximum term of that statute. . . .

. . .

THE COURT: . . . Mr. Mee, you may object, sir, now.

DEFENDANT: Yes, I object to what he's talking about.

THE COURT: All right, sir. That's overruled. Let me ask you a question, sir. . . . I understand you object to the jurisdiction of the Court, but you are indicted under three separate indictments. One is trafficking and possession of less than -

DEFENDANT: Sir –

THE COURT: Let me just finish talking and then we'll - trafficking by possession of less than 28 but more than 200, which is a class G felony. Carries a minimum of 35 and a maximum of 50, and a mandatory minimum fine of $50,000. Your other two charges are possession with intent to sell and deliver marijuana greater than one and one half ounces, which is a class I felony with a maximum possible punishment of a minimum of 12 and a maximum of 24. And a third indictment of intentionally maintaining a dwelling for the keeping or selling of controlled substances, which is also a class I felony, with a minimum of 12 and a maximum of 24. And the reason I'm telling you this, Mr. Mee, is that if you would like to be represented by a court-appointed counsel to represent you in this matter –

DEFENDANT: I'm not going to –

THE COURT: - I will do that.

DEFENDANT: Okay. I understand what you're saying. But I'm saying I'm not going to accept these proceedings. I'm not going to be in this proceeding. I'm not going to take count in these proceedings.

. . .

THE COURT: But I just want to inform you that I would appoint counsel to represent you.

DEFENDANT: The only thing that I'm here for is personal jurisdiction, and the Court doesn't have it over me. . . . So as far as the charges or whatever you're talking about, I don't even know what you're talking about.

THE COURT: But you don't want me to give you an appointed attorney, you want to just object to the jurisdiction of the Court; is that correct?

DEFENDANT: Jurisdiction of the Court, and . . . this fictitious corporation, which is North Carolina, bringing charges against me[.] . . .

. . .

THE COURT: What we're going to do, how we're going to proceed is that there are these charges that have been brought and we're going to --

DEFENDANT: By who?

THE COURT: By the State of North Carolina. . . . And we're going to bring them to trial.

DEFENDANT: No, I object.

THE COURT: I understand, and that objection is overruled. But let me tell you this. We're going to have a trial --

DEFENDANT: No, sir.

THE COURT: - and we're going to bring a jury into the courtroom. And you –

DEFENDANT: You cannot proceed --

THE COURT: Sir, I'm talking now. So I'm warning you, I don't want to be interrupted. If you'll just let me finish, and I'll let you talk too.

DEFENDANT: Okay.

THE COURT: So what we're going to do is, in a bit we're going to call for people who have been called for jury service, and about 40 or 50 people are going to come into the room. Twelve of them are going to be placed randomly into the box. . . . And the District Attorney is going to have a chance to ask them some questions. And you're going to have a chance to ask them some questions.

DEFENDANT: No, I'm not. I'm not going to - I'm not going to be with these proceedings, Your Honor. If you're telling me you're going to do what you're going to do, you're going to violate my United States, United Nation rights. The best thing you can do right now is send me back to jail. All I'm going to do is object to any time you ask me something. . . . I will not participate in this contract in any kind of way. . . .

THE COURT: Mr. Mee, I want you to understand, yes, you're correct –

DEFENDANT: I'm not understanding anything you're talking about.

THE COURT: Sir, please don't interrupt me, one human being to another. . . . What we're going to do is, we're going to bring a jury in here. And you're right, we are going to proceed . . . whether you like it or not.

DEFENDANT: That's fine. . . . I won't be a part of the proceedings, is what I'm saying.

THE COURT: That's fine. Let me just explain to you what's going to happen, because you have a right to know it. So we're going to bring 40, 50 people into this room. Twelve of them are going to be put in the box. The District Attorney is going to have a chance to ask them questions. You're going to have a chance to ask them some questions.

DEFENDANT: No, I'm not.

THE COURT: Then 12 people are going to be selected.

DEFENDANT: No, sir.

THE COURT: Then after that, Mr. Wilson here as the State is going to put his evidence on. And he's going to have a chance to ask some questions, and you're going to have a chance to ask some questions.

DEFENDANT: I will not.

THE COURT: That's fine. But you have a right to be here, is what I'm trying to tell you.

DEFENDANT: It's participating. I done told you I'm not going to participate.

THE COURT: So are you telling me you want to go back –

. . .

DEFENDANT: What I'm saying, anyway, you can sit there . . . Mr. Administrator. Because since 1789, there's been no Judges. You're just an administrator of the court anyway. That's all you are, with your yellow fringe. . . . My First Amendment right has been violated. My Eighth Amendment right and Fourteenth[.] . . .

. . .

THE COURT: Sir, you have a right to participate in this trial. And if you don't want to take it, you don't have to.

DEFENDANT: I've already told you. I will not participate in any of the fictitious contracts that the State of North Carolina are bringing. So if you're telling me you're going to send me back and proceed, then you do so. . . . I'm going to object. I'm going to object to everything that happens. So if you're saying for me to stay here is participating, take me back, because I'm not going to participate.

THE COURT: So you don't want to sit here during this trial.

DEFENDANT: I will not participate in any trial, anything, no, sir.

THE COURT: You will not exercise your right to sit here and have Mr. Williams help you.

DEFENDANT: I will not participate with anything with the fictitious State of North Carolina. . . . The trial is going to happen without me. . . .

THE COURT: Well, you have a right to sit here and listen to the evidence against you -

DEFENDANT: No.

THE COURT: - and consult with Mr. Williams. And I'm also - you also have the right to take court-appointed counsel, to have an attorney represent you, to see if a jury will find you not guilty.

DEFENDANT: I will not take a court-appointed attorney. An agent of the State. He's representing the State. He's with you, he's not with me. . . . I've told you I will not participate in anything dealing with the Court trying to forcibly make me stand to trial. I'm not going to participate in it. . . . And if you're saying you're going to proceed without me, then that's what you need to do. But I won't participate in it. I won't consent to it. No, sir.

THE COURT: If you don't want to sit here in this trial, I'm going to try to get it hooked up so that you can at least see the proceedings.

DEFENDANT: No, no, I'm not going to participate in them at all. . . . I'm not going to take part in this, Your Honor. . . . I will not watch a video. . . . My sole purpose here is for jurisdiction. You're saying you overruled that[.] . . . The holder in due course has to press charges. Who is the holder in due course? UCC 3-308. All law is contract. . . . Therefore, the Uniform Commercial Code applies. . . . I'm not going to participate in this. I'm protected under international law of the United States Republic Peace Treatise of 1787[.]. . .

. . .

DEFENDANT: . . . I put on the record where I stand with the jurisdiction, that this Court lacks jurisdiction. I put on the record that I will not participate in these proceedings.

. . .

THE COURT: So let me try to just give you a little information.

DEFENDANT: Okay.

THE COURT: So I understand what you're saying, that you're not going to participate. . . . I suppose it's your right really, not to participate. . . . But if you continue to say you won't participate, then I am going to proceed. . . . A jury is going to rule on your guilt or innocence, based on the evidence that's presented. . . . And if you're not here, and there's no defense presented and you're not participating, the chances of the jury acquitting you are . . . kind of lessened. . . . And if you don't participate, one thing that Mr. Williams could do, is that Mr. Williams could ask questions on your behalf to try to -

DEFENDANT: No, sir.

. . .

THE COURT: And you don't want Mr. Williams to ask questions of the witnesses on your behalf?

DEFENDANT: There's nobody to talk to. There's nobody here. If you're going to proceed, then you do what you have to do, without my consent. You do what you have to do. But no, I don't have counsel. I don't want counsel.

. . .

> THE COURT: And you don't want Mr. Williams to do anything on your behalf?
>
> DEFENDANT: Nobody do nothing on my behalf. . . .

The trial court attempted unsuccessfully to obtain defendant's cooperation in remaining in the courtroom when the jury venire was brought in, to ascertain that defendant had no prior acquaintance with the any of the prospective jurors. Defendant refused to be seated or stay in the courtroom, despite being held in contempt three times. After defendant was taken to a holding cell, the trial court stated that:

> THE COURT: The Court finds that Mr. Mee was removed from the courtroom because he was brought in for approximately an hour. The Court attempted to give him the right to proceed to trial, either *pro se* or with appointed counsel, or with standby counsel, and that Mr. Mee continually interrupted the Court and . . . the Prosecutor, and stated emphatically over and over . . . again that he would not participate in this trial. So the Court finds that his behavior is willfully disruptive, disrespectful of the Court, and the trial may proceed in his absence, since he has stated that he will not participate.
>
> . . .
>
> THE COURT: . . . [He] appeared to me to be competent too. And he certainly has filed a lot of paperwork in the file, which indicates that he is a very intelligent person. . . . [H]e's unequivocally stated over and over again that he won't participate and doesn't recognize the jurisdiction of the Court[.] . . . There's a number of things I'd like Mr. Williams to do at every break. And one is, is to inform Mr. Mee of his right to be present. . . . And I would like Mr. Williams to request Mr. Mee to allow him to make objections, address the Court, and cross examine witnesses on his behalf. . . .

At appropriate intervals during the trial, defendant's standby counsel spoke with defendant, informing him of his right to be present in court and asking if he had changed his mind about participating in the trial. Defendant consistently refused to participate, on one occasion asking standby counsel "to inform the Court that he's not going to participate,

that he does not know who the State of North Carolina is, and he does not understand the proceedings." In response, the trial court stated:

> THE COURT: . . . [T]he Court finds as a fact that Mr. Mee is intentionally disrupting these proceedings and intentionally trying to impede his trial. And that was apparent from his demeanor yesterday when I saw him. . . . [T]he Court notes from the court file that Mr. Mee had at least one court-appointed attorney that he fired. Then he retained Mr. Williams; he fired Mr. Williams. Then he came in front of Judge Abernathy and said he wanted to proceed pro se. He told Judge Abernathy [and] Judge Stephens . . . that he would not recognize this Court. . . . [H]e refused to participate yesterday and would not sit and would not recognize the Court's contempt powers. So despite Mr. Mee's protestations that he does not understand these proceedings, the Court is of the opinion that he understands these proceedings very well, and just is not recognizing the Court[.] . . . He's obstructing these proceedings.

To summarize the procedural background:

> 5 January 2012: Defendant was arrested.
>
> 6 January 2012: Defendant appeared in district court and signed a waiver of his right to appointed counsel.
>
> 6 June 2012: Defendant appeared in district court, refused to check any of the options on a waiver of counsel form, and signed the form as "Kenneth Mee Bey." Handwritten notes state that defendant refused to address the court regarding counsel, and that he had previously hired an attorney, Alton Williams, who had been permitted to withdraw due to ethical concerns.
>
> 30 July 2012: Defendant appeared in superior court before Judge Stephens and refused to enter a plea or to clearly state his wishes regarding counsel, instead making statements regarding his legal status and demanding to see the court's oath of office so that he could file "a counterclaim." Judge Stephens entered a plea of not guilty, appointed the public defender to represent him, and revoked defendant's bond.
>
> 22 August 2012: Defendant appeared before Judge Stephens, represented by assistant public defender

Stephanie Davis. He allowed Ms. Davis to request a bond reduction, but would not allow her to enter a plea on his behalf, and stated that he objected to the court's jurisdiction. Judge Stephens entered a plea of not guilty and denied defendant's request for a modification of bond.

25 October 2012: Mr. Williams filed a notice of representation. Ms. Davis's motion to withdraw was allowed.

29 October 2012: Mr. Williams represented defendant in superior court before Judge Paul Gessner, where he made a "general appearance" on defendant's behalf and told the court that defendant was "submitting himself" to the court's jurisdiction and would withdraw his *pro se* motions challenging the jurisdiction of the North Carolina courts. Mr. Williams asked for a bond reduction, assuring the court that defendant's objection to the court's jurisdiction was no longer an issue.

30 November 2012: Mr. Williams filed a motion for continuance, which was granted by Judge Howard Manning.

4 February 2013: Defendant appeared before Judge Abernathy. The prosecutor stated that defendant had resumed his challenge to the court's jurisdiction. When Mr. Williams said he was ready to proceed, defendant objected, insisting he was present only to challenge jurisdiction and that Mr. Williams was not his attorney. Defendant asserted that he was not subject to the court's jurisdiction, and the court denied his motions to dismiss for lack of jurisdiction. In response to the court's statements on any subject other than jurisdiction, defendant claimed that he did "not understand" what was said, without identifying the source of his confusion, and objected to the court speaking on any subject other than jurisdiction. He refused to sign a waiver of counsel or state his wishes regarding representation and informed the court that he would "never participate" in a trial. Judge Abernathy appointed Mr. Williams as standby counsel and found that defendant waived the right to counsel and was proceeding *pro se*.

25 March 2013: Defendant was in court for trial and engaged in an extensive colloquy with the trial court, during which he refused to state his wishes regarding counsel, alleged that he did "not understand" any subject other

> than jurisdiction, argued with the trial court, repeatedly insisted that he would not participate in the trial, and was held in contempt three times for refusing to sit down. Defendant left the courtroom and was not present during his trial.

In sum, defendant appeared before at least four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was briefly represented by an assistant public defender, refused to indicate his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and claimed not to understand anything that was said on a subject other than jurisdiction. When the case was called for trial, defendant refused to participate in the trial. "Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned. Defendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine, pursuant to G.S. § 15A-1242, that defendant had knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*." *Montgomery* at 525, 530 S.E.2d at 69 (citing *McFadden*).

Defendant acknowledges the extensive procedural history of this case and concedes that defendant was "disagreeable, suspicious, and obsessed with legally irrelevant matters." He argues, however, that defendant should not be held to have forfeited his right to counsel because he "did not threaten counsel or court personnel" and "was not abusive." Defendant contends that forfeiture requires evidence that he "asserted his position by means of serious misconduct that prevented the court from making a determination about whether he was competent and wanted to make a knowing and understanding waiver of his right to counsel." Defendant thus posits that, unless a defendant is physically abusive or prevents the court from informing him of his right to counsel, the defendant's behavior cannot support a finding that he forfeited the right to counsel.[2] Defendant cites no authority for this position, and we know of none. "Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006) (citing *Montgomery* at 524, 530 S.E.2d at 69). Moreover,

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2. Defendant also makes generalized references to the possibility that he "asserted his position because of ignorance, [or] some form of limited mental capacity or [mental] illness[.]" However, defendant does not identify any evidence that raises an issue concerning defendant's competence, and we discern none.

defendant was held in contempt three times by the trial court, which indicates that his behavior was somewhat disruptive.

We also note that in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011), we held in a similar factual context that the defendant had forfeited his right to counsel. In *Leyshon*, as in the present case, the defendant "refused to answer whether he waived or asserted his right to counsel," "made contradictory statements about his right to counsel," and contended that he was not subject to the court's jurisdiction. *Leyshon*, 211 N.C. App. at 517, 710 S.E.2d at 287. We held that he had forfeited the right to counsel:

> [The defendant] obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court . . . repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." . . . Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. . . . At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. . . . Based on the evidence in the record, we conclude Defendant willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings. Accordingly, Defendant forfeited his right to counsel[.]

Leyshon at 518-19, 710 S.E.2d at 288-89. Based on *Leyshon* and similar cases, we hold that defendant engaged in "purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts" that resulted in a forfeiture of his right to counsel. *Montgomery*, *id.* "Because forfeiture does not require a knowing and voluntary waiver of the right to counsel, the inquiry pursuant to section 15A-1242 is not required in such cases." *State v. Boyd*, 200 N.C. App. 97, 102, 682 S.E.2d 463, 467 (2009) (citing *Montgomery*), *disc. review denied*, __ N.C. __, 691 S.E.2d 414 (2010). Accordingly, we need not address defendant's argument that the trial court failed to conduct the inquiry required under N.C. Gen. Stat. § 15A-1242.

We conclude that the defendant had a fair trial, free of error.

NO ERROR.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
ANTONIO ALONZO MONROE

No. COA13-954

Filed 15 April 2014

Firearms and Other Weapons—possession by felon—self-defense instruction—denied

The trial court did not err by refusing defendant's request for a special instruction on self-defense in a prosecution for possession of a firearm by a felon. Defendant did not make the requisite showing of each element of the justification defense, even assuming that the rationale in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir.), applied in North Carolina.

Judge STROUD dissenting.

On writ of certiorari from judgment entered 11 April 2013 by Judge Yvonne Mims Evans in Superior Court, Gaston County. Heard in the Court of Appeals 25 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.

Mark Hayes for Defendant.

McGEE, Judge.

Antonio Alonzo Monroe ("Defendant") was indicted for first-degree murder of Mario Davis ("Davis"), possession of a firearm by a felon, and for attaining the status of an habitual felon. A jury found Defendant not guilty of first-degree murder but guilty of possession of a firearm by a felon and of attaining the status of an habitual felon on 10 April 2013. Defendant appeals from judgments entered upon his convictions.

The night before the offenses at issue, Defendant and Davis had an argument at the residence of Defendant's uncle. Antwan Cobb ("Cobb"), a witness to the events, testified that "as we unlock the door to leave out, [Davis and another man] barge in[.]" An argument resulted, the police arrived, and the argument ended. The following day, 17 June 2011, Defendant and Davis had another brief argument outside the residence of Jah'Kwesi Gordon ("Gordon"). Davis told Defendant he was going to "turn the heat up on" him, and Davis then left with O'Brian Smith ("Smith").

Shortly thereafter, Davis returned to the front yard of Gordon's residence, along with Smith. There was conflicting evidence as to whether Davis had a gun when he returned. Cobb testified that Davis said he was "going to stay out here until the door come open." Gordon retrieved a gun from his bedroom in the back of the house. While Defendant and Gordon were inside the house, Defendant took the gun from Gordon.

Gordon went outside the house to ask Davis to leave. Defendant remained in the house with the gun. Gordon testified that he was outside talking to Davis for less than five or ten minutes before Defendant came to the doorway. Gordon further testified that, when Defendant came to the doorway, "[h]e had a couple more words and then [Davis] hit" Defendant "towards the facial area." Defendant then shot Davis five times. Defendant and Cobb left in Cobb's car.

At trial, during the charge conference, Defendant asked the trial court to instruct the jury on self-defense as to the charge of possession of a firearm by a felon. Defendant submitted the requested instruction in writing in a document titled "Request for Special Jury Instruction on Duress or Justification." The trial court denied Defendant's request for the special instruction.

Defendant argues on appeal that the trial court erred by failing to instruct the jury on self-defense as to the charge of possession of a firearm by a felon. This Court addressed this argument in *State v. Craig*, 167 N.C. App. 793, 606 S.E.2d 387 (2005), in which we noted that "[f]ederal courts have recently recognized justification as an affirmative defense to possession of firearms by a felon." *Id.* at 795, 606 S.E.2d at 389 (citing *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000)).

I. The *Deleveaux* Test

"[T]he *Deleveaux* court limited the application of the justification defense to 18 U.S.C. § 922(g)(1) cases (federal statute for possession of a firearm by a felon) in 'only extraordinary circumstances.' " *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *State v. Napier*, 149 N.C. App.

462, 465, 560 S.E.2d 867, 869 (2002)). In *Deleveaux*, the United States Court of Appeals for the Eleventh Circuit cited three cases from other circuits, *U.S. v. Paolello*, 951 F.2d 537 (3rd Cir. 1991), *U.S. v. Singleton*, 902 F.2d 471 (6th Cir. 1990); *cert denied*, 498 U.S. 872, 112 L. Ed. 2d 158 (1990), and *U.S. v. Perez*, 86 F.3d 735 (7th Cir. 1996), to illustrate that the defense is available only in extraordinary circumstances. *Deleveaux*, 205 F.3d at 1297.

In *Paolello*, the United States Court of Appeals for the Third Circuit observed that the "restrictive approach is sound" and required that "the defendant meet a high level of proof to establish the defense of justification." *Paolello*, 951 F.2d at 542. In *Singleton*, the United States Court of Appeals for the Sixth Circuit held that "a defense of justification may arise in rare situations" in prosecutions for possession of a firearm by a felon. *Singleton*, 902 F.2d at 472. The Court observed that, although the language of 18 U.S.C. § 922 "gives no hint of an affirmative defense of justification, Congress enacts criminal statutes 'against a background of Anglo-Saxon common law.' " *Id.* (quoting *U.S. v. Bailey*, 444 U.S. 394, 415, 62 L. Ed. 2d 575, 594 n.11 (1980)).

"In *Bailey*, the Supreme Court held that prosecution for escape from a federal prison, despite the statute's absolute language and lack of a *mens rea* requirement, remained subject to the common law justification defenses of duress and necessity." *Singleton*, 902 F.2d at 472. "Similarly, the Congressional prohibition of possession of a firearm by a felon does not eliminate the possibility of a defendant being able to justify the possession through duress or necessity." *Id.*

"Common law historically distinguished between the defenses of duress and necessity." *Bailey*, 444 U.S. at 409, 62 L. Ed. 2d at 590. "Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." *Id.* "While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *Id.* at 409-10, 62 L. Ed. 2d at 590. "Modern cases have tended to blur the distinction between duress and necessity." *Id.* at 410, 62 L. Ed. 2d at 590.

"[I]f a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *Singleton*, 902 F.2d at 472. The Court

held that the "justification defense for possession of a firearm by a felon should be construed very narrowly" and emphasized "that the keystone of the analysis is that the defendant must have no alternative—either before or during the event—to avoid violating the law." *Id.* at 472-73.

In *Perez*, the United States Court of Appeals for the Seventh Circuit observed that the "defense of necessity will rarely lie in a felon-in-possession case unless the ex-felon, not being engaged in criminal activity, does nothing more than grab a gun with which he or another is being threatened (the other might be the possessor of the gun, threatening suicide)." *Perez*, 86 F.3d at 737. The Court held that "the defendant may not resort to criminal activity to protect himself or another if he has a legal means of averting the harm." *Id.*

Under *Deleveaux*, "a defendant must show four elements to establish justification as a defense" to the charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Craig, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *Deleveaux*, 205 F.3d at 1297); *see also U.S. v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

II. Standard for Reviewing the Evidence

Defendant argues that, when deciding whether to give a requested instruction, the trial court must consider the evidence in the light most favorable to the movant. As support, Defendant cites *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000), wherein the appeal arose from the denial of a requested instruction on a "sudden emergency" in a civil negligence action. The present appeal, by contrast, arises from the denial of a requested instruction on self-defense in a

criminal prosecution. We examine *Napier*, *Craig*, and other cases that have considered this issue for guidance.

In *Napier*, this Court stated only that the trial court must give the requested instruction, "at least in substance, if [it is] proper and supported by the evidence." *Napier*, 149 N.C. App. at 463, 560 S.E.2d at 868. This Court did not state that the trial court must consider the evidence in the light most favorable to the movant. In *Craig*, this Court considered only the uncontroverted evidence. *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389.

In *State v. Boston*, 165 N.C. App. 214, 222, 598 S.E.2d 163, 167 (2004), this Court made no statement as to how the evidence must be viewed. In our analysis, we considered what the evidence tended to show and referred to what the State's evidence tended to show. *Id.* Also, in *State v. McNeil*, 196 N.C. App. 394, 406, 674 S.E.2d 813, 821 (2009), this Court considered only that the evidence showed that the defendant "possessed the shotgun inside his home . . . at which time there was no imminent threat of death or serious bodily injury."

Thus, the only guidance from this Court is that the instruction must be "supported by the evidence." *Napier*, 149 N.C. App. at 463, 560 S.E.2d at 868. This Court has never stated that, in prosecutions for possession of a firearm by a felon, the evidence must be viewed in the light most favorable to a defendant.

However, in an appeal from a conviction for driving while impaired, this Court stated that "there must be substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant'" to entitle the defendant to a necessity instruction. *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (quoting *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (regarding an instruction on manslaughter)). Thus, we review the evidence in the present case in the light most favorable to Defendant, in order to determine whether there is substantial evidence of each element of the defense.

Though the case is not binding, we note that in *Perez*, the United States Court of Appeals for the Seventh Circuit stated that a "criminal defendant is entitled to an instruction on any defense for which there is some support in the evidence[.]" *Perez*, 86 F.3d at 736. The Court further stated that the United States "Supreme Court has made clear that the evidence must be sufficient to allow a reasonable jury to find the defense proved." *Id.* (citing *Mathews v. U.S.*, 485 U.S. 58, 99 L. Ed. 2d 54 (1988)).

III. North Carolina Cases Applying *Deleveaux* By Assuming *Arguendo* That It Applies In North Carolina

In *Napier*, this Court noted that "the courts of this State have not recognized justification as a defense to a charge of possession of a firearm by a felon." *Napier*, 149 N.C. App. at 464, 560 S.E.2d at 869. Nevertheless, the defendant in that case asked "this Court to expand the necessity defense and adopt the test for justification" set forth in *Deleveaux*. *Id.* (internal quotation marks omitted). This Court assumed, without deciding, that the *Deleveaux* rationale applied, but concluded that the evidence in *Napier* did "not support a conclusion that [the] defendant was under a present or imminent threat of death or injury." *Id.* at 465, 560 S.E.2d at 869.

The evidence in *Napier* was that the defendant, a convicted felon who was involved in an on-going dispute with his neighbor and his neighbor's son, "voluntarily walked across the street" to his neighbor's property, while armed with a handgun. *Id.* The defendant stayed there for several hours and eventually shot the neighbor's son in the arm. *Id.* This Court disregarded evidence of the neighbor's son's drug and alcohol use, his threats to the defendant, and recent shootings into the air by him over the defendant's property in deciding whether the defendant was entitled to an instruction on justification. *Id.*

In *Craig*, the defendant continued to hold the firearm after leaving the altercation, while "not under any imminent threat of harm." *Craig*, 167 N.C. App. at 796-97, 606 S.E.2d at 389. This Court concluded that "the evidence did not support giving a special instruction on justification because there was a time period where [the] [d]efendant was under no imminent threat while possessing the gun." *Id.* at 797, 606 S.E.2d at 389.

In *Boston*, the evidence tended to show that the defendant and the victim "were engaged in an on-going conflict whereby in the week prior to the shooting, [the victim] threatened to kill [the] defendant, and on at least one prior occasion [the victim] fired a gun at [the] defendant." *Boston*, 165 N.C. App. at 222, 598 S.E.2d at 167. This Court held that the trial court did not err in failing to instruct the jury on justification because the defendant "was observed walking through the apartment complex carrying a pistol." *Id.* There was "no evidence to support the conclusion that [the] defendant was under an imminent threat of death or injury when he made the decision to carry the gun." *Id.* at 222, 598 S.E.2d at 167-68.

In *McNeil*, this Court held that the evidence did not support giving a special instruction on justification where the evidence showed that the

defendant "possessed the shotgun inside his home and away from" the victim, "at which time there was no imminent threat of death or serious bodily injury." *McNeil*, 196 N.C. App. at 406-07, 674 S.E.2d at 821.

Although unpublished, the analysis in *State v. Ponder*, ___ N.C. App. ___, 725 S.E.2d 674 (2012) (unpublished) (COA 11-1365) is instructive. This Court held that the defendant was "not under an imminent threat when he acquired the gun" in *Ponder*. *Id.*, slip op. at 4. The defendant "chose to leave the residence and stand in the field, waiting to confront [the victim]. [The] [d]efendant could have telephoned the police before obtaining the weapon." *Id.*, slip op. at 5.

IV. Application To The Present Case

Consistent with the precedent from this Court, we assume *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon. Nevertheless, the evidence in the present case, even when viewed in the light most favorable to Defendant, does not support a conclusion that Defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

The evidence showed there had been an on-going dispute between Defendant and Davis. Defendant was at Gordon's house on 17 June 2011. Davis and Smith later arrived at Gordon's house, and Defendant and Davis subsequently argued outside Gordon's house. The argument did not last long. Cobb, who witnessed the events on 17 June 2011, testified that Davis told Defendant he was going to "turn the heat up on" him. Cobb testified that the phrase meant: "I guess I'm going to shoot you, anything." Cobb further testified that after Davis said that, Davis and Smith left and were gone for fifteen or twenty minutes.

Davis and Smith returned to Gordon's house. Inside the house, Gordon retrieved a gun from his bedroom in the back of the house. While inside the house, Defendant took the gun from Gordon. Gordon went outside to ask Davis to leave. Defendant followed Gordon to the door and stood in the doorway of the residence. Gordon testified that he was outside talking to Davis for less than five or ten minutes before Defendant came to the doorway. Gordon further testified that, when Defendant came to the doorway, "[h]e had a couple more words and then [Davis] hit" Defendant "towards the facial area." Defendant then shot Davis five times.

The uncontroverted evidence at trial showed that Defendant was inside Gordon's house when Defendant took possession of a firearm.

Defendant's primary support for his argument that the trial court erred in failing to give a special instruction is that the jury found Defendant not guilty of first-degree murder "under a theory of perfect self-defense." However, the record does not indicate why the jury acquitted Defendant of first-degree murder—whether on the basis of self-defense or that the jury found that the State failed to carry its burden to prove beyond a reasonable doubt that Defendant murdered Davis. The record is silent as to this issue. Any speculation by this Court as to the reason or reasons for the jury's decision to acquit Defendant of first-degree murder is therefore baseless.

Furthermore, the offenses of murder and possession of a firearm by a felon are separate and distinct criminal offenses. They share no elements in common. *See* N.C. Gen. Stat. §§ 14-415.1; 14-17 (2013); *State v. Vance*, 328 N.C. 613, 621-22, 403 S.E.2d 495, 501 (1991). Murder is a crime, defined as at common law. *See Vance*, 328 N.C. at 622, 403 S.E.2d at 501 ("as N.C.G.S. § 14-17 does not define the crime of murder, the definition of that crime remains the same as it was at common law"). By contrast, possession of a firearm by a felon is a statutory criminal offense of relatively recent vintage. The offenses are related in the present case only by the fact that the State sought to prove that Defendant used a firearm to shoot Davis.

Defendant's subsequent contentions are that Davis "had instigated violence against [Defendant] before," and that remaining inside Gordon's residence would have been "no protection" because Davis had previously "barged in" to a residence where Defendant was located. However, the evidence does not compel a conclusion that, while inside the residence, Defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury. As previously discussed, this Court has disregarded evidence of the victim's drug and alcohol use, threats, and recent shooting over the defendant's property in *Napier*, 149 N.C. App. at 465, 560 S.E.2d at 869.

We thus cannot rely on the mere possibilities that (1) Davis may have been about to enter the residence and (2) that Davis then would have threatened death or serious bodily injury to Defendant. Defendant has failed to show that he was under " 'unlawful and present, imminent, and impending threat of death or serious bodily injury' " at the time he took possession of the firearm. *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389 (quoting *Deleveaux*, 205 F.3d at 1297).

Although the failure to make this showing is alone sufficient to hold that the trial court did not err in denying Defendant's request for the

instruction, we note that Defendant also failed to show that he "had no reasonable legal alternative to violating the law[.]" *Id.* It was uncontroverted that Defendant voluntarily armed himself and then walked to the doorway of the residence. Defendant has not shown there was no acceptable legal alternative other than arming himself with a firearm, in violation of N.C.G.S. § 14-415.1, and walking to the doorway of Gordon's house.

Even viewing the evidence in the light most favorable to Defendant, we conclude that Defendant has not made the requisite showing of each element of the justification defense. Thus, even assuming *arguendo*, without deciding, that the rationale in *Deleveaux* applies in North Carolina prosecutions, the trial court did not err in refusing Defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon.

No error.

Judge STEELMAN concurs.

STROUD, Judge, dissenting.

Because I believe that the evidence would permit a jury to find that defendant was justified in possessing the firearm under the *Deleveaux* test, I dissent, and I would reverse defendant's conviction for possession of a firearm by a felon and remand for a new trial on these charges.

The majority opinion summarizes the evidence presented at trial quite well, but draws a different conclusion from it than I would; a properly instructed jury may also. First, I would hold that the *Deleveaux* test does apply in North Carolina. Our cases have relied upon it several times, although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test. The test is entirely consistent with North Carolina's common law defenses of justification and necessity and provides useful guidance to the trial courts for instructing juries. In the cases discussed by the majority opinion, different factual situations were presented and, in those cases, the jury instruction was not supported by the evidence under the *Deleveaux* test. The factual situation here is different and presents a question of fact that I believe a jury should have the opportunity to resolve.

In *Napier*, the defendant possessed a gun when he went to the victim's property, where he stayed several hours and only then shot the

victim. *State v. Napier*, 149 N.C. App. 462, 463, 560 S.E.2d 867, 868 (2002). Thus, the defendant possessed the gun well before he was potentially under any sort of threat which would justify possession of the gun. In addition, the jury's assessment of the facts in *Napier* was quite different than in this case. The *Napier* defendant was charged with

> (1) discharging a firearm into occupied property, (2) assault with a deadly weapon with intent to kill inflicting serious injury, (3) conspiracy to discharge a firearm into occupied property, (4) conspiracy to commit an assault with a deadly weapon, (5) possession of a firearm by a felon on 4 July 1999, and (6) possession of a firearm by a felon on 3 July 1999.

Id.

The jury deadlocked and a mistrial was declared on the first two charges. *Id.* The jury found defendant not guilty of conspiracy and possession on 4 July and found defendant guilty only of the charge of possession on 3 July. *Id.* This Court noted that the evidence did not support defendant's claim of justification due to the lapse of time between when defendant went to the victim's property while carrying a gun and the shooting: "[D]efendant asked Robert Ford and Brad Ford if they wanted him to take the gun home; and defendant, while armed, stayed on Robert Ford's premises for several hours talking to Robert Ford before the fight ensued." *Id.* at 465, 560 S.E.2d at 869. Under these circumstances, defendant was not entitled to an instruction on justification. *Id.*

In *Craig*, the defendant was charged with assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). An instruction as to self-defense was given, but the trial court did not give the requested instruction as to justification for possession of the gun.[1] *Id.* at 794, 606 S.E.2d at 388. The jury found defendant guilty of both charges. *Id.* at 795, 606 S.E.2d at 388. On appeal, failure to give an instruction as to justification for possession of the firearm was the only issue raised by defendant. *Id.* The Court noted that the

> uncontroverted evidence in this case shows that after leaving the altercation, Defendant kept the gun and took it with him to a friend's house on Dana Road. He continued to hold it and carry it while speaking with Hamilton. At

1. Although not clear from the opinion, the record from *Craig* shows that a self-defense instruction was given.

> that time, Defendant was not under any imminent threat of harm. Thus, the evidence did not support giving a special instruction on justification because there was a time period where Defendant was under no imminent threat while possessing the gun.

Id. at 796-97, 606 S.E.2d at 389 (citation omitted).

In *Boston*, the defendant was charged with and convicted of second-degree trespassing and possession of a firearm by a felon. *State v. Boston*, 165 N.C. App. 214, 215, 598 S.E.2d 163, 164 (2004). The evidence showed that the

> defendant and Daniels were engaged in an on-going conflict whereby in the week prior to the shooting, Daniels threatened to kill defendant, and on at least one prior occasion Daniels fired a gun at defendant. However, the evidence also tends to show that on the day of the shooting, defendant was observed walking through the apartment complex carrying a pistol. The State's evidence also tended to show that defendant chased Daniels around a parked car with the gun in hand. Therefore, we hold that, as in *Napier*, there is no evidence to support the conclusion that defendant was under an imminent threat of death or injury when he made the decision to carry the gun. Accordingly, the trial court did not err in failing to instruct the jury on justification as an affirmative defense.

Id. at 222, 598 S.E.2d at 167-68. Again, regardless of whether defendant may have been justified in possessing the gun at the moment of the shooting, the evidence showed that defendant possessed the gun at a time entirely separate from the altercation—when he was "walking through the apartment complex carrying a pistol." *Id.* at 222, 598 S.E.2d at 167.

In *McNeil*, the defendant was charged with and found guilty of "first degree murder and possession of a firearm by a felon." *State v. McNeil*, 196 N.C. App. 394, 396, 674 S.E.2d 813, 815 (2009). As in this case, defendant did request and the trial court gave an instruction on self-defense. *Id.* at 400, 674 S.E.2d at 817. Unlike the present case, the jury found defendant guilty on all charges and rejected defendant's claims of self-defense. *Id.* The evidence as to the defendant's possession of the firearm in *McNeil* was as follows:

> On 15 March 2007, William Frederick Barnes ("Barnes") rode his bicycle up to the passenger side window of

> Vashawn Tomlin's ("Tomlin") car at approximately 10:00 a.m. Tomlin testified that Barnes wanted to wash Tomlin's car. Approximately five minutes later, Tomlin saw Defendant walk out of Defendant's house by Tomlin's car and then walk into another house. Defendant walked out of the second house and spoke to Tomlin and Barnes. Barnes asked Defendant, "What's up[?]" to which Defendant replied, "You got a nerve speaking to me, I ain't forgot what you did, I was going with her then." Barnes asked Tomlin what Defendant was talking about. Defendant tried to argue with Barnes, and " kept saying . . . 'I'll burn your ass[.]' " Defendant also told Barnes he would "put a hot one in him."
>
> Tomlin testified that Defendant walked back into the first house and returned carrying a shotgun. Defendant walked from his porch toward Barnes, who was still sitting on a bicycle and leaning against the door of Tomlin's car, and Defendant shot Barnes with the shotgun. Tomlin testified Defendant walked back toward his house, then turned and walked into the street, stood over Barnes, aimed the shotgun at Barnes and fired. After shooting Barnes the second time, Defendant walked back to his house and stood in the doorway "looking crazy."

Id. at 396-97, 674 S.E.2d at 815-16.

As to the defendant's request for an instruction on justification, the *McNeil* court stated that

> As in *Craig* and *Napier*, the evidence in the present case shows that Defendant possessed the shotgun inside his home and away from Barnes, at which time there was no imminent threat of death or serious bodily injury. Without deciding the availability of the justification defense in possession of a firearm by a felon cases in North Carolina, we hold that the evidence in this case did not support giving a special instruction on justification.

Id. at 406-07, 674 S.E.2d at 821 (citation omitted).

Overall, these cases support, rather than defeat, defendant's argument that the jury should have been instructed on justification. The most significant difference between this case and all of those above is that in those cases, there was an obvious time period when the defendant

possessed a gun but was not under any imminent threat of death or great bodily harm. Even if the those defendants may have been justified in possessing a gun at the exact moment of the altercation—which the juries all found they were not, by rejecting the self-defense theory—they would still be guilty of possessing the gun at a time completely separate from the altercation with the victim.

Here, by contrast, the evidence, taken in the light most favorable to defendant, showed that the entire time that defendant possessed the gun Mr. Davis was standing outside of the house with a gun, posing an imminent threat. One witness testified that Mr. Davis said he was "going to stay out here until the door come open." Therefore, there was evidence from which a jury could reasonably conclude that defendant's possession of the firearm was justified for the entire time he possessed it.

Moreover, unlike in the prior cases, the jury acquitted the defendant of all homicide charges based upon self-defense. Defendant was charged with first degree murder, but the jury was presented with issues as to first degree murder, second degree murder, and voluntary manslaughter and found defendant not guilty of all of these. I disagree with the majority's statement that "the record does not indicate why the jury acquitted Defendant of first-degree murder—whether on the basis of self-defense or that the jury found that the State failed to carry its burden to prove beyond a reasonable doubt that Defendant murdered Davis."

To the contrary, it is not disputed that defendant shot Davis, and the jury acquitted defendant of first degree murder as well as all lesser-included offenses. The only logical inference we can draw from the jury's verdict is that the jury relied upon defendant's claim of perfect self-defense. In none of the cases discussed above did the jury believe the defendants' claims of self-defense, where that issue was presented. It is true that the facts presented might have permitted a jury to reject a claim of self-defense, and that a jury might have found that defendant could have used some other means to protect himself or to avoid a confrontation with Davis, but the jury has already considered that evidence and found in favor of defendant. This means that the jury found that:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (citation and quotation marks omitted).

Given the jury's determination as to self-defense as to the shooting here, it is entirely possible, and indeed probable, that the jury would have also found, if properly instructed, that the four elements of the justification defense were established:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

United States v. Deleveaux, 205 F.3d 1292, 1297, *cert. denied*, 530 U.S. 1264, 147 L.Ed. 2d 988 (2000).

The elements of perfect self-defense and justification are slightly different, but not much, particularly under the facts as presented in this case. The gun defendant used was not his own; he got it from Gordon just prior to the shooting—not hours or days before, but minutes—while Davis was just outside the house, threatening defendant. The issue of the timing of defendant's possession of the gun is crucial. It is possible that a jury could find that he possessed it longer than necessary for his own protection, but the facts certainly present a jury question in that regard, and that is sufficient for defendant to be entitled to the instruction.[2]

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2. *See State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) ("A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm.").

This case presents one of those "most extraordinary circumstances" where the justification defense is applicable. It is odd that a man could be acquitted for all forms of homicide based on the theory that he had a clear right of self-defense, but he would be convicted for using the gun that the jury found to be necessary under the circumstances to protect himself from "death or great bodily harm." *Lyons*, 340 N.C. at 661, 459 S.E.2d at 778. This is not one of those cases where the jury already evaluated any claims of self-defense and rejected them, as all of the prior cases from this court cited by the majority were. Indeed, it is difficult to imagine a situation in which a defendant would be entitled to an instruction on justification for possession of a firearm if defendant here was not. I would therefore specifically adopt the justification defense as laid out in *Deleveaux*, reverse defendant's convictions for possession of a firearm by a felon and habitual felon, and remand for a new trial on these matters. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
SUSAN LYNETTE PARKER, DEFENDANT

No. COA13-757

Filed 15 April 2014

1. Embezzlement—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of embezzlement. The State's evidence of atypical food and item purchases and numerous forged signatures was sufficient evidence from which a jury could infer defendant's intent to commit embezzlement.

2. Evidence—prior crimes or bad acts—misappropriation of church funds

The trial court did not abuse its discretion in an embezzlement case by admitting evidence under N.C.G.S. § 8C-1, Rule 404(b) that defendant also misappropriated funds from her church. The evidence was used to show motive, intent and common plan or scheme. Further, the probative value of such evidence outweighed its prejudicial effect.

STATE v. PARKER

[233 N.C. App. 577 (2014)]

Appeal by defendant from judgment entered 28 January 2013 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Katherine A. Murphy, for the State.

Leslie C. Rawls for defendant-appellant.

BRYANT, Judge.

Where the State presents substantial evidence of each element of the charge of embezzlement, defendant's motion to dismiss the charge is properly denied. Where evidence of prior bad acts admitted pursuant to Rule 404(b) is used to show, *inter alia*, motive, intent and common plan or scheme, and where the probative value of such evidence outweighs its prejudicial effect, the trial court has neither erred nor abused its discretion by admitting the evidence.

In 2008, defendant Susan Lynette Parker began work as a secretary in the Union County Public Schools (the "school system"). Defendant's job responsibilities included purchasing food and non-food items for school meetings, training sessions, and programs. Purchases were typically conducted with a school system credit card. The school system would also reimburse employees such as defendant for purchases made using personal funds and for any mileage expenses incurred.

Also beginning in 2008, defendant worked as the bookkeeper for the Centerview Baptist Church. As church bookkeeper, defendant was responsible for paying the church's bills, keeping all financial records, and providing the church with quarterly financial reports.

In 2010, after noticing irregularities in the church's finances, the pastor of Centerview Baptist Church contacted the Union County Sheriff's Office. A police investigation and audit revealed that defendant had used the church's checking account to pay personal debts. Defendant subsequently apologized to the church and repaid the misappropriated funds.

The school system was notified of the police investigation into defendant's misappropriation of funds from the Centerview Baptist Church. Shortly thereafter, defendant's supervisor discovered her name had been forged on reimbursement forms submitted by defendant to the school system. After a police investigation of purchases defendant made using the school system credit card, defendant was arrested for embezzlement of school funds.

On 7 November 2011, a grand jury indicted defendant on one count of embezzlement. On 28 January 2013, a jury convicted defendant of embezzlement. Defendant appeals.

On appeal, defendant argues that the trial court erred in (I) denying her motion to dismiss and (II) admitting evidence pursuant to Rule 404(b).

I.

[1] Defendant first argues that the trial court erred in denying her motion to dismiss. We disagree.

A motion to dismiss is properly denied where there is substantial evidence of each element of the offense charged and of defendant being the perpetrator of that offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). 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) (citations omitted). Evidence should be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975) (citation omitted). Where the State offers substantial evidence of each essential element of the crime charged, defendant's motion to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981) (citation omitted). We review a denial of a motion to dismiss *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

Defendant contends the trial court erred in denying her motion to dismiss because the State failed to prove embezzlement. Specifically, defendant argues that the State failed to offer substantial evidence that defendant used the school system's property for a wrongful purpose.

> N.C. Gen. Stat. § 14-90 defines the offense of embezzlement and requires the State to present proof of the following essential elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Rupe, 109 N.C. App. 601, 608, 428 S.E.2d 480, 485 (1993) (citations omitted). In establishing the third element of embezzlement, a fraudulent or knowing misapplication of property, the State can show such intent by direct or circumstantial evidence. *State v. McLean*, 209 N.C. 38, 40, 182 S.E. 700, 702 (1935) (citations omitted). The State does not need to show that the agent converted his principal's property to the agent's own use, only that the agent fraudulently or knowingly and willfully misapplied it, or that the agent intended to fraudulently or knowingly and willfully misapply it. *State v. Smithey*, 15 N.C. App. 427, 429–30, 190 S.E.2d 369, 370–71 (1972) (citations omitted).

Here, the State presented evidence that defendant was an employee of the school system who used a school system credit card to make food purchases. For example, defendant was instructed to purchase snack items such as pre-cut cheese, pre-cut fruit and grapes, and crackers, and other food items such as premade sandwiches and doughnuts to be served at teachers' conferences and events; defendant would then use the school system credit card to purchase these items at Harris Teeter, Krispy Kreme or McAllister's Deli. Each time defendant was asked to make food purchases for the school system, defendant was required to submit a request form indicating when, where, and why the credit card was to be used. Once the purchase was completed, defendant would submit the request form with receipts for final approval by a school administrator.

The State presented evidence and testimony that numerous food purchases made by defendant were questionable because they consisted of items that would not be purchased by or served at school system events. Items flagged as questionable included: a mop, beef tortelloni, marinara sauce, hash browns, chicken, chewing gum, blocks of cheese, oatmeal, and hot sauce. Defendant also purchased coffee, creamer, sugar, and cups using the school system's credit card, products which school administrators testified defendant would not need to buy because they were provided through an outside vendor. Further, evidence showed that defendant had forged her supervisors' signatures and/or changed budget code information on credit card authorization forms and reimbursement forms at least 29 times, and submitted forms for reimbursement with unauthorized signatures totaling $6,641.02. As such, the State presented sufficient evidence of each element of the charge of embezzlement to survive a motion to dismiss.

Defendant further argues that the State failed to meet its burden of proving each element of embezzlement because some witness testimony was contradictory as to whether certain food items were served at school events, and because purchase and reimbursement forms do not

constitute embezzlement simply because the authorizing signatures are not authentic. We find defendant's argument to lack merit, as the State's evidence – of atypical food and item purchases and numerous forged signatures – presents sufficient evidence by which a jury could infer defendant's intent to commit embezzlement. *See State v. Sutton*, 53 N.C. App. 281, 287, 280 S.E.2d 751, 755 (1981) (holding that evidence that the defendant exceeded his authority in issuing himself coupons "permitted the inference" that the defendant had the fraudulent intent necessary for embezzlement); *State v. Helsabeck*, 258 N.C. 107, 128 S.E.2d 205 (1962) (holding that fraudulent intent, as required in the charge of embezzlement, can be inferred from the facts proven; direct evidence of such intent is not necessary). Accordingly, defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred by admitting evidence pursuant to Rule 404(b). We disagree.

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

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

North Carolina Rules of Evidence, Rule 404(b), holds that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). Rule 404(b) is "subject to but *one exception* requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990).

> It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it

> is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.

State v. Stager, 329 N.C. 278, 302, 406 S.E.2d 876, 890 (1991) (citations omitted). The admissibility of evidence under Rule 404(b) is further constrained by the requirements of similarity and temporal proximity. *State v. Al-Bayyinah*, 356 N.C. 150, 154–55, 567 S.E.2d 120, 123 (2002) (citations omitted).

The trial court conducted a hearing on the admissibility of the State's Rule 404(b) evidence during the trial, outside the presence of the jury. The State presented four witnesses who testified as to defendant's misappropriation of funds from Centerview Baptist Church, arguing that such evidence was permissible under Rule 404(b) to show an absence of mistake, opportunity, motive, intent, and/or common plan or scheme by defendant to embezzle from the school system. The trial court announced its findings of fact and conclusions of law in open court and admitted the evidence. Defendant does not contest the trial court's findings of fact; therefore, these findings are presumed to be supported by competent evidence and are binding on this Court. *See State v. Phillips*, 151 N.C. App. 185, 190–91, 565 S.E.2d 697, 701 (2002). Thus, we review the trial court's conclusions of law based on its findings of fact. *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

In making its Rule 404(b) ruling, the trial court stated the following:

> The Court would review this issue and find that there are six different factors that the Court must consider before 404(B) evidence is admitted.
>
> First, that the State must identify specific purpose[s] in which to use this 404(B) evidence, and the Court is finding that the State is seeking to admit this evidence to show absence of mistake, opportunity, motive, intent, and a similar pattern of conduct.
>
> Next, the Court must consider whether or not this evidence is logically relevant to the evidence in the main case in chief. The Court would note that the dates of employment for Ms. Parker at both Union County Public Schools and Centerview Baptist Church do overlap. In a review of the case files, would also find that the dates of the offenses overlap almost to the day. Case number 11 CRS 54880,

> which is our current case, alleges an offense date of on or between August 24th of 2007 and August 10th of 2010, and the case with Centerview Baptist Church, which is 10 CRS 54380 alleged dates of offense of 1 September of 2007 through 9 August of 2010. Would also find that based on the testimony and evidence presented that the defendant was in similar positions of trust where she had access to funds or credit cards, checking accounts for both the church and the school system.
>
> The third factor the Court is to consider is, is there sufficient evidence to prove the extrinsic act, and those are the acts at Centerview Baptist Church [which] were committed by the defendant. The Court[,] based on the testimony specifically of the pastor and the accountant, Mr. Helms, would find that there is sufficient evidence to show that Ms. Parker embezzled from Centerview Baptist Church as her -- in her duties as the bookkeeper.

The trial court went on to find that the probative value of the evidence outweighed the danger of unfair prejudice, and admitted the Rule 404(b) evidence.

Defendant contends the trial court erred in admitting the Rule 404(b) evidence because defendant's acts of misappropriating Centerview Baptist Church funds and of embezzling from the school system are "sufficiently distinct" and, thus, are not permissible under Rule 404(b). Specifically, while defendant concedes that these two acts are "overlapping in time" (and thus, satisfy the requirement of temporal proximity), she contends they are not similar because misappropriation of the church funds was for personal purposes while the school system embezzlement involved "large or bulk quantity items suitable for use at various school events."

The record supports the trial court's conclusion of similarity and temporal proximity. Here, the Rule 404(b) evidence showed that the misappropriation of church funds occurred about the same time as the embezzlement of school funds; that defendant held a similar position of trust in each setting which allowed her access to funds — checking account for the church, credit cards for the school; and that defendant abused that position of trust through the unauthorized use of funds and property. The only distinction is that defendant admitted to the misappropriation of the church funds and was allowed to repay the money. In the instant case, defendant exercised her right to a jury trial, requiring

the State to set forth proof — substantial evidence by which a jury could find beyond a reasonable doubt that her misappropriation of school funds was intentional and constituted the crime of embezzlement. "Where specific mental intent or state of mind is an essential element of the offense charged, evidence of similar acts are admissible to prove defendant's intent or state of mind." *State v. Whitted*, 99 N.C. App. 502, 506, 393 S.E.2d 590, 593 (1990) (citation omitted). Accordingly, where, as here, the findings of fact support the trial court's conclusions of law, evidence of defendant's misappropriation of funds from the Centerview Baptist Church was properly admitted under Rule 404(b).

Defendant further argues that the admission of the Rule 404(b) evidence was unfairly prejudicial to her as "[e]vidence of the Centerview events was prejudicial [on the] jury and not probative on any issue in the case at bar." We disagree.

Rule 404(b) is "a clear general rule of *inclusion*." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). Rule 404(b) evidence must meet Rule 403's balancing test which requires the exclusion of relevant evidence only where its probative value "is substantially outweighed by the danger of unfair prejudice." *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citing N.C. Gen. Stat. § 8C-1, Rule 403). However, any potential prejudicial effect caused by the admission of 404(b) evidence can be constrained by a limiting instruction to the jury. *See Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160–61.

As previously discussed, the admission of evidence concerning the Centerview Baptist Church was proper under Rule 404(b). The trial court conducted a Rule 403 balancing test and gave an appropriate limiting instruction to the jury. We see nothing in the record indicating that the trial court abused its discretion in admitting the Rule 404(b) evidence against defendant. *See id.* (finding no abuse of discretion where the trial court conducted a hearing out of the presence of the jury, made findings of fact and conclusions of law as to the admissibility of the evidence and its potential probative vs. prejudicial effect, and gave the jury a limiting instruction as to this evidence); *see also State v. Jones*, ___ N.C. App. ___, ___, 734 S.E.2d 617, 621—22 (2012) (State's use of Rule 404(b) evidence was proper to show element of intent in a charge of embezzlement against the defendant, and the defendant was not overly prejudiced where the trial court gave a limiting instruction to the jury); *State v. McDowell*, No. COA05-424, 2006 N.C. App. LEXIS 1871 (Sept. 5, 2006) (the defendant failed to show prejudice where the admission of Rule 404(b) evidence which tended to show the defendant's intent

and knowledge for the charge of embezzlement was proper pursuant to Rules 403 and 404(b)). Accordingly, defendant's argument is overruled.

No error.

Judges STEPHENS and DILLON concur.

STATE OF NORTH CAROLINA
v.
ERADIO VELAZQUEZ-PEREZ AND EDGAR AMPELIO-VILLALVAZO

No. COA13-694

Filed 15 April 2014

1. Drugs—trafficking cocaine—possession with intent to sell or deliver cocaine—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant Villalvazo's motions to dismiss two counts of trafficking cocaine based upon possession and transportation, and one count of possession with intent to sell or deliver cocaine. The State failed to produce substantial evidence of each essential element of those charges.

2. Drugs—conspiracy to traffic in cocaine by transporting—possession of cocaine in excess of 400 grams—motion to dismiss—sufficiency of evidence

The State failed to present substantial evidence in support of the charges of conspiracy to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams.

3. Search and Seizure—traffic stop—amount of time—routine check of relevant documentation

The trial court did not err by denying defendant Perez's motion to suppress cocaine seized based upon his argument that the traffic stop was unconstitutionally extended. Perez provided no citation to authority to support the proposition that the purpose of the stop was completed once the citation for the infraction justifying the stop had been given to the person who committed the infraction. Further, law enforcement officers routinely check relevant documentation while conducting traffic stops.

4. Constitutional Law—effective assistance of counsel—failure to renew objection

Defendant Perez's trial counsel was not ineffective due to a failure to renew an objection to the admission of evidence that was allegedly fruits of the improper extension of a traffic stop. The Court of Appeals has already rejected this argument.

5. Costs—lab fees—fingerprint examination—statutory violation

The trial court erred by ordering costs for fingerprint examination as lab fees as part of defendant Perez's sentence. N.C.G.S. § 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis, and therefore the State did not object to Perez's request that $600 be vacated from the $1,200 costs ordered by the trial court.

Appeal by Defendants from order entered 16 October 2012 and judgments entered 13 November 2012 by Judge Marvin P. Pope in Superior Court, Buncombe County. Heard in the Court of Appeals 7 January 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods and Assistant Attorney General Stuart M. (Jeb) Saunders, for the State.

Anne Bleyman for Defendant-Appellant Eradio Velazquez-Perez.

Goodman Carr, PLLC, by W. Rob Heroy, for Defendant-Appellant Edgar Ampelio-Villalvazo.

McGEE, Judge.

Henderson County Sheriff's Deputy David McMurray ("Deputy McMurray") was working with a special unit that involved both Henderson and Buncombe Counties along Interstate 40 on 4 September 2011. That day he was working in Buncombe County. Defendant Edgar Ampelio-Villalvazo ("Villalvazo") was driving a tractor-trailer ("the truck") on 4 September 2011 that was owned by Defendant Eradio Velazquez-Perez ("Perez") (together, "Defendants"). Perez was also in the truck at the time. Deputy McMurray was sitting in an unmarked SUV ("the SUV") parked at a commercial vehicle weigh station, facing the exit ramp, when he observed the truck exiting Interstate 40 headed into the weigh station. Deputy McMurray, who had been trained in visual estimation of speed, testified that he estimated the truck to be travelling at approximately fifty miles per hour where the posted recommended speed was thirty miles per hour.

After the truck had exited the scales, Deputy McMurray stopped the truck at the weigh station. Deputy McMurray positioned his SUV facing the truck and activated the SUV's dashboard camera. The camera simultaneously recorded video of the truck and the interior of Deputy McMurray's SUV. The camera also recorded audio inside the SUV, and had the capability to record audio from a receiver that Deputy McMurray could wear on his person, but Deputy McMurray either forgot to wear the receiver or failed to activate it. Deputy McMurray approached the cab of the truck, spoke with Defendants, and returned to his SUV with some documentation. Villalvazo then exited the truck and walked back to the SUV with additional documentation. Villalvazo sat in the passenger seat of the SUV for approximately forty-nine minutes, while Deputy McMurray wrote a warning citation and conducted certain records checks related to the stop, including checking the driver's licenses of Villalvazo and Perez, the truck registration, insurance information, log books, and other documentation related to the load then being transported on the truck.

During the stop, Deputy McMurray asked Villalvazo a number of questions, and on several occasions left the SUV, returning to the truck to ask Perez additional questions. Deputy McMurray completed the warning citation and handed it to Villalvazo approximately twelve minutes into the stop and informed Villalvazo that the documentation check was ongoing, and so Villalvazo remained in the SUV.

During this process, Deputy McMurray became suspicious that criminal activity, such as drug trafficking, might be occurring. Deputy McMurray's suspicions were based on a number of observations, including concerns he had about the log books, what he perceived as nervous behavior on the part of Villalvazo, and certain discrepancies between answers given by Villalvazo and Perez. Both Villalvazo and Perez told Deputy McMurray that Villalvazo had not been working for Perez for very long. Villalvazo told Deputy McMurray that he had not known Perez before he began working for him, and that this was Villalvazo's first out-of-state trip since he began working for Perez. The log books were consistent with this statement.

Once Deputy McMurray completed checking the documents, he returned the documents to Villalvazo and Perez, and asked them both if they would consent to a search of the truck. Both agreed and signed voluntary consent forms authorizing a search of the truck. Deputy McMurray used a hammer to tap on various areas of the interior of the cab, and located several places that he believed might contain hidden compartments. Deputy McMurray used a knife to cut through or remove

upholstery, and to remove sheet metal beneath the upholstery. In so doing, Deputy McMurray uncovered several hidden compartments, two of which contained a combined twenty-four kilograms of cocaine. Only one fingerprint was recovered from inside the hidden compartments, and it matched neither Villalvazo nor Perez. A duffel bag containing Perez's clothes and personal items was also located inside the cab of the truck and $5,000.00 in cash was recovered from inside the lining of that duffel bag. Several mobile phones belonging to Perez were also recovered. Villalvazo had one mobile phone with him, and only a small amount of cash.

Villalvazo and Perez were arrested and tried together. Each was found guilty of two counts of trafficking cocaine in excess of 400 grams (based upon possession and transportation), one count of possession with intent to sell or deliver cocaine, and one count of conspiracy to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams. Both Defendants appealed, and we address both of their appeals in this opinion.

I.

[1] In Villalvazo's first argument, he contends the trial court erred in denying his motions to dismiss the two counts of trafficking cocaine (based upon possession and transportation), and the one count of possession with intent to sell or deliver cocaine, because the State failed to produce substantial evidence of each essential element of those charges. We agree.

> A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury.

State v. Tisdale, 153 N.C. App. 294, 296-97, 569 S.E.2d 680, 682 (2002) (citations omitted). "Trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of N.C. Gen. Stat. § 90–95(h)

(3) (2001), require the State to prove that the substance was knowingly possessed and transported." *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003) (citation omitted).

> "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred."

Tisdale, 153 N.C. App. at 297, 569 S.E.2d at 682 (citations omitted). Knowledge of the existence of the contraband was necessary to prove the trafficking and possession charges. *State v. Wiggins*, 185 N.C. App. 376, 386, 648 S.E.2d 865, 872 (2007).

The State argues that the facts in this case regarding Villalvazo's knowledge of the cocaine are analogous to those in *Tisdale* and *State v. Munoz*, 141 N.C. App. 675, 541 S.E.2d 218 (2001). We disagree. In *Tisdale*, this Court found sufficient additional incriminating circumstances where the defendant was driving alone in an automobile that had been rented by another person, Harold Leak ("Leak"). *Tisdale*, 153 N.C. App. at 295, 569 S.E.2d at 681.

> Just before defendant was pulled over, he had accelerated from 0 to 60 miles per hour in a 35 mile per hour speed zone with a police officer directly behind him. The officer noticed the cocaine in *plain view* in the car door handle on the driver's side of the vehicle, well within reach of defendant. While talking with the officer, defendant was "sweating profusely" and was nervous. In the officer's opinion, defendant "was under the influence of something[,]" although the officer did not consider defendant to be so impaired that he could not drive. A subsequent search of the vehicle uncovered more cocaine located

> under the driver's seat. This second baggie of cocaine was also well within defendant's reach. Although Cosby [a carwash employee], [and] an admitted cocaine addict, testified he placed or dropped cocaine in the car while cleaning it, Leak testified he did not notice any cocaine in the vehicle following the cleaning. Taken in the light most favorable to the State, this evidence supports a reasonable inference that defendant was aware of the presence of cocaine in the vehicle and had the power and intent to control its disposition.

Tisdale, 153 N.C. App. at 298-99, 569 S.E.2d at 683.

In *Munoz*, regarding the defendant's knowledge of cocaine recovered from a vehicle the defendant had been driving, this Court held that "it could be inferred [from the attendant circumstances] that defendant had knowledge of the presence of [] cocaine." *Munoz*, 141 N.C. App. at 686, 541 S.E.2d at 224.

> An inference that defendant had knowledge of the presence of the cocaine can be drawn from defendant's power to control the Sentra. The Sentra had been under defendant's exclusive control since it was loaded onto the car carrier in Houston, Texas six days prior to defendant's arrest, and Trooper Gray testified that he had to obtain keys from defendant to unlock the cars to be able to search them. In addition, the State presented other evidence from which an inference of defendant's knowledge could be drawn. First, defendant presented the troopers with bills of lading for the Aerostar and the other vehicles which he had transported, but had no such document for the Sentra. Each bill of lading contained an inspection checklist. Defendant explained that he had no such inspection checklist for the Sentra because it was raining when he picked up the car in Houston, Texas; however, a certified copy of a report by the National Climatic Data Center was introduced into evidence showing that there was no precipitation in the Houston area on that date. Trooper Gray's testimony regarding the lack of rear tags, the absence of a trunk lock, the grease-like odor and the displacement of the rear seat indicates that defendant could have found the cocaine had he inspected the Sentra in a manner consistent with the inspection he conducted on the Aerostar. Second, the FAX indicated that the Sentra was to be shipped to Junior City,

> New Jersey and provided a contact number with an area code of 917. Agents from the State Bureau of Investigation testified that Junior City, New Jersey does not exist and that 917 is a New York City area code. Finally, defendant told the agents that he did not know Mr. Angel and that Mr. Angel would not be able to contact defendant directly; however, a call was received on defendant's pager from the number identified as Mr. Angel's on the FAX. Taking the facts in the light most favorable to the State and leaving discrepancies and inconsistencies in the testimony for the jury to resolve, we conclude there was sufficient evidence from which it could be inferred that defendant had knowledge of the presence of the cocaine.

Id. at 685-86, 541 S.E.2d at 224.

We note that not only was Villalvazo's control over the truck not exclusive, the owner of the truck was Perez, the co-driver. The cocaine was secreted in hidden compartments that were not accessible to Villalvazo. Because the truck belonged to Perez, Perez was the one with the authority to cut open the truck, hide the cocaine, and seal the compartments with sheet metal and upholstery. The State argues there were other incriminating circumstances sufficient to submit to the jury the charges of trafficking and possession against Villalvazo. Specifically, the State cites Deputy McMurray's "review of the logbooks and other documentation [that] caused him to question the economic feasibility of the trip, which supported his overall suspicion of illegal narcotics activity." If, in fact, Perez's trucking company was operating in an economically unsound manner, that would be evidence the jury could consider in its deliberations concerning Perez. Evidence suggested Villalvazo had not been working very long for Perez, there was no evidence that Villalvazo had any stake or control in Perez's trucking company, or any authority to countermand Perez's authority. Deputy McMurray's suspicions concerning the logbooks and other documentation are not particularly relevant to Villalvazo in this matter.

The State contends that "as the driver of the vehicle, [Villalvazo] had the power to control the contents of the vehicle." No evidence was presented that Villalvazo had the power to control the cocaine hidden inside secret compartments that Deputy McMurray had to cut through upholstery and sheet metal to discover. The State also argues: "[Villalvazo] did not testify, and indeed presented no evidence as to his lack of access." It is improper for the State to base arguments at trial on a defendant's decision not to testify, and it is at least inappropriate to do so on appeal. The

State contends Villalvazo "was in essence the borrower of the vehicle" which, based upon *State v. Glaze*, 24 N.C. App. 60, 210 S.E.2d 124 (1974), allowed

> an inference of knowledge and possession which may be sufficient to carry the case to the jury. The inference is rebuttable, and if the owner of a vehicle loans it to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference.

Id. at 64, 210 S.E.2d at 127. We disagree with the State that a hired employee of a trucking company, who has been instructed to drive by his employer, is "in essence the borrower of the vehicle[.]" We find this analogy especially tenuous when the employer and owner of the vehicle was in the vehicle and would have been driving the vehicle had it been stopped at another time during the trip.

The State also refers to Deputy McMurray's "many suspicions" concerning Villalvazo. These suspicions included Villalvazo clearing his throat and "kind of coughing" several times during the approximately fifty minutes Villalvazo was sitting in Deputy McMurray's SUV, Deputy McMurray's testimony that Villalvazo sometimes avoided eye contact, and that Villalvazo's "heart" was beating in his neck. In its order denying Defendants' motions to suppress, the trial court found as fact: "The Court observed the demeanor of [Villalvazo] in the video to be somewhat apprehensive and nervous during the investigation by Officer McMurray[.]" We agree with the trial court that Villalvazo's demeanor could be characterized as "somewhat apprehensive and nervous during the investigation[.]"

The State contends that Villalvazo "presented no evidence as to his lack of access [to the hidden compartments]." However, on cross-examination of the State's witnesses, the defense attorneys elicited testimony that none of Villalvazo's fingerprints were recovered from inside the compartments or from the packaged cocaine, that cutting and removing upholstery and sheet metal to uncover the compartments was labor intensive, and that the compartments would not have been visible "to the average-civilian naked eye." When Deputy McMurray was asked how Villalvazo reacted to hearing there had been cocaine recovered from the truck, Deputy McMurray testified that Villalvazo was "surprised," and that Villalvazo responded: "Cocaine? Cocaine in the truck?"

The State's evidence in support of the required element that Villalvazo had knowledge of the cocaine hidden within the structure

of the truck was that Villalvazo was in the truck, was driving the truck at the time of the stop, and that Deputy McMurray believed Villalvazo showed some signs of nervousness during the stop. The State presented no evidence that Perez actually communicated with Villalvazo in any manner concerning hidden compartments or any cocaine within the hidden compartments. The evidence presented — that Villalvazo knew Perez only because Perez had hired Villalvazo as a driver and they had only known each other only for a short period of time — does not establish a relationship between the two as indicative of the trust one would expect when admitting to a serious felony. We can think of no good reason why Perez would want, or need, to share that information with one in Villalvazo's position. The level of nervousness demonstrated by Villalvazo in this instance is also of limited value to the State's case. As our Supreme Court has stated: "[M]any people do become nervous when stopped by [a law enforcement officer]." *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999). Some degree of nervousness is common when a person is stopped and detained by law enforcement, even for minor traffic violations.

We hold that the evidence presented to support the required element that Villalvazo knew there was cocaine secreted within the body of the truck was not substantial, in that it did not constitute " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Tisdale*, 153 N.C. App. at 296, 569 S.E.2d at 682 (citation omitted). We make this holding even considering "all of the evidence . . . in the light most favorable to the State[.]" *Id.* at 296-97, 569 S.E.2d at 682 (citation omitted). We vacate Villalvazo's convictions for trafficking in cocaine by transportation, trafficking in cocaine by possession, and possession of cocaine with intent to sell or deliver.

II.

[2] Both Villalvazo and Perez argue the State failed to present substantial evidence in support of the charges of "conspir[acy] to traffic in cocaine . . . by transporting and possessing [cocaine] in excess of 400 grams[.]" We agree.

> A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed."

State v. Morgan, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted).

> While conspiracy can be proved by inferences and circumstantial evidence, it "cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy." Instead "[i]f the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy."

State v. Benardello, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (citations omitted). Though not dispositive, the fact we held above that there was not substantial evidence indicating Villalvazo knew there was cocaine secreted in the truck factors into our analysis. The State submitted no evidence directly implicating Villalvazo and Perez in a conspiracy. The only evidence presented was that Villalvazo worked for Perez, and that they were both involved in driving the truck while it contained the cocaine. In the present case, "[t]he evidence . . . does not point unerringly toward conspiracies [to traffic in cocaine by transporting and possessing cocaine in excess of 400 grams] and is insufficient to support convictions on those charges." *Id.* We hold there was not substantial evidence of a conspiracy presented at trial, and we vacate Villalvazo's and Perez's convictions for conspiracy to traffic in cocaine by transporting and possessing.

III.

Because our holdings above result in vacating all four convictions against Villalvazo, we do not address Villalvazo's remaining arguments.

IV.

[3] In Perez's second argument, he contends the trial court erred in denying his motion to suppress the cocaine seized based upon his argument that the stop was unconstitutionally extended. We disagree.

Perez contends:

> Once Deputy McMurray issued the warning citation to . . . Villalvazo for speeding, the justification for the initial stop was completed. Deputy McMurray then told . . . Villalvazo he was going to run more checks. Deputy McMurray had not obtained any evidence up to that point that would justify prolonging the detention beyond the time it took to investigate the initial traffic stop.

Perez's argument is limited to contending that, once Deputy McMurray handed Villalvazo the warning citation, the purpose of the stop was over, and anything that occurred after that time constituted an unconstitutional prolongation of the stop. However, Perez provides no citation to authorities upon which he relies in support of the proposition that the purpose of the stop was necessarily completed once the citation for the infraction justifying the stop had been given to the person who committed the infraction. Failure to cite to supporting authority is a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and constitutes abandonment of this argument. N.C.R. App. P. 28(b)(6).

In addition, we find no such authority. Law enforcement officers routinely check relevant documentation while conducting traffic stops. This Court has recognized that

> an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration. *See State v. Kincaid*, 147 N.C. App. 94, 100, 555 S.E.2d 294, 299 (2001) (holding that because a reasonable person would have felt free to leave when his documents were returned, the initial seizure concluded when the officer returned the documents to defendant)[.]

State v. Jackson, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009).

In the present case, though Deputy McMurray had completed writing the warning citation, he had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of Perez's commercial vehicle. Perez does not argue that investigation into any of these documents was improper. The purpose of the stop was not completed until Deputy McMurray finished a proper document check and returned the documents to Villalvazo and Perez. Because Perez does not argue this issue, we do not make any holding regarding which documents may be properly investigated during a routine commercial vehicle stop.

The trial court found as fact that: "The actual time for this traffic stop of [] Defendants was approximately 53 minutes[;]" that Deputy McMurray asked both Villalvazo and Perez for consent to search the truck, and consent was given by both; that both Villalvazo and Perez signed consent to search forms; and that "[d]uring the course of the consent search," the hidden compartments were located, and the cocaine was recovered from two of those compartments. Perez does not challenge these findings of fact, and they are therefore binding on appeal. *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009).

The trial court concluded that Villalvazo and Perez "voluntarily consented and agreed to additional questioning once the purpose of the traffic stop was completed." Because these unchallenged findings of fact support the trial court's conclusion that Villalvazo and Perez voluntarily consented to the search of the truck after the approximately fifty-three minute stop concluded, we have nothing further to review.

> "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." " 'Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's [sic] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion.' "

State v. Hernandez, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005) (citations omitted). The fact that the trial court also included findings of fact and conclusions of law relating to Defendants' reasonable suspicion argument at the hearing is of no moment. The 16 October 2012 order contains unchallenged findings of fact supporting the trial court's conclusion that the search was a legal search based on the voluntary consent of both Villalvazo and Perez. This argument is without merit.

V.

[4] In Perez's third argument, he contends his trial counsel was ineffective due to his "failure to renew the objection to the admission of evidence that was fruits of the improper extension of the traffic stop." Having held that Perez's argument in Section IV. fails, this argument also fails.

VI.

[5] In Perez's fourth argument, he contends the trial court erred "in ordering costs for fingerprint examination as lab fees as part of [Perez's] sentence in violation of a statutory mandate." We agree.

N.C. Gen. Stat. § 7A-304 (2013) covers costs in criminal prosecutions, and allows certain lab costs to be assessed to a defendant who is convicted.

> For the services of any crime laboratory facility operated by a local government or group of local governments, the district or superior court judge shall, upon conviction,

> order payment of the sum of six hundred dollars ($600.00) to be remitted to the general fund of the local governmental unit that operates the laboratory to be used for law enforcement purposes. The cost shall be assessed only in cases in which, as part of the investigation leading to the defendant's conviction, the laboratory has performed DNA analysis of the crime, test of bodily fluids of the defendant for the presence of alcohol or controlled substances, or analysis of any controlled substance possessed by the defendant or the defendant's agent.

N.C. Gen. Stat. § 7A-304(a)(8) (2013).

The State agrees with Perez that N.C.G.S. § 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis, "and therefore the State does not object to [Perez's] request that $600 be vacated from the $1,200 costs ordered by the trial court." The trial court erred in assessing $600.00 for fingerprint analysis done by the Charlotte-Mecklenburg Police Department. We reverse and remand for correction of this error.

VII.

In conclusion, we vacate all four of Villalvazo's convictions. We vacate Perez's conviction for conspiracy to traffic in cocaine. We find no error related to Perez's remaining convictions. We reverse and remand for the trial court to delete the $600.00 it assessed as costs for fingerprint examination as lab fees as part of Perez's sentence, and enter a corrected judgment.

Vacated in part, no error in part, reversed and remanded in part.

Judges HUNTER, Robert C. and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 APRIL 2014)

ANDERSON v. AURORA LOAN SERVS., LLC No. 13-844	Pender (12CVS1082)	Affirmed
BENJAMIN v. CITY OF DURHAM No. 13-909	Durham (12CVS4537)	Affirmed
BENTLEY v. REVLON, INC. No. 13-932	N.C. Industrial Commission (609188) (X22096)	Affirmed
BRYANT/SUTPHIN PROPS. v. HALE No. 13-1189	Guilford (13CVS5523)	Affirmed
CAMPBELL v. CAMPBELL No. 13-1133	Wake (09CVD17335)	Affirmed
DAVIS v. DAVIS No. 13-984	Davidson (10CVD3929)	Vacated and Remanded
IN RE A.F. No. 13-565	Mecklenburg (11JB212)	Affirmed
IN RE A.M.M. No. 13-936	Guilford (11JT327-328)	Affirmed
IN RE H.L.M. No. 13-1027	Caldwell (12JT146) (12JT147)	Vacated and Remanded
IN RE H.R. No. 13-1277	Randolph (11JT92-95)	Affirmed
IN RE J.M.M. No. 13-1263	Sampson (11JT09) (11JT9)	Affirmed
IN RE P.V.M. No. 13-1155	Guilford (11JT163)	Affirmed
IN RE REED No. 13-1163	Catawba (12SP582)	Affirmed
IN RE S.A.A. No. 13-1357	Durham (11J108)	Affirmed

IN RE T.S. No. 13-1380	Mecklenburg (13JA260-261)	Affirmed
IN RE W.J.W. No. 13-1129	Buncombe (10JB283)	Affirmed
KENNEDY v. RAMIREZ No. 13-927	Mecklenburg (07CVS7515)	Dismissed
STATE v. BANNER No. 13-563	Mecklenburg (11CRS233836)	No Error
STATE v. BARNETTE No. 13-1076	Rowan (11CRS51850-51)	No Error
STATE v. DICKENSON No. 13-1106	Mecklenburg (10CRS200906-07)	Affirmed
STATE v. FARRIS No. 13-702	Burke (11CRS52086)	No Error
STATE v. FERRELL No. 13-917	Wayne (10CRS55383)	No error in part; vacated in part and remanded for resentencing
STATE v. GERARD No. 13-1120	Mecklenburg (10CRS218127-30) (10CRS218132) (10CRS218134)	Dismissed
STATE v. LINDLEY No. 13-944	Mecklenburg (10CRS225348)	No Error
STATE v. MCLENDON No. 13-915	Iredell (11CRS50709)	No Prejudicial Error
STATE v. MITCHELL No. 13-645	Columbus (11CRS53725-27) (11CRS53760)	No Error
STATE v. MORAN No. 13-1046	Forsyth (11CRS62670) (11CRS62672)	No error in part; dismissed in part
STATE v. RUSSELL No. 13-1308	Buncombe (11CRS63119)	No prejudicial error
STATE v. SMITH No. 13-1000	Person (12CRS1794-95)	No Error

STATE v. TAYLOR No. 13-988	Catawba (11CRS5731)	No Error
STATE v. WOOD No. 13-1187	Johnston (11CRS56615)	Remanded for re-sentencing

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