234 N.C. App.—No. 2 Pages 119-329

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 28, 2016

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COURT OF APPEALS

CASES REPORTED

FILED 3 JUNE 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.

CAN AM SOUTH, LLC, PLAINTIFF
v.
THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, DEFENDANTS

No. COA13-1240

Filed 3 June 2014

1. Appeal and Error—interlocutory orders and appeals—sovereign immunity—personal jurisdiction

Although defendants' appeal from the trial court's order denying their N.C.G.S. § 1A-1, Rule 12(b)(1) motion to dismiss based on sovereign immunity was dismissed because it did not affect a substantial right, their Rule 12(b)(2) motion to dismiss based on sovereign immunity was allowed because it constituted an adverse ruling on personal jurisdiction. Defendants' appeal from the trial court's order denying their Rule 12(b)(6) motion to dismiss based on the argument that plaintiff failed to adequately plead an actual controversy in the declaratory judgment claim was dismissed because it involved neither a substantial right nor an adverse ruling as to personal jurisdiction.

2. Immunity—sovereign immunity—waiver—lease agreements—breach of contract—declaratory judgment

The trial court did not err by denying defendants' motion to dismiss both the breach of contract claim and the claim for declaratory relief. Plaintiff sufficiently pled waiver of defendants' sovereign immunity. Defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff. The State waives its sovereign immunity when it enters into a contract with a private party, and not when it engages in conduct that may or may not constitute a breach.

Appeal by defendants from order entered 8 May 2013 by Senior Resident Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 5 March 2014.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Walter L. Tippett, Jr. and S. Wilson Quick, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Donald R. Teeter, Sr. and Assistant Attorney General G. Mark Teague, for defendants-appellants.

HUNTER, Robert C., Judge.

The State of North Carolina ("the State"), the North Carolina Department of Health and Human Services ("DHHS"), and the North Carolina Department of Administration (collectively "defendants") appeal from an order denying their motion to dismiss. Can Am South, LLC ("plaintiff") filed suit against defendants for breach of contract and declaratory judgment. Defendants argue that the trial court erred by: (1) denying defendants' motion to dismiss plaintiff's claim for a declaratory judgment because defendants did not waive sovereign immunity, or in the alternative, the complaint fails to allege the existence of an actual controversy; and (2) denying defendants' motion to dismiss because defendants did not breach any contract with plaintiff, thus foreclosing waiver of sovereign immunity. Defendants also argue that the availability of funds clause in the lease agreements is enforceable and its enforcement does not constitute a breach of contract.

After careful review, we dismiss the appeal in part and affirm the trial court's order denying defendants' Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity.

Background

The facts of this case are undisputed. Plaintiff is a limited liability company existing under the laws of North Carolina but operating its principal place of business in New York. Plaintiff owns a converted commercial office and storage facility in Raleigh, N.C., which it leased at varying times and capacities to defendants.

Plaintiff entered into the first lease ("the DDS lease") with the State on 20 May 1999 for use by the Department of Health and Human Services, Disability Determination Services ("DDS"). Plaintiff and the State entered into a renewal agreement, the effect of which was to extend the DDS lease through 31 July 2019 and to include the so-called "availability of funds clause." The availability of funds clause states:

> 15. The parties to this lease agree and understand that the continuation of this Lease Agreement for the term period set forth herein, or any extension or renewal thereof, is dependent upon and subject to the appropriation, allocation or availability of funds for this purpose to the agency of the Lessee responsible for payment of said rental. The parties to this lease also agree that in the event the agency of the Lessee or that body responsible for the appropriation

> of said funds, in its sole discretion, determines in view of its total local office operations that available funding for the payment of rents is insufficient to continue the operation of its local office on the premise leased herein, it may choose to terminate the lease agreement set forth herein by giving Lessor written notice of said termination, and the lease agreement shall terminate immediately without any further liability to Lessee.

Defendants have not attempted to exercise their right to terminate the DDS lease pursuant to the availability of funds clause.

On 6 November 2000, plaintiff and the State entered into the second lease ("the ACTS lease") for use by an administrative unit of DHHS known as Automation Collections and Tracking System(s) ("ACTS"). The availability of funds clause was included in the ACTS lease, and after renewal, the lease was set to run through 28 February 2014. However, DHHS notified plaintiff on 12 May 2011 that the State was exercising its right to terminate the ACTS lease pursuant to the availability of funds clause, effective 30 June 2011. The State thus terminated the ACTS lease on 30 June 2011, removed ACTS from the premises, and stopped paying rent on the lease.

On 2 April 2001, plaintiff and the State entered into the third lease ("the CSE lease") for use by the Child Support Enforcement ("CSE") division of DHHS. The CSE lease also contained the availability of funds clause, and after renewal, the lease was set to run through 31 August 2014. However, the Department of Administration notified plaintiff on 15 August 2011 that the State was exercising its right to terminate the CSE lease pursuant to the availability of funds clause, effective 31 October 2011. A second termination letter was sent 26 September 2011 notifying plaintiff that the termination date was revised to 30 September 2011. The State terminated the CSE lease on 30 September 2011, removed CSE from the premises, and stopped paying rent on the lease.

Plaintiff filed suit against defendants on 23 October 2012 claiming breach of both the ACTS and CSE leases and seeking declaratory judgment prohibiting the State from terminating the DDS lease under the availability of funds clause. Defendants entered a motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(1), (2), and (6), claiming specifically that defendants' sovereign immunity had not been waived in any way. By order entered 8 May 2013, the trial court denied defendants' motion to dismiss in its entirety. Defendants filed timely notice of appeal.

Motion to Dismiss

[1] Plaintiff filed a motion to dismiss this appeal on 7 January 2014. We must first determine what portion of defendants' appeal, if any, is properly before us. After careful review, we allow in part and deny in part plaintiff's motion to dismiss.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). However, N.C. Gen. Stat. § 1-277 (2013) allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction.

Here, defendants moved to dismiss plaintiff's cause of action pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2013) (lack of subject matter jurisdiction); N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (2013) (lack of personal jurisdiction); N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013) (failure to state a claim upon which relief can be granted). Specifically, defendants moved to dismiss both of plaintiff's claims under Rules 12(b)(1) and (2), but notably not Rule 12(b)(6), based on the defense of sovereign immunity. Defendants moved to dismiss the claim for a declaratory judgment under Rule 12(b)(6) for failure of the complaint to adequately plead an actual controversy.

Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a). *See Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). However, defendants' sovereign immunity defense is premised on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2). A denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right is therefore not immediately appealable under section 1-277(a). *See Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009); *Horne v. Town of Blowing Rock*, __ N.C. App. __, __, 732 S.E.2d 614, 616 (2012).

Thus, discussion as to whether sovereign immunity raises the question of subject matter or personal jurisdiction under Rules 12(b)(1) and 12(b)(2) is necessary to analyze whether defendants may immediately appeal pursuant to section 1-277(b).

Initially, our Supreme Court held in *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982), that immediate appeal under section 1-277(b) is limited to adverse rulings on "minimum contacts" questions, not issues of personal jurisdiction generally. However, shortly over two months after the *Love* decision was entered, the Supreme Court in *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982), hinted at the possibility of sovereign immunity defenses triggering immediate appeal under section 1-277(b). The Court noted that:

> A viable argument may be propounded that the State, as a party, is claiming by the doctrine of sovereign immunity that the particular forum of the State courts has no jurisdiction over the State's person. On the other hand, the doctrine may be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of [the] claims against the State. Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion. The determination of this issue is not essential to this Court's authority to decide the instant case, however, because the case is before us on discretionary review under G.S. 7A-31, and we elect to exercise our supervisory authority to determine the underlying issues. . . . Therefore, we do not determine whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable.

The Supreme Court has yet to offer further guidance on this distinction.

However, apparently beginning with *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of

sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b). *See Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 383, 269 S.E.2d 217, 219 (1980) (citing *Sides* for the proposition that "an immediate appeal lies under G.S. 1-277(b) from the trial court's refusal to dismiss a suit against the State on grounds of governmental immunity"); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 133–34, 360 S.E.2d 115, 116-17 (1987) (noting that the *Teachy* Court cited *Sides* and *Stahl-Rider, Inc.*, but did not expressly overturn them, and holding that the trial court's denial of a Rule 12(b)(2) motion premised on sovereign immunity was immediately appealable under section 1-277(b) pursuant to those rulings); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 99–100, 545 S.E.2d 243, 245–46 (2001) (relying on *Zimmer* for the same proposition); *Meherrin Indian Tribe*, 197 N.C. App. at 385, 677 S.E.2d at 207 (relying on *Data Gen. Corp.* for the same proposition).

Pursuant to this line of precedent, we enter the following disposition as to plaintiff's motion to dismiss. First, we dismiss defendants' appeal from the trial court's order denying their Rule 12(b)(6) motion to dismiss based on the argument that plaintiff failed to adequately plead an actual controversy in the declaratory judgment claim; denial of this motion involves neither a substantial right under section 1-277(a) nor an adverse ruling as to personal jurisdiction under section 1-277(b), and thus is not immediately appealable. *See* N.C. Gen. Stat. § 1-277. Second, we dismiss defendants' appeal from the trial court's order denying their Rule 12(b)(1) motion based on the defense of sovereign immunity. As the *Meherrin Indian Tribe* Court held, orders denying Rule 12(b)(1) motions to dismiss based on sovereign immunity are not immediately appealable because they neither affect a substantial right nor constitute an adverse ruling as to personal jurisdiction. *Meherrin Indian Tribe*, 197 N.C. App. at 384, 677 S.E.2d at 207. However, we allow defendants' appeal from the trial court's order denying their Rule 12(b)(2) motion to dismiss based on sovereign immunity. As has been held consistently by this Court, denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b). *See id.*; *Data Gen. Corp.*, 143 N.C. App. at 99–100, 545 S.E.2d at 245–46; *Zimmer*, 87 N.C. App. at 133–34, 360 S.E.2d at, 116; *Stahl-Rider, Inc.*, 48 N.C. App. at 383, 269 S.E.2d at 219.

In sum, we will consider only one issue on appeal: whether the trial court properly denied defendants' Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity.

Discussion

I. Sovereign Immunity

[2] Defendants argue that they did not expressly or impliedly waive their sovereign immunity and the trial court therefore erred by denying their motion to dismiss both the breach of contract claim and the claim for declaratory relief. We disagree.

The doctrine of sovereign immunity is well-settled in North Carolina:

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute.

Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005) (citations omitted). Sovereign immunity is not merely a defense to a cause of action; it is a bar to actions that requires a plaintiff to establish a waiver of immunity. *Arrington v. Martinez*, 215 N.C. 252, 263, 716 S.E.2d 410, 417 (2011). Thus, the trial court must determine "whether the complaint specifically alleges a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007) (internal quotation marks omitted). However, "[p]recise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver." *Richmond Cnty. Bd. of Educ. v. Cowell*, __ N.C. App. __, __, 739 S.E.2d 566, 569 (2013) (citations and internal quotation marks omitted).

The seminal case on waiver of sovereign immunity in the context of contractual disputes is *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). In *Smith*, the North Carolina Supreme Court articulated five considerations which moved the Court to recognize an implied waiver of sovereign immunity where the State enters into a valid contract with a private party:

> (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may

> arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

Id. at 320, 222 S.E.2d at 423. Based on these considerations, the *Smith* Court held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.* at 320, 222 S.E.2d at 423-24. "Thus, . . . in causes of action on contract . . . the doctrine of sovereign immunity will not be a defense to the State." *Id.* at 320, 222 S.E.2d at 424.

In order to analyze the trial court's order denying defendants' Rule 12(b)(2) motion to dismiss based on sovereign immunity here, we must consider: (1) whether plaintiff sufficiently pleaded that defendants waived their sovereign immunity; and (2) whether defendants expressly or impliedly waived sovereign immunity.

First, we hold that plaintiff sufficiently pleaded waiver of defendants' sovereign immunity. The requirement that a plaintiff specifically allege waiver of governmental immunity "does not . . . mandate that a complaint use any particular language." *Fabrikant v. Currituck Cnty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). Rather, "consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." *Id.* Here, plaintiff specifically pleaded in its complaint that "[t]he defense of sovereign immunity is not applicable to any claims alleged herein." Furthermore, plaintiffs pleaded with particularity the circumstances surrounding their entry into three facially valid contracts with defendants, which, as will be discussed below, amount to "facts, if taken as true, [that] are sufficient to establish a waiver by the State of sovereign immunity." *Id.* at 38, 621 S.E.2d at 25.

Next, we conclude that defendants impliedly waived their sovereign immunity by entering into the lease agreements with plaintiff. Defendants argue that because they did not breach either the ACTS or the CSE lease agreements, and because there is no proof that they will breach the DDS lease, plaintiff cannot establish waiver of sovereign immunity.[1] However, defendants cite to no authority, and we find none, for the proposition that waiver of sovereign immunity is contingent on breach of contract. This Court has consistently held that we are not to consider the merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability. *See Archer v. Rockingham Cnty.*, 144 N.C. App. 550, 558 548 S.E.2d 788, 793 (2001) (noting that, when considering the applicability of sovereign immunity as a defense to breach of a governmental employment contract, "[this Court is] not now concerned with the merits of plaintiff's contract action. . . . whether plaintiffs are ultimately entitled to relief [is a] question[] not properly before us"); *see also Smith*, 289 N.C. at 322, 222 S.E.2d at 424 ("We are not now concerned with the merits of the controversy. . . . We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.").

Furthermore, all applicable caselaw leads us to conclude that the State waives its sovereign immunity when it *enters* into a contract with a private party, not when it engages in conduct that may or may not constitute a breach. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24 ("[W]henever the State of North Carolina, through its authorized officers and agencies, *enters into a valid contract*, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.") (emphasis added); *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 654, 435 S.E.2d 309, 312 (1993) ("[V]arious policy considerations compel the conclusion that when the State *enters into a contract through its authorized officers and agencies*, it implicitly consents to suit for damages if it breaches that contract.") (emphasis added). It is plain to us that the phrases "in the event it breaches the contract" and "if it breaches that contract" in the cases above refer to the events that would typically

1. For example, defendants assert that: "In order to overcome the bar of sovereign immunity and establish an implied waiver of Defendants' immunity to suit, the Plaintiff is required to plead with sufficient certitude that Defendants did indeed breach the lease contracts." Regarding the DDS lease, defendants contend: "Plaintiff has not alleged that the State has breached the DDS lease in any manner and also has not alleged a sufficient factual basis to find that there is a likelihood the State will breach the DDS lease. Therefore, sovereign immunity bars Plaintiff's claim for declaratory relief and the trial court erred in denying Defendants' motion to dismiss."

trigger a suit against the State. They do not mean that the State only waives its sovereign immunity "in the event it breaches the contract" and "if it breaches that contract." To hold otherwise would require a plaintiff to definitively establish its entire cause of action against the State in its complaint without the opportunity to conduct discovery, a result that was clearly unintended by the *Smith* Court when it adopted the doctrine of implied waiver of sovereign immunity in this context. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423 (noting that the same policy considerations it identified as the basis for its holding are used in other states to hold that "a state implicitly consents to be sued upon any valid contract *into which it enters*") (emphasis added).

Defendants also cite *Petroleum Traders Corp. v. State*, 190 N.C. App. 542, 546-47, 660 S.E.2d 662, 664 (2008) for the proposition that they did not waive sovereign immunity as a defense to plaintiff's claim for a declaratory judgment. We disagree. This argument was previously addressed in *ACC v. University of Maryland*, __ N.C. App. __, __, 751 S.E.2d 612, 621 (2013), where this Court held that *Smith*'s recognition of waiver in "causes of action on contract" includes actions for declaratory relief seeking to ascertain the rights and obligations owed under a contract with the State. The *ACC* Court distinguished *Petroleum Traders Corp*. on the ground that the plaintiff in that case sought "a declaration that a statutorily authorized bidding fee . . . violated the North Carolina Constitution," not a request to ascertain the rights and obligations owed by the parties to a contract. *Id.* at __, 751 S.E.2d at 620. Because plaintiff here is seeking to ascertain the rights and obligations of the parties to the DDS lease and is not asking for a declaration as to a potential constitutional breach, this case is more comparable to *ACC* than *Petroleum Traders Corp*. Therefore the holding in *ACC* that "declaratory relief actions are a 'cause of action on contract' sufficient to waive the State's sovereign immunity" is binding and applicable here.

Because it is undisputed that plaintiff and defendants entered into three facially valid lease agreements, we hold that defendants impliedly waived their sovereign immunity from suit as to those contracts. We further conclude that it is inappropriate to consider the merits of plaintiff's claims at this time, because such arguments are unnecessary to determine the dispositive issues on appeal, namely, whether defendants waived sovereign immunity.

Conclusion

For the foregoing reasons, we allow plaintiff's motion to dismiss the appeal as to defendants' Rule 12(b)(1) and (6) motions, but allow

immediate appeal from the order denying defendants' Rule 12(b)(2) motion to dismiss on the ground of sovereign immunity. Because plaintiff sufficiently alleged waiver of sovereign immunity in its complaint and defendants impliedly waived sovereign immunity by entering into the lease agreements with plaintiff, we affirm the trial court's order denying defendants' motion.

AFFIRMED IN PART; DISMISSED IN PART.

Judges GEER and McCULLOUGH concur.

ALISA G. HENDERSON, PLAINTIFF
v.
JASON JORDAN HENDERSON, DEFENDANT

No. COA13-843

Filed 3 June 2014

1. Domestic Violence—time to file answer—up to ten days rather than full ten days

The trial did not exceed its jurisdiction in holding a hearing on a Domestic Violence Prevention Order (DVPO) because defendant was deprived of a full 10 days to file his answer. N.C.G.S. § 50B-2(c) states unequivocally that a hearing on an ex parte DVPO must be held "within 10 days" of the issuance of the DVPO or "within seven days" of the date of service of process, whichever is later. The statute gives defendant no more than 10 days to answer, not the absolute right to a full 10 day; moreover, defendant was permitted to appear and testify despite the fact that he had not filed an answer.

2. Domestic Violence—jurisdiction—stated purpose of hearing

The trial court did not exceed its jurisdiction entering a Domestic Violence Protective Order (DVPO) where defendant asserted that the hearing was not held in accordance with the notice he received, which stated that the purpose of the hearing was to determine whether the ex parte order should be continued. A hearing to determine whether to continue the trial court's ex parte order must be a hearing to determine whether the trial court's protective order should be continued beyond the temporary time frame of the ex parte DVPO.

3. Domestic Violence—findings—statements made during investigation

In a hearing on a Domestic Violence Prevention Order, the evidence justified the trial court's findings of fact even though certain statements by the children were made in the context of DSS's investigation. The mere existence of a DSS investigation did not mean that domestic violence had occured.

4. Domestic Violence—findings—children's statements—specificity about dates

Plaintiff's inability to be specific about certain dates was not fatal to the findings in a Domestic Violence Prevention Order. Young children cannot be expected to be exact regarding times and dates, and a child's uncertainty as to time or date goes to the weight rather than the admissibility of the evidence.

Appeal by Defendant from Orders entered 8 February 2013 by Judge Ned W. Mangum, 18 and 20 February 2013 by Judge Robert B. Rader, and 18 April 2013 by Judge Margaret Eagles in Wake County District Court. Heard in the Court of Appeals 22 January 2014.

Cranfill Sumner & Hartzog LLP, by M. Denisse Gonzalez, for Plaintiff.

Edmundson & Burnette, L.L.P., by James T. Duckworth, III, for Defendant.

STEPHENS, Judge.

Factual Background and Procedural History

This case arises from the filing of a complaint for a domestic violence protective order ("DVPO") by Plaintiff Alisa G. Henderson. The complaint was filed on 8 February 2013 and alleged that Plaintiff's former spouse, Defendant Jason Jordan Henderson, intentionally caused bodily injury to the parties' children, both girls, by frequently spooning with them in his underwear, grabbing their buttocks, placing cameras in their rooms while they were dressing, and beating them with belts, his hands, and a wooden spoon while other children were forced to watch. The complaint also asserted that Defendant placed the children in actual fear of imminent serious bodily injury by cursing at and threatening the children, allowing a friend to offer alcohol to one of the children, and becoming intoxicated to the point of falling over. Given

these allegations, the trial court issued a temporary, *ex parte* DVPO on 8 February 2013. The *ex parte* DVPO was effective through 18 February 2013, and a hearing was set for the same date. Defendant received notice of the entering of the *ex parte* DVPO and the 18 February 2013 hearing. Therein, Defendant was informed that the purpose of the hearing was to determine "whether the [o]rder will be continued."

Evidence presented at the hearing tended to show that Plaintiff and Defendant are divorced with two daughters, Eliza and Anna.[1] At the time of the hearing, Eliza was fourteen and Anna was eleven. The parties shared joint custody of the children before the DVPO was issued. Both parties are now re-married, and Defendant has two daughters from his current marriage.

According to a social worker at the Wake County Division of Social Services ("DSS"), DSS received a report on 8 February 2013 alleging a number of instances of misconduct by Defendant. At the time of the hearing, the allegations had not been substantiated. Nonetheless, DSS had implemented a safety plan for the children. The children would stay with Plaintiff and have no unsupervised contact with Defendant.

At the close of the hearing, the trial court found that "there have been acts that constitute domestic violence." Thus, the court entered a DVPO for a period of one year, ordering Defendant, *inter alia*, to abide by the DSS safety plan and refrain from any unsupervised contact with Eliza and Anna during that period. A written DVPO was filed the same day, memorializing the court's oral pronouncement. An amended DVPO was filed two days later, on 20 February 2013, providing that, as a law enforcement officer, Defendant may possess or use a firearm for official use.

On 15 March 2013, Defendant filed notice of appeal from the trial court's 8, 18, and 20 February 2013 orders. That same day, Defendant filed a motion to vacate or set aside the DVPO under Rule 60(b) of the North Carolina Rules of Civil Procedure. The trial court denied Defendant's motion by order filed 28 March 2013. On 18 April 2013, the trial court filed a second, written order denying Defendant's motion to vacate. The court determined that it retained jurisdiction over Defendant's motion pursuant to Rule 60(b), despite the fact that Defendant had already filed his notice of appeal of the DVPO orders. The court concluded that Defendant was not entitled to relief pursuant to Rule 60(b)(4) or (6) because the DVPO was not void and because "Defendant was unable to

1. Pseudonyms are used for the protection of the juveniles.

show that any extraordinary circumstances exist or that justice demands for the DVPO to be vacated." Defendant also appealed from that order.

Discussion

On appeal, Defendant argues that the DVPO and amended DVPO are void because the trial court acted in excess of its jurisdiction. Therefore, Defendant asserts, the trial court erred in denying his Rule 60(b) motion to vacate. Alternatively, Defendant contends that the trial court's findings of fact are not supported by competent evidence and, thus, do not support its conclusion that Defendant committed acts of domestic violence against the children and put them in serious and immediate danger of injury. We affirm.

I. Subject Matter Jurisdiction

Defendant first argues that the trial court lacked subject matter jurisdiction to enter the DVPO because the court (1) failed to follow statutory procedure by not allowing Defendant 10 days following service of the summons and complaint to file an answer, and (2) held the DVPO hearing on the merits rather than for the purpose of simply continuing the *ex parte* order. We disagree.

"Where jurisdiction is statutory and the [l]egislature requires the [trial court] to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the [c]ourt to certain limitations, an act of the [c]ourt beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975). "Whether a trial court has subject[ ]matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (italics added).

(1) Time to File an Answer

[1] Section 50B-2 of the North Carolina General Statutes applies to the institution of civil actions, motions for emergency relief, temporary orders, and temporary custody in domestic violence cases. N.C. Gen. Stat. § 50B-2 (2013). Relevant to this appeal, subsections (a) and (c) provide as follows:

> (a) . . . Any action for a [DVPO] requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. . . .
>
> . . .
>
> (c) *Ex Parte* Orders. —

. . .

> (5) Upon the issuance of an *ex parte* order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. . . .

. . .

> (7) Upon the issuance of an *ex parte* order under this subsection, if the party is proceeding *pro se*, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection[] and shall effect service of the summons, complaint, notice, order[,] and other papers through the appropriate law enforcement agency where the defendant is to be served.

N.C. Gen. Stat. § 50B-2 (italics added). Here, Defendant was served with his summons on 12 February 2013. On appeal, Defendant contends that the trial court violated subsection (a) and, therefore, exceeded its jurisdiction because he was required to appear for the hearing on 18 February 2013, depriving him of a full 10 days to file his answer. We disagree.

"[T]he Rules of Civil Procedure apply to actions under Chapter 50B, except to the extent that a differing procedure is prescribed by statute." *Hensey v. Hennessy*, 201 N.C. App. 56, 62, 685 S.E.2d 541, 546 (2009) (citation and internal quotation marks omitted). Relevant to this case, section 50B-2 sets forth specialized procedures to "deal with issuance of . . . *ex parte* DVPOs," which are distinct from those for issuing temporary restraining orders. *Id.* at 63, 685 S.E.2d at 546 (italics added). Instead, "[t]he procedures under [section] 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Id.* at 63, 685 S.E.2d at 546–47. Moreover,

> in construing statutes[,] courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend

> untoward results. Accordingly, an unnecessary implication arising from one statutory section, inconsistent with the express terms of another on the same subject, yields to the expressed intent.

Romulus v. Romulus, 216 N.C. App. 28, 34, 715 S.E.2d 889, 893 (2011) (citation omitted). Similarly, the words in a statute "must be interpreted in context so as to render them harmonious with the intent and tenor of the entire statute and must be accorded the meaning which harmonizes with the other modifying provisions so as to give effect to the reason and purpose of the law." *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 7 (1968).

Defendant's contention that he has the right to a period of 10 days in which to file his answer is inconsistent with subsection 50B-2(c), which explicitly pertains to "[*e*]*x* [*p*]*arte* [o]rders." N.C. Gen. Stat. § 50B-2(c) (italics added). Subsection (c)(5) states unequivocally that a hearing on an ex parte DVPO must be held "within 10 days" of the issuance of the DVPO or "within seven days" of the date of service of process, whichever is later. N.C. Gen Stat. § 50B-2(c)(5). Subsection (c)(7) clarifies that, when the complaining party is proceeding *pro se*, the clerk must set a hearing date "within the time periods provided in this subsection." N.C. Gen. Stat. § 50B-2(c)(7). Accordingly, if service of process occurs even one day after the issuance of an *ex parte* DVPO, the subsequent hearing must occur *before* the 10-day period of time within which Defendant might otherwise be allowed to answer. To interpret subsection (a) according to Defendant's logic would strip subsections (c)(5) and (7) of any rational construction. We decline Defendant's invitation to do so.

As we noted in *Hensey*, the "fundamental nature and purpose of an *ex parte* DVPO" is that it must be "entered on relatively short notice in order to address a situation in which quick action is needed . . . to avert a threat of imminent harm." 201 N.C. App. at 63, 685 S.E.2d at 547. Similarly, the hearing on the *ex parte* DVPO must be conducted quickly in order to ensure that the rights of both parties, the complainant and the respondent, are not infringed. Subsection (c) encapsulates this principle by ensuring that both parties are able to present their positions to the trial court in a timely manner. To the extent that subsection (a) might otherwise suggest that the defendant has a longer period of time in which to answer,[2] subsection (c) supersedes it by mandating the

2. We do not hold that subsection (a) gives a defendant in a section 50B case the absolute right to a full 10 days in which to file an answer. On the contrary, we conclude that the statute gives him *no more than* 10 days to answer.

time limits for the court to conduct the hearing after the issuance of an *ex parte* DVPO. *See* N.C. Gen. Stat. § 50B-2. In the circumstance in which, as here, the hearing on the *ex parte* DVPO must be held before the expiration of 10 days after service of process on the defendant, the defendant is required to answer, if at all, within the period of time leading up to the hearing as prescribed by subsection (c)(5).

Here, the *ex parte* DVPO was issued on 8 February 2013, and Defendant was served with a summons and notice of the hearing on 12 February 2013. Pursuant to section 50B-2(c), the hearing was set to occur within seven days of the date of service of process and within 10 days of the date of the issuance of the order, on 18 February 2013. Following service of process, Defendant had at least five days in which to submit a formal, written answer. At the hearing, Defendant had the opportunity to further respond to Plaintiff's allegations. He was permitted to appear and testify despite the fact that he had not filed an answer. This comports with section 50B-2. Accordingly, Defendant's argument is overruled.

(2) The Purpose of the DVPO Hearing

[2] Defendant also argues that the trial court exceeded its jurisdiction by holding a hearing on whether to issue a DVPO. Specifically, Defendant asserts that this hearing was not held in accordance with the notice he received, which stated that the purpose of the hearing was to determine whether the *ex parte* order should be continued. Citing case law which prohibits the court from entering a permanent injunction during a hearing on a temporary restraining order ("TRO"), Defendant contends that the "express, unambiguous language" of the notice informed him that "the hearing is *not* to decide the claim on the merits; rather the hearing's function is to determine whether the *ex parte* order should be continued in effect until a *future* hearing, when [the] plaintiff's claims . . . would be decided." (Certain italics added). We disagree.

As discussed in *Hensey*, the procedures for *ex parte* DVPOs are distinct from the procedures for TROs. 201 N.C. App. at 63, 685 S.E.2d at 546. Defendant's attempt to liken this case to one involving a TRO or a permanent injunction is misplaced. The process of issuing an *ex parte* DVPO is completed once the trial court determines that the complainant, alone, has alleged sufficient facts to show a "danger of acts of domestic violence." *See id.* at 65, 685 S.E.2d at 548. It is nonsensical to suggest that a hearing involving both parties could possibly be for the purpose of

continuing an *ex parte* DVPO. In accordance with the term "*ex parte*,"[3] such orders are not intended to be issued with input from both sides. Therefore, a hearing to determine whether to continue the trial court's order, notice of which must be given to the opposing party, cannot be a hearing on whether to continue the *ex parte* DVPO. Instead, it must be a hearing to determine whether the trial court's protective order should be continued beyond the temporary time frame of the *ex parte* DVPO.

Defendant's argument that the trial court lacked jurisdiction to enter the 18 February 2013 order and 20 February 2013 amended order is overruled. The trial court did not exceed its jurisdiction in entering those orders. Accordingly, Defendant's argument that the trial court erred in denying his Rule 60(b) motion to vacate the DVPO for lack of jurisdiction is also overruled.[4]

II. The Trial Court's Findings and Conclusions

[3] Alternatively, Defendant asserts that the trial court's 18 February 2013 DVPO and 20 February 2013 amended DVPO must be reversed because certain of the court's findings of fact are not based on competent evidence and, without those findings, the trial court's conclusions of law are improper. Again, we disagree.

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). The trial court made the following relevant findings of fact in the challenged orders:

> 3. On . . . Jan. 5, 2013, . . . [D]efendant
>
> a. attempted to cause . . . bodily injury to . . . [the children;]
>
> b. placed in fear of imminent serious bodily injury . . . a member of the plaintiff's family[;]

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3. "*Ex parte*" means "[d]one or made at the instance and for the benefit of *one party only*, and *without notice to*, or argument by, *any person adversely interested*; of or relating to court action taken by one party without notice to the other, usu[ally] for temporary or emergency relief[.]" Black's Law Dictionary 657 (9th ed. 2009) (emphasis added).

4. Defendant's argument that the trial court erred by denying his Rule 60(b) motion to vacate is based entirely on his argument that the trial court lacked jurisdiction to enter the 18 and 20 February 2013 orders.

. . .

> d. committed an act defined by [N.C. Gen. Stat. §] 14-[27.5A (sexual battery)] against the [children] by BECOMING EXTREMELY INTOXICATED WHILE CARING FOR THE CHILDREN AND ENGAGED IN INAPPROPRIATE CONTACT, CHILDREN DISCLOSED PRIOR INCIDENTS OF PHYSICAL AND VERBAL ABUSE INCLUDING HITTING W/A BELT AND THREATENING TO KNOCK THEIR TEETH DOWN THEIR THROAT. ALSO, [DEFENDANT] INAPPROPRIATELY SQUEEZED BUTTOCKS OF MINOR DAUGHTER. CONDUCT HAS RESULTED IN EMOTIONAL HARM TO CHILDREN RESULTING IN THREATS OF SELF[-]HARM.

Based upon those findings, the court concluded that:

> 2. . . . [D]efendant has committed acts of domestic violence against the minor child(ren) residing with or in the custody of . . . [P]laintiff.
>
> 3. There is a danger of serious and immediate injury to the minor child(ren). . . .

Defendant argues that findings 3(a), 3(b), and 3(d) are not supported by the evidence because they are based on statements made by the children to Plaintiff and the children's psychiatrist in the context of an *ongoing* DSS investigation. For support, Defendant cites *Burress v. Burress*, where we stated that the "results" of a DSS investigation might be relevant to the issue of domestic violence, but the mere existence of the investigation is not. 195 N.C. App. 447, 450, 672 S.E.2d 732, 734 (2009). Defendant contends that, as in *Burress*, the evidence concerning the children's allegations is irrelevant because it stems from "reports of abuse," not the "results" of a DSS investigation. Defendant also asserts that Plaintiff's testimony is not competent because it did not reference specific dates of the acts at issue. We are unpersuaded.

Plaintiff offered the following pertinent testimony at trial:

> [PLAINTIFF]: [Eliza] went to her . . . psychiatrist appointment and told of drunken episodes that happened in the house in which there were seven children in the house; two of which were my children.
>
> And . . . [Defendant] and a friend offered my daughter alcohol. She did not drink it, but it ended up with the one man passed out on the floor; my ex-husband in a drunken stupor.

[My daughter] asked him, "What do I look like to you?" And he said, "You look like [a] n i-g-g-e-r." And then spilled alcohol on the floor; made [Eliza] clean it up: "Clean this s-h-i-t up." . . .

. . .

[My daughters] have actually exhibited self-harm such as cutting themselves because . . . the discipline of [Defendant] is so strict and strong that when he disciplines them, they express wanting to kill themselves and cutting themselves.

. . .

JUDGE . . . : All right. So this incident that you spoke of when they were — when he was intoxicated —

[PLAINTIFF]: Yes, sir.

JUDGE . . . : — and had another man in the house, when was this?

[PLAINTIFF]: It was January 5th. But there's been ongoing over-the-top abuse: spankings with belts, one much — the younger child was made to stand there and — in front — he had all three children sit down on the couch[] and said, "This is what happens when you forget your agenda at school." And spanked her with a belt in front of all three children.

He curses at . . . them. He yells at them. He screams at them. . . .

JUDGE . . . : All right. Now, as I understand it, there were more allegations than what you've just told me in your —

[PLAINTIFF]: Yes, sir. Yes, sir. There is the spooning incident that happened with [Eliza]. [Defendant] spooned with her in his underwear. . . .

JUDGE . . . : When was that?

[PLAINTIFF]: [Eliza] said that he does it very often. I don't have a date.

JUDGE . . . : And then was there some — you've also alleged some inappropriate contact?

[PLAINTIFF]: Yes. He slaps her on the bottom and squeezes her bottom, which I feel, obviously, very inappropriate for a 14[ ]year[ ]old or even 11[-]year[-]old girls.

JUDGE . . . : All right. And you said there were threats of violence or extensive violence? Was it — physical violence?

[PLAINTIFF]: Yes. [Defendant] threatens, "If — if you tell what happens in my home — if you tell family business or tell daddy/daughter secrets," he said in the past, "I will knock your teeth down your throat."

JUDGE . . . : And what's the most recent time that that has happened?

[PLAINTIFF]: I don't know. I know that it happens quite often. My youngest actually has told myself and the DSS worker that when she — every time she sees a belt, she has flashbacks, and she gets afraid.

She says she has nightmares every night and headaches quite often, and she's very [emotionally] scarred.

. . .

[Regarding the intoxication incident, Eliza] was very afraid, and she asked the friend, "Do I need to call an ambulance for you? What do I need to do?" 'Cause he was laying on the floor, talking out of his mind. [Defendant] started speaking Spanish. He doesn't speak Spanish. This is according to my daughter.

And so, [Eliza] had to be responsible, while these men were intoxicated, for all [seven] children [who were in the house at the time].

. . .

. . . May I say something else?

JUDGE . . . : Sure.

[PLAINTIFF]: Okay. After [Eliza] told the psychiatrist about the incident, she said — and she knew that she was going to make the DSS report. She said, "Do I have to go back to Dad's?" She said, "Cause if I do, he's going to hurt me."

> Several times she has busted out into tears because of fear of her father.

Testifying for himself, Defendant admitted becoming intoxicated, getting sick, and throwing up while supervising the children on January 5th, but asserted that he still "kn[ew] what was going on around the house[.]" Defendant also admitted to cursing in front of the children, yelling at them, and, approximately four years before the hearing, spanking one of the children with a belt until she began to make retching sounds.

Defendant's admissions and Plaintiff's testimony constitute competent evidence to justify the trial court's findings of fact. Plaintiff testified to multiple circumstances in which Defendant vigorously spanked the children, and Defendant admitted to hitting one daughter until she made retching sounds. Plaintiff testified that Defendant threatened the children, spooned with them, and squeezed their buttocks. According to Plaintiff, this distressed the children, causing them to exhibit self-harm and express an interest in suicide. Plaintiff testified that Anna has nightmares every night, headaches on a regular basis, and is now emotionally scarred. Plaintiff also testified to an incident in which Defendant became intoxicated, which Defendant admitted. On that occasion, according to Plaintiff, Defendant was unable to stand or supervise the children and began babbling in Spanish.

It does not matter that certain of these allegations were also made in the context of DSS's investigation. In *Burress*, we found irrelevant the plaintiff's testimony that "[DSS] was investigating allegations of sexual abuse against the plaintiff's minor children by [the] defendant" because the mere existence of a DSS investigation does not mean that domestic violence has occurred. *Id.* at 450, 672 S.E.2d at 734. As no evidence was presented in that case regarding what was revealed by the investigation, however, we did not have the opportunity to address whether statements made in the context of a DSS investigation would also be irrelevant. *See id.* We hold that they are not. To hold otherwise would create a conflict of interest in which the plaintiff in a domestic violence case is incentivized to decline sharing information with DSS for fear of having her testimony stricken at a subsequent DVPO hearing. We decline to reach such a result here. Plaintiff testified to statements made to her by her children about what they experienced with Defendant.[5] In addition, Plaintiff

5. Defendant does not argue that Plaintiff's testimony about statements her daughters made directly to her is incompetent as inadmissible hearsay. In addition, Defendant did not make any objection on those grounds at the hearing. Therefore, any such objection is waived, and Plaintiff's testimony is not incompetent in that respect. *See In re Ivey*, 156 N.C. App. 398, 403, 576 S.E.2d 386, 390 (2003) (holding that the respondent-parents

described her personal observations of the adverse effects Defendant's actions have had on her daughters' behavior and emotional health. The fact that some of the children's statements were also made to DSS does not render the rest of Plaintiff's testimony irrelevant and incompetent. Accordingly, Defendant's argument is overruled.

[4] Moreover, Plaintiff's inability to provide specific dates with regard to certain of the incidents, which were largely described to her by her children, is not fatal. *See State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984) ("We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence."). Therefore, we hold that the trial court's findings of fact in the 18 February 2013 and 20 February 2013 orders are based on competent evidence and, in turn, fully support its conclusions of law. Accordingly, Defendant's alternative argument is overruled. The orders appealed from are

AFFIRMED.

Judges STEELMAN and DAVIS concur.

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waived their argument that certain testimony constituted inadmissible hearsay because they failed to object to the testimony at the permanency planning hearing); *see also In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 753 (2009) (commenting that "no objection on hearsay grounds was made by either parent [at the termination of parental rights hearing]. Therefore, any objection has been waived, and the testimony must be considered competent evidence.") (citation omitted); N.C.R. App. P. 10(a)(1).

JACKSON KAHIHU, PLAINTIFF
v.
RAYMOND BRUNSON, DEFENDANT

No. COA13-1121

Filed 3 June 2014

1. Process and Service—summons never received—directed verdict

The trial court did not err by granting defendant Integon's motion for directed verdict where plaintiff presented evidence that Integon had been served with a copy of the summons and amended complaint, but the trial court necessarily concluded that the affidavit of an employee of the registered agent of Integon rebutted the presumption of valid service by showing that Integon never received a copy of the summons.

2. Insurance—puninsured motorist—insurer a separate party—service required

The trial court did not err in an action arising from a car accident in its determination that defendant Integon was required to be served with a copy of the complaint and summons to be made a party to the action. N.C.G.S. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist.

Appeal by plaintiff from order entered 12 March 2013 by Judge Nancy E. Gordon in Durham County District Court. Heard in the Court of Appeals 5 February 2014.

The Law Offices of Andrew J. Kisala, PLLC, by Andrew J. Kisala, for plaintiff-appellant.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for defendant Integon National Insurance Company, defendant-appellee.

McCULLOUGH, Judge.

Plaintiff Jackson Kahihu challenges an order granting defendant Integon National Insurance Company's motion for directed verdict. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 23 September 2011 Plaintiff Jackson Kahihu filed a complaint against defendant Raymond Brunson. Plaintiff alleged the following: On 22 April 2011, plaintiff and defendant Brunson were involved in a car accident in Durham, North Carolina. Plaintiff was driving west in the right lane on Holloway Street near U.S. 70 when defendant Brunson was driving west in the left lane on the same street. As defendant Brunson was approaching the PVA turnoff to 2101 Holloway Street, he "immediately and without warning swerved across the right lane and suddenly applied his brakes which caused him to rapidly decelerate in front of Plaintiff's vehicle, leaving Plaintiff unable to stop before colliding with Defendant [Brunson]." "The sudden swerving and braking action by Defendant [Brunson] left Plaintiff unable to stop before colliding into the back of Defendant [Brunson]'s vehicle." Plaintiff alleged that due to defendant Brunson's negligence, plaintiff had suffered damage to his property, physical injuries, and other expenses.

The civil summons, issued on 23 September 2011, was returned to plaintiff on 2 November 2011, stating that defendant Brunson was not served. The civil summons included the following notation: "No contact mult. attempts + note."

On 8 November 2011, plaintiff filed a "Motion for Entry of Default" for entry of default and default judgment against defendant Brunson for failure to plead. On the same day, plaintiff's counsel filed an "Affidavit of Service by Certified Mail." Plaintiff's counsel testified that upon filing the complaint on 23 September 2011, he mailed a file-stamped Civil Summons and Complaint to defendant Brunson via United States postal service certified mail, addressed to defendant, return receipt requested. Plaintiff's counsel testified that on 24 September 2011, the summons and complaint were delivered to defendant Brunson's place of residence and "signed for by a person presumably of suitable age and discretion who is an agent for Defendant." On 8 November 2011, the trial court entered an "Entry of Default" against defendant Brunson for failure to plead.

On 10 February 2012, plaintiff filed an amended complaint. That same day, plaintiff filed a "Motion to Set Aside Entry of Default" as to defendant Brunson. Plaintiff argued in the motion that "[a]ll responsible parties were not known to Plaintiff on the date of his Motion for Entry of Default through no fault of his own, and could not have been discovered through due diligence." Based on the foregoing, plaintiff asserted that he failed to correctly serve all responsible parties pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and wished to amend

his complaint. On 10 February 2012, the trial court entered an "Order Setting Aside Entry of Default" as to defendant Brunson.

On 23 March 2012, plaintiff filed a "Motion for Entry of Default" against defendant Brunson. Thereafter, the trial court filed an "Entry of Default" against defendant Brunson.

Also on 23 March 2012, plaintiff's counsel filed an "Affidavit of Service by Certified Mail," amended 26 March 2012, alleging that on 24 September 2011, a summons and complaint was delivered to defendant Brunson's place of residence and signed by a person presumably of suitable age and discretion who is agent for defendant Brunson. The affidavit also stated that after learning that this case would proceed as an uninsured motorists claim, plaintiff's counsel mailed a file-stamped Civil Summons and Complaint on 16 February 2012 to plaintiff's insurance company and provider of his uninsured motorists policy, GMAC Insurance Management Corporation ("GMAC") or previously named Integon National Insurance Company. The summons and complaint were sent via United States postal service certified mail, addressed to GMAC's registered agent on file with the North Carolina Secretary of State, return receipt requested. Plaintiff's counsel testified that on 17 February 2012, the summons and complaint were delivered to GMAC's registered agent and signed for by a person presumably of suitable age and discretion who is an agent for GMAC.

On 28 March 2012, Integon National Insurance Company ("defendant Integon") filed an Answer. Defendant Integon moved to dismiss plaintiff's action for lack of jurisdiction over the person, insufficiency of process, and insufficiency of service of process. Defendant Integon also moved to dismiss plaintiff's action for lack of jurisdiction over defendant Brunson, insufficiency of process over defendant Brunson, and insufficiency of service of process over defendant Brunson.

On 7 May 2012, plaintiff filed a motion for default judgment against defendant Brunson and defendant Integon. Plaintiff argued that the final day for defendant Brunson to timely file an answer to plaintiff's 10 February 2012 amended complaint was 16 March 2012. Plaintiff also asserted that defendant Integon's final day to timely file an answer was 22 March 2012.

On 14 May 2012, the trial court entered an order finding the following:

> 2. [Defendant Brunson and defendant Integon] have been legally served with process.

3. [Defendant Brunson and defendant Integon] have failed to timely answer in a manner allowed by the North Carolina Rules of Civil Procedure, and are adjudged to be in default.

4. Plaintiff maintained a policy of uninsured motorists coverage with Defendant INTEGON.

Accordingly, plaintiff's motion for default judgment was granted and default judgment was entered against defendant Brunson and defendant Integon.

On 13 June 2012, defendant Integon filed a "Motion to Set Aside Default Judgment" pursuant to Rules 60(b)(1), (3), and (6) of the North Carolina Rules of Civil Procedure. Defendant Integon argued that plaintiff erroneously proceeded with a motion for default judgment on 14 May 2012 against defendant Integon, without first obtaining an entry of default against defendant Integon. Defendant Integon asserted that no entry of default could have been entered against defendant Integon because the trial court lacked "authority to enter an Entry of Default against a party after that party has filed its Answer."

Following a hearing held on 16 July 2012 on defendant Integon's motion to set aside the default judgment, the trial court entered an "Order Setting Aside Default Judgment Against Unnamed Defendant" on 20 July 2012. The trial court concluded, *inter alia*, that defendant Brunson and defendant Integon are two separate entities and that an entry of default against defendant Brunson is not binding as an entry of default against defendant Integon. Thus, the trial court granted defendant Integon's motion to set aside default judgment pursuant to Rule 60(b)(6)[1].

On 30 October 2012, plaintiff filed a motion for summary judgment against defendant Brunson. On 20 November 2012, the trial court entered an order granting plaintiff partial summary judgment against defendant Brunson as to the property damages specifically pled in plaintiff's amended complaint.

The case came on for trial at the 12 March 2013 session of Durham County District Court. At the close of plaintiff's evidence, defendant Integon moved for a directed verdict.

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1. N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2013) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment."

On 12 March 2013, the trial court entered an order, finding that no summons was ever served on defendant Integon. Furthermore, the trial court found that defendant Integon preserved its challenge to jurisdiction in its answer and did not stipulate in the pre-trial order that the trial court had jurisdiction in this action. Thus, defendant Integon's motion for directed verdict was allowed for failure to serve a civil summons and complaint as required by Rule 4 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 20-279.21(b)(3)(a).

The case continued as a bench trial and judgment was entered on 19 March 2013 entitling plaintiff to recover for personal injury from defendant Brunson. On 21 March 2013, plaintiff filed a "Motion to Alter or Amend Judgment or New Trial Pursuant to Rules 59 & 60" which the trial court denied on 6 June 2013.

Plaintiff appeals the 12 March 2013 granting directed verdict in favor of defendant Integon.

II. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (citation omitted). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004) (citation omitted).

III. Discussion

Plaintiff argues that the trial court erred (A) in granting defendant Integon's motion for directed verdict based on the finding that defendant Integon was not served with a summons and (B) by determining that defendant Integon needed to be served with a copy of the complaint and summons to be made a party to the action.

A. Directed Verdict

[1] First, plaintiff argues that the trial court erred by granting defendant Integon's motion for directed verdict where plaintiff presented evidence that defendant Integon had been served with a copy of the summons and amended complaint. Plaintiff relies on the 26 March 2012 "Amended Affidavit of Service by Certified Mail" filed by plaintiff's attorney. He argues that this affidavit created a presumption of service which defendant Integon failed to rebut.

We note that section 20-279.21(b)(3) of the North Carolina General Statutes

> *unequivocally requires* that the [uninsured motorist] carrier be served *with a copy of the summons and complaint* in order to be bound by a judgment against the uninsured motorist. Subsection (b)(3) further directs that upon service of process, the [uninsured motorist] carrier shall become a party to the suit and shall have the time allowed by statute to file responsible pleadings.

Liberty Mutual Insurance Co. v. Pennington, 356 N.C. 571, 576, 573 S.E.2d 118, 122 (2002) (emphasis added); *see also Darroch v. Lea*, 150 N.C. App. 156, 160, 563 S.E.2d 219, 222 (2002).

The filing of an affidavit of service that complies with the requirements set out in section 1-75.10 of the North Carolina General Statutes creates a rebuttable presumption of valid service. *See Goins v. Puleo*, 350 N.C. 277, 280-81, 512 S.E.2d 748, 750-51 (1999). N.C. Gen. Stat. § 1-75.10 provides:

> (a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . . .
>
> (4) Service by Registered or Certified Mail. – In the case of service by registered or certified mail, by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2013).

Here, plaintiff's attorney filed an "Affidavit of Service by Certified Mail." Plaintiff's affidavit of service stated that on 16 February 2012,

plaintiff's attorney mailed a file-stamped summons and amended complaint to defendant Integon via certified mail, return receipt requested. This affidavit complied with the requirements set out in N.C. Gen. Stat. § 1-75.10, thereby creating a rebuttable presumption of valid service.

Defendant Integon argues that the trial court necessarily concluded that the affidavit of Andrew Gachaiya, an employee of Corporation Service Company ("CSC") who is the registered agent of defendant Integon, rebutted the presumption of valid service. We agree.

Gachaiya's affidavit stated that CSC documents and maintains records of "all documents served upon it on behalf of the companies for which it is registered agent." Gachaiya stated that he had reviewed its records to identify all documents plaintiff had served on it as defendant Integon's registered agent. According to Gachaiya, on 17 February 2012, "CSC's North Carolina office received via certified mail an Amended Complaint addressed to Corporation Service Company in the matter of *Jackson Kahihu vs. Raymond Brunson* Case Number 11CVD05031 in the Durham County District Court[.]" Gachaiya's affidavit made no mention of receiving a copy of the summons. In addition, CSC received an affidavit of service and an amended affidavit of service on 26 March 2012 and 28 March 2012, respectively. Furthermore, Gachaiya's affidavit stated that "prior to March 27, 2012, CSC did not notify or communicate in any manner the existence of the [matter of *Kahihu v. Brunson* Case Number 11 CVD 05031 in Durham County District Court] to GMAC Insurance Management Corporation."

Based on the foregoing, we hold that Gachaiya's affidavit rebutted the presumption of service by showing that defendant Integon never received a copy of the summons on 17 February 2012 and the trial court could properly find that defendant Integon was not served with a copy of the summons as required by N.C. Gen. Stat. § 20-279.21(b)(3). Accordingly, the trial court was without jurisdiction over defendant Integon and did not err in granting defendant Integon's motion for directed verdict.

B. Insurer as a Separate Party

[2] In his last argument, plaintiff contends that the trial court erred in its determination that defendant Integon was required to be served with a copy of the complaint and summons to be made a party to his action. We disagree.

Section 20-279.21(b)(3)a (2013) of the North Carolina General Statutes provides that all liability insurance policies are subject to the following:

> A provision that the 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; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. 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 consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists.

N.C. Gen. Stat. § 20-279.21(b)(3)a establishes that the insurer is a separate party to the action between the insured plaintiff and an uninsured motorist. *Grimsley v. Nelson*, 342 N.C. 542, 546, 467 S.E.2d 92, 95 (1996). It is well established that "[N.C. Gen. Stat.] § 20-279.21(b)(3)a unambiguously provides that an uninsured motorist carrier may defend in the name of the uninsured motorist or in its own name, evincing a legislative recognition that the uninsured motorist and the insurer providing uninsured motorist coverage are separate parties with independent interests." *Reese v. Barbee*, 129 N.C. App. 823, 826, 501 S.E.2d 698, 700 (1998) (citation omitted). Therefore, "in order for the insurer to be

bound by a judgment against the uninsured motorist, service of process must be obtained upon the insurer." *Id.* Based on the foregoing reasons, we must reject plaintiff's arguments.

IV. Conclusion

Where the trial court did not err in granting defendant Integon's motion for directed verdict, we affirm the order of the trial court.

Affirmed.

Judges HUNTER, Robert C., and GEER concur.

MICHELE LaFRAGE PETER AND CARL PETER, PLAINTIFFS
v.
JOHN VULLO, M.D., SOUTHEAST ANESTHESIOLOGY CONSULTANTS, PLLC F/K/A SOUTHEAST ANESTHESIOLOGY CONSULTANTS, P.A., AMERICAN ANESTHESIOLOGY OF THE SOUTHEAST, PLLC, THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM D/B/A CAROLINAS MEDICAL CENTER, AND MERCY HOSPITAL, INC., DEFENDANTS

No. COA13-1050

Filed 3 June 2014

1. Medical Malpractice—expert testimony—affidavit—standard of care

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendant doctors. Plaintiffs forecasted sufficient evidence to satisfy the requirements of N.C.G.S. § 90-21.12(a). Further, the trial court erred by applying the holding in *Wachovia Mortgage Co.*, 30 N.C. App. 1, to a doctor's affidavit regarding the applicable standard of care. The case was remanded to the trial court for further proceedings.

2. Agency—respondeat superior—hospital—anesthesiologists—independent contractors—apparent agency

The trial court did not err in a medical malpractice case by granting summary judgment in favor of hospital defendants on the claim that they were liable under the doctrine of respondeat superior. Plaintiff patient was provided meaningful notice from hospital defendants that the anesthesiologists may be independent contractors. Thus, plaintiffs' apparent agency arguments also failed.

3. Medical Malpractice—loss of consortium—summary judgment improperly granted

The trial court erred in a medical malpractice case by granting summary judgment in favor of defendants on plaintiff husband's loss of consortium claim. Because summary judgment was erroneously entered as to plaintiffs' claims of negligence, the loss of consortium claim, which was derivative of the negligence claim, should have survived a motion for summary judgment.

Appeal by plaintiffs from order entered 12 April 2013 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2014.

Van Laningham Duncan PLLC, by Stephen M. Russell, Jr., for plaintiff-appellants.

Parker Poe Adams & Bernstein, LLP, by John H. Beyer, Jami J. Farris, and John D. Branson, for defendants John F. Vullo, M.D., Southeast Anesthesiology Consultants, PLLC, f/k/a Southeast Anesthesiology Consultants, P.A., and American Anesthesiology of the Southeast, PLLC.

Lincoln Derr PLLC, by Tricia M. Derr, for defendants The Charlotte-Mecklenburg Hospital Authority d/b/a/ Carolinas Healthcare System d/b/a Carolinas Medical Center and Mercy Hospital, Inc.

McCULLOUGH, Judge.

Plaintiffs Michele LaFrage Peter and Carl Peter appeal from an order granting summary judgment in favor of defendants John Vullo, M.D., Southeast Anesthesiology Consultants, PLLC f/k/a Southeast Anesthesiology Consultants, P.A., American Anesthesiology of the Southeast, PLLC, The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System d/b/a Carolinas Medical Center, and Mercy Hospital, Inc. Based on the reasons stated herein, we reverse in part and affirm in part.

I. Background

Plaintiffs Michele LaFrage Peter ("Ms. Peter") and Carl Peter ("Dr. Peter") are married. On 13 July 2012, plaintiffs filed an amended complaint against defendants John F. Vullo, M.D., Southeast Anesthesiology Consultants, PLLC f/k/a Southeast Anesthesiology Consultants, P.A.,

American Anesthesiology of the Southeast, PLLC, (collectively "the doctor defendants"), The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System d/b/a Carolinas Medical Center ("CMC"), and Mercy Hospital, Inc. ("CMC Mercy") (collectively "the hospital defendants"). Plaintiffs' claims included professional negligence, loss of consortium by Dr. Peter, and *respondeat superior* liability.

Plaintiffs' complaint alleged the following: In February 2010, Ms. Peter suffered a severe sprain of her right ankle. In June 2010, after several months of physical therapy and two MRIs, Ms. Peter was referred to Dr. Robert Anderson, a foot and ankle specialist with OrthoCarolina in Charlotte, North Carolina. Dr. Anderson recommended surgical intervention and scheduled for it to take place on 22 December 2010 at CMC/CMC Mercy. On 22 December 2010, Ms. Peter underwent surgery at CMC/CMC Mercy. Plaintiffs alleged that defendants induced regional anesthesia in preparation for Ms. Peter's right ankle arthroscopic surgery. "Ms. Peter was given fentanyl and versed for sedation and remained in 'conscious sedation' throughout the procedure." Dr. Vullo, an employee of Southeast Anesthesiology Consultants, PLLC, f/k/a Southeast Anesthesiology Consultants, P.A. and/or American Anesthesiology of the Southeast, PLLC, was to administer a popliteal nerve block and a saphenous nerve block into an area behind Ms. Peter's right knee.

Plaintiffs alleged that at some point during the procedure, an unknown female attendant entered the room to assist Dr. Vullo as he was "having problems locating a nerve" to administer the appropriate blocks. Plaintiffs assert that defendants failed to properly administer the nerve blocks and improperly administered repeated needle insertions, resulting in nerve damage. Ms. Peter stated that immediately following the injections, she experienced extreme pain and numbness in her right leg from which she still suffers. The pain and numbness has resulted in her inability to work and conduct day-to-day activities.

The hospital defendants and the doctor defendants filed motions for summary judgment on 25 February 2013 pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. The doctor defendants argued that plaintiffs' complaint was a medical malpractice action as defined by N.C. Gen. Stat. § 90-21.11. The doctor defendants contended that on 10 October 2012, a "Revised Consent Discovery Scheduling Order" was entered. This order set forth a schedule for the designation of expert witnesses and the completion of discovery prior to trial. Pursuant to this order, plaintiffs identified two retained medical expert witnesses that were to testify at trial: Dr. Steven Fiamengo, anesthesiologist of Newberry, South Carolina, and Dr. Robert Friedman, neurologist of Palm

Beach, Florida. Both doctors were deposed and the doctor defendants argued that plaintiffs "failed to designate a qualified expert witness to offer an opinion that Dr. Vullo deviated from the applicable standard of care." Furthermore, the doctor defendants argued that plaintiffs could not establish a prima facie case of medical malpractice.

On 5 April 2013, plaintiffs filed an affidavit of Dr. Fiamengo in response to defendants' motions for summary judgment. On 8 April 2013, doctor defendants filed a motion to strike Dr. Fiamengo's affidavit.

Following a hearing held at the 9 April 2013 term of Mecklenburg County Superior Court, the trial court entered an order granting defendants' motions for summary judgment and dismissing plaintiffs' claims with prejudice on 12 April 2013. The trial court also held the following:

> The Court declines to strike Dr. Fiamengo's Affidavit in its entirety, but is aware of and has applied the law as set forth in Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 SE2d 727 (1978) (holding that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting the prior sworn testimony of a witness).

From this 12 April 2013 summary judgment order, plaintiffs appeal.

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 a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted).

> The moving party bears the burden of establishing the lack of a triable issue of fact. If the movant meets its burden, the nonmovant is then required to produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial. Furthermore, the evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002) (internal citations and quotation marks omitted).

III. Discussion

On appeal, plaintiffs argue that the trial court erred (A) by granting summary judgment in favor of the doctor defendants; (B) in its consideration of Dr. Fiamengo's affidavit; (C) by granting summary judgment in favor of the hospital defendants; and (D) by granting summary judgment as to the loss of consortium claim. Because issues (A) and (B) are closely related, we will address them together.

A. Summary Judgment in favor of the Doctor Defendants

and

B. Affidavit of Dr. Fiamengo

[1] Plaintiffs argue that that trial court erred by granting summary judgment in favor of the doctor defendants where plaintiffs forecast sufficient evidence to satisfy the requirements of a medical malpractice claim pursuant to section 90-21.12(a) of the North Carolina General Statutes. Plaintiffs also argue that the trial court erred in its consideration of Dr. Fiamengo's affidavit. We agree.

N.C. Gen. Stat. § 90-21.12(a) provides as follows:

> in any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action[.]

N.C. Gen. Stat. § 90-21.12(a) (2013) (emphasis added). "In order to maintain an action for medical malpractice, a plaintiff must offer evidence to establish (1) the applicable standard of care; (2) breach of that standard; (3) proximate causation; and (4) damages." *Robinson v. Duke Univ. Health Systems*, __ N.C. App. __, __, 747 S.E.2d 321, 334 (2013) (citation omitted).

It is well established that

> [b]ecause questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant

> standard of care through expert testimony. Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice.
>
> Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities.

Smith v. Whitmer, 159 N.C. App. 192, 195-96, 582 S.E.2d 669, 671-72 (2003) (internal citations and quotation marks omitted).

In the case *sub judice*, plaintiffs presented Dr. Fiamengo as their expert witness to testify that the medical care received by Ms. Peter did not comply with the applicable standard of care. Dr. Fiamengo is an anesthesiologist practicing at Crescent Anesthesia Associates, LLC, in South Carolina. Dr. Fiamengo was deposed first on 15 November 2012 and then subsequently provided an affidavit on 5 April 2013. The doctor defendants filed a motion to strike the affidavit, arguing that plaintiffs "served the contradictory affidavit of Dr. Fiamengo in an attempt to create an issue of fact and defeat these Defendants' Motion for Summary Judgment," prohibited by North Carolina law.

Our review establishes that during Dr. Fiamengo's 15 November 2012 deposition testimony, Dr. Fiamengo testified that although he believed Dr. Vullo's actions amounted to a deviation from the standard of care, he failed to demonstrate that he was familiar with the standard of care in the community where the injury occurred. Rather, Dr. Fiamengo appeared to be applying a national standard of care rather than the "same or similar community" standard required pursuant to N.C. Gen. Stat. § 90-21.12:

> [Counsel for the doctor defendants]: Have you arrived at some opinions in this case concerning the standard of care that applied to Dr. Vullo when he performed this peripheral nerve block for Mrs. Peter?
>
> [Dr. Fiamengo]: My opinion is that the nerve injury occurred during the performance of the block, that it should have been recognized with a sonogram, and that injection occurred nevertheless and it resulted in an injury.

> And because of the lack of recognition that the injury occurred — that the injection occurred intraneurally, that that was a deviation from the standard of care.
>
> . . . .
>
> [Counsel for the doctor defendants]: Now with respect to that standard of care opinion, are you taking into consideration in forming that opinion anything about the medical community in Charlotte as it existed in December 2010?
>
> [Dr. Fiamengo]: No
>
> . . . .
>
> [Counsel for the doctor defendants]: So am I right, Dr. Fiamengo, that the standard of care that you're applying to assess Dr. Vullo's care in this case would be a national standard of care?
>
> [Dr. Fiamengo]: Yes.

Dr. Fiamengo's 5 April 2013 affidavit, on the other hand, provided as follows:

> 8. I have reviewed information about the community of Charlotte, North Carolina, Mecklenburg County, and CMC Mercy Hospital for the period December 2010. I am familiar with the size of the population and economic condition of Charlotte, North Carolina. I am familiar with the level of care and resources available at the hospital, the facilities, and the number of health care providers for anesthesiology.
>
> 9. I have worked in communities similar to Charlotte and performed anesthesiology services in a hospital similar in size and resources to CMC Mercy.
>
> 10. The standard for performance of popliteal nerve blocks would not differ between my practice and an anesthesiologist in Charlotte, NC, given the similarities between my practice compared to the resources available to CMC Mercy and the experience of Dr. Vullo.
>
> 11. I am familiar with the prevailing standard of care for performing popliteal nerve blocks in the same or similar community to Charlotte, North Carolina in

December 2010 by a physician with the same or similar training, education, and experience as Dr. Vullo.

12. Based on my review of this case, it is my opinion within a reasonable degree of medical certainty that the care of Dr. Vullo provided to Michele Peter was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the . . . performance of Ms. Peter's nerve block in December 2010.

13. The applicable standard in Charlotte in 2010 for an anesthesiologist such as Dr. Vullo required, among other things, that Dr. Vullo recognize and avoid intraneural injections while performing popliteal nerve blocks. Dr. Vullo failed to do so in this case, which directly caused Ms. Peter's injuries.

The trial court stated in its summary judgment order that it declined to strike Dr. Fiamengo's affidavit in its entirety, but noted that it had "applied the law as set forth in Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 SE2d 727 (1978) (holding that a party opposing a motion for summary judgment cannot create an issue of fact by filing an affidavit contradicting the prior sworn testimony of a witness)."

Plaintiffs argue, and we agree, that the trial court erroneously characterized Dr. Fiamengo's affidavit testimony as a tactic to contradict his own prior deposition testimony, in an attempt to create an issue of fact to defeat defendants' summary judgment motions. Rather, we believe that the circumstances are very similar to the facts found in *Roush v. Kennon*, 188 N.C. App. 570, 656 S.E.2d 603 (2008). In *Roush*, the trial court granted the defendants' motion to strike the plaintiff's proffered expert witness, Dr. Tuzman. The defendants argued, among other things, that Dr. Tuzman was not qualified to offer standard of care opinions because he had no familiarity with Charlotte, North Carolina as required pursuant to Rule 9(j)[1]. Specifically, defendants argued that a deposition

1. Rule 9(j) of the North Carolina Rules of Civil Procedure provides for the requirements when pleading medical malpractice:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable

prior to trial established that Dr. Tuzman was not qualified because he had never been to Charlotte, the location where the alleged injury occurred, knew nothing about the dental community in Charlotte, and believed in the existence of a national standard of care for all dentists. *Id.* at 574, 656 S.E.2d at 607. Our Court held that

> the record on appeal indicates that subsequent to his deposition, Dr. Tuzman sought to supplement his understanding of the applicable standard of care in the Charlotte metropolitan area by reviewing, *inter alia*, the demographic data for the Charlotte metropolitan area, the Dental Rules of the North Carolina State Board of Dental Examiners, and the deposition of [the defendant] Dr. Kennon regarding the procedures, techniques, and implements which he used while performing a molar extraction on plaintiff. After reviewing these sources, Dr. Tuzman was able to conclude that the standard of care for Atlanta, Georgia (in which he practiced), was the same standard of care that applied to the similar community of Charlotte, North Carolina. . . . Thus, we find that Dr. Tuzman possessed sufficient familiarity with Charlotte and the practice of dentistry therein to testify as to the appropriate standard of care as required by N.C. Gen. Stat. § 90-21.12.

Id. at 576-77, 656 S.E.2d at 607-608.

The record before us indicates that subsequent to giving his deposition, Dr. Fiamengo reviewed information about the community of Charlotte and CMC Mercy for the period of December 2010, became familiar with the population size and economic condition of Charlotte, and became familiar with the level of care and resources available at the hospital, the facilities, and the number of health care providers for anesthesiology. Furthermore, Dr. Fiamengo testified that he had worked in communities similar to Charlotte and performed anesthesiology services in a hospital similar in size and resources to CMC Mercy. He

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> standard of care under G.S. 90-21.12 shall be dismissed unless: (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2013).

testified that he was "familiar with the prevailing standard of care for performing popliteal nerve blocks in the same or similar community to Charlotte, North Carolina in December 2010 by a physician with the same or similar training, education, and experience as Dr. Vullo." Thus, we hold that the trial court erred by applying the holding in *Wachovia Mortgage Co.* to Dr. Fiamengo's affidavit.

Dr. Fiamengo testified that "[t]he applicable standard in Charlotte in 2010 for an anesthesiologist such as Dr. Vullo required, among other things, that Dr. Vullo recognize and avoid intraneural injections while performing popliteal nerve blocks. Dr. Vullo failed to do so in this case, which directly caused Ms. Peter's injuries." Reviewing the evidence in the light most favorable to plaintiffs, plaintiffs offered sufficient evidence of (1) the applicable standard of care, (2) breach of that standard of care, (3) proximate causation, and (4) damages, successful to defeat defendants' summary judgment motion.

> When plaintiffs have introduced evidence from an expert stating that the defendant doctor did not meet the accepted medical standard, [t]he evidence forecast by the plaintiffs establishes a genuine issue of material fact as to whether the defendant doctor breached the applicable standard of care and thereby proximately caused the plaintiff's injuries. This issue is ordinarily a question for the jury, and in such case, it is error for the trial court to enter summary judgment for the defendant.

Robinson, __ N.C. App. at __, 747 S.E.2d at 335 (citation omitted).

Based on the foregoing reasons, we reverse the order of the trial court granting summary judgment in favor of the doctor defendants and remand to the trial court for further proceedings consistent with this opinion.

C. Summary Judgment in Favor of the Hospital Defendants

[2] Next, plaintiffs argue that there was sufficient evidence to support their claim that the hospital defendants were liable under the doctrine of *respondeat superior*. Plaintiffs argue that "an inference can be drawn that an agency relationship existed between Dr. Vullo and the Hospital Defendants" since CMC and CMC Mercy held themselves out as providing medical services to Ms. Peter under the doctrine of apparent agency. We disagree.

> Under the doctrine of *respondeat superior*, a hospital is liable for the negligence of a physician or surgeon acting

> as its agent. There will generally be no vicarious liability on an employer for the negligent acts of an independent contractor. Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court.

Hylton v. Koontz, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000) (citations omitted).

"[A]pparent agency would be applicable to hold the hospital liable for the acts of an independent contractor if the hospital held itself out as providing services and care." *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 305, 628 S.E.2d 851, 861 (2006) (citation omitted).

> Under this approach, a plaintiff must prove that (1) the hospital has held itself out as providing medical services, (2) the plaintiff looked to the hospital rather than the individual medical provider to perform those services, and (3) the patient accepted those services in the reasonable belief that the services were being rendered by the hospital or by its employees. A hospital may avoid liability by providing meaningful notice to a patient that care is being provided by an independent contractor.

Id. at 307, 628 S.E.2d at 862 (citation omitted).

Plaintiffs compare the facts of the present case to those found in *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006), and argue that a jury could decide that Ms. Peter accepted medical services in the reasonable belief that the services were being provided by the hospital defendants. After thoughtful review, we find the facts of the present case distinguishable.

In *Diggs*, the plaintiff filed a medical malpractice action arising out of a gall bladder surgery performed at Forsyth Medical Center ("FMC"). The plaintiff alleged that Forsyth Memorial Hospital, Inc., Novant Health, Inc., and Novant Health Triad Region, L.L.C. were vicariously liable for the negligence of the hospital nursing staff and the team assigned to administer anesthesia to the plaintiff. *Id.* at 292, 628 S.E.2d at 853. The trial court granted summary judgment in favor of the Forsyth Memorial Hospital, Inc., Novant Health, Inc., and Novant Health Triad Region, L.L.C. *Id.* Our Court affirmed summary judgment for Novant Health Inc. and Novant Health Triad Region, L.L.C., but reversed summary judgment as to Forsyth Memorial Hospital, Inc. ("the hospital"). *Id.*

The *Diggs* plaintiff chose to have Dr. Ismael Goco, who had hospital privileges at FMC, perform her surgery. On 12 October 1999, the plaintiff was admitted to FMC, which is operated by the hospital. The plaintiff's surgery required general anesthesia. Piedmont Anesthesia & Pain Consultants, P.A. ("Piedmont") had a contract with the hospital that granted Piedmont the exclusive right to provide anesthesia services at FMC. *Id.* at 293, 628 S.E.2d at 854. Piedmont employees, Dr. McConville and nurse Sheila Crumb, "were responsible for administering anesthesia to [the] plaintiff through an induction and intubation process. Ms. Crumb performed the intubation, which involved inserting a tube into [the] plaintiff's trachea, under the supervision of Dr. McConville." *Id.* During the plaintiff's procedure, her esophagus was perforated, resulting in injuries. *Id.* The *Diggs* plaintiff argued that she was not aware that Dr. McConville and Ms. Crumb were not employees of the hospital and argued that the hospital was vicariously liable for the negligence of Dr. McConville, Ms. Crumb, and Piedmont. *Id.* at 293-94, 628 S.E.2d at 854. Our Court held that the plaintiff failed to present sufficient evidence to establish a *prima facie* case of actual agency and then turned to the issue of liability based on apparent agency. *Id.* at 301, 628 S.E.2d at 858.

Our Court found that the plaintiff had presented sufficient evidence to meet the test of apparent agency based on the following evidence: (1) the hospital had a Department of Anesthesiology with a Chief of Anesthesiology and a Medical Director, "a fact that a jury could reasonably find indicated to the public that FMC was providing anesthesia services to its patients." *Id.* at 307-308, 628 S.E.2d at 862; (2) the hospital chose to provide anesthesia services by contracting with Piedmont exclusively, with Piedmont doctors serving as the hospital's Chief of Anesthesiology and Medical Director; (3) the plaintiff and other surgical patients had no choice as to who would provide anesthesia services for their operations; and (4) the plaintiff signed a "Consent to Operation and/or Other Procedures" form that was printed on FMC letterhead which distinguished between the plaintiff's personal physician and unnamed anesthesiologists. *Id.* at 308, 628 S.E.2d at 863. Based on the foregoing, our Court held that "[a] jury could decide based on this [consent] form that plaintiff was, through this form, requesting anesthesia services from FMC and that – given the distinction made between plaintiff's personal physician and the unnamed anesthesiologist – plaintiff was accepting those services in the reasonable belief that the services would be provided by the hospital and its employees." *Id.* at 308-309, 628 S.E.2d at 863.

In the case *sub judice*, the record indicates that as of December 2010, Dr. Vullo was not an employee of the hospital defendants. Dr. Vullo

was an employee of American Anesthesiology of the Southeast, PLLC, which had acquired Southeast Anesthesiology Consultants in October 2010. Dr. Vullo had hospital staff privileges at CMC Mercy and provided anesthesia services to Ms. Peter at CMC Mercy. Nonetheless, our Court has established that "evidence that a physician has privileges at a hospital is not sufficient, standing alone, to make the physician an agent of the hospital[.]" *Id.* at 301, 628 S.E.2d at 859.

Distinguishable from the facts found in *Diggs*, Ms. Peter was provided meaningful notice from the hospital defendants that the anesthesiologists may be independent contractors. In fact, the hospital defendants expressly disclaimed that independent contractors providing certain services at the hospital defendants' facilities were not agents of the hospital defendants.

In a 11 July 2012 deposition, Ms. Peter testified that prior to her surgery on 22 December 2010, she signed a "Confirmation of Consent for Procedure or Operation" form ("the consent form") and "Request for Treatment and Authorization Form" ("the authorization form"). The consent form included a clause, right above the signature line, that stated the following:

> I UNDERSTAND THAT MY PHYSICIAN, THE *ANESTHESIOLOGISTS*, RADIOLOGISTS, PATHOLOGISTS, AND OTHER HEALTH CARE PROVIDERS MAY NOT BE EMPLOYED BY OR BE AGENTS OF THE HOSPITAL, AND I AGREE THE HOSPITAL IS NOT RESPONSIBLE OR LIABLE FOR WHAT THEY DO OR FAIL TO DO.

(emphasis added). Furthermore, the authorization form contained a provision entitled "Notice of Independent Contractors" which provided as follows:

> I understand that [The Charlotte-Mecklenburg Hospital Authority] has contracted with certain independent professional groups for such groups to exclusively provide certain services at [The Charlotte-Mecklenburg Hospital Authority] facilities, including but not limited to Charlotte Radiology, P.A., *Southeast Anesthesiology Consultants, P.A.*, Carolinas Pathology Group, P.A., Southeast Radiation Oncology Group, P.A., and Emergency Medicine Physicians, P.A. I understand that these professional groups are *independent contractors*, are not employees or agents of [The Charlotte-Mecklenburg Hospital Authority], and are not subject to control or supervision

> by [The Charlotte-Mecklenburg Hospital Authority] in their delivery of professional services.

(emphasis added).

Next, plaintiff argues that the consent and authorization forms are insufficient to defeat plaintiffs' apparent agency claim when contrasting it with the release form found in *Ray v. Forgy*, __ N.C. App. __, 744 S.E.2d 468 (2013). We do not find plaintiffs' arguments persuasive.

In *Ray*, the issue before the Court was whether the plaintiff patient looked to the hospital rather than the individual medical provider, Dr. Forgy, to perform her surgeries. *Id.* at __, 744 S.E.2d at 471. Our Court held that there were no issues of material fact regarding apparent agency where:

> [b]efore [the patient's procedures, the patient] signed request for treatment forms. In a section labeled "Designation(s)," she checked the box labeled "Physician" and wrote in "Dr. Forgy." Additionally, [the patient] separately checked a box labeled "Grace Hospital Personnel." [The patient's husband, who is also a plaintiff,] also signed nearly identical consent forms before allowing a catheter to be placed and allowing a drain to be put in his wife's abdomen. This suggests that [the patient] looked to Dr. Forgy separate and distinct from Grace Hospital and its personnel to receive medical treatment.

Id. In addition, our Court found that the release form, in large print just above the signature line, provided explicit notice regarding the employment status of Grace Hospital physicians:

> that many of the physicians on the staff of Grace Hospital are not employees or agents of the hospital, but rather, are independent contractors who have been granted the privilege of using its facilities for the care and treatment of patients. . . . My signature below indicates that I have read and understand the above information.

Id.

Plaintiffs contend that the *Ray* release document specifically identified the physician who allegedly violated the standard of care while here, there was "no identification of the treating physician on the [h]ospital [d]efendants' release form, or a quantification of the likelihood of Mrs. Peter being treated by an unidentified non-employee physician."

However, our review reveals that Ms. Peter's consent form separately listed Dr. Anderson, the foot and ankle specialist of OrthoCarolina, as the physician performing Ms. Peter's operation on 22 December 2010 from the hospital CMC Mercy. As found in *Ray*, this suggests that Ms. Peter looked to Dr. Anderson, separate and distinct from CMC Mercy and its personnel, to receive medical treatment. Although the consent and authorization forms did not identify Dr. Vullo by name, the consent form identified that "anesthesiologists . . . may not be employed by or be agents of the hospital." The authorization form also provided that "certain independent professional groups" were independent contractors and identified a non-comprehensive list of the independent professional groups that included Southeast Anesthesiology Consultants, P.A., a predecessor to Dr. Vullo's employer American Anesthesiology of the Southeast, PLLC. Therefore, comparing the facts of *Ray* and the facts in the case before us, we find them to be more analogous than dissimilar as plaintiffs argue.

Because it is clear from the record that the hospital defendants did not represent or hold out that the providers of Ms. Peter's anesthesia services were agents of the hospital defendants, plaintiffs' apparent agency arguments must fail. *See Holmes v. Univ Health Serv. Inc.*, 205 Ga. App. 602, 603, 423 S.E.2d 281, 283 (1992) (the plaintiff's arguments that an apparent agency relationship existed failed where forms that the plaintiff signed explicitly stated that "[p]hysicians providing medical services within this hospital are not employees of University Hospital. Each physician is an independent contractor"); *Cantrell v. Northeast Ga. Med Ctr.*, 235 Ga. App. 365, 365, 508 S.E.2d 716, 718 (1998) (no holding out by the hospital of the doctor as anything but an independent contractor where a sign over the registration desk advised patients that the doctors were independent contractors and the consent for treatment form also stated that "physicians . . . are not hospital employees, but are independent contractors[.]"); *Compare with Jennison v. Providence St. Vincent Med. Ctr.*, 174 Or. App. 219, 234, 25 P.3d 358, 367 (2001) (finding that it was reasonable for the patient to assume that the radiologist was a hospital employee where nowhere on the consent form did it indicate that the radiologists were independent contractors). We affirm the order of the trial court granting summary judgment in favor of the hospital defendants.

D. Loss of Consortium Claim

[3] Because we hold that summary judgment was erroneously entered as to plaintiffs' claims of negligence against defendant doctors, we also hold that Dr. Peter's loss of consortium claim, derivative of Ms. Peter's

negligence claim, should have survived a motion for summary judgment. The trial court erred in granting summary judgment in favor of defendants on Dr. Peter's loss of consortium claim.

Reversed in part; affirmed in part.

Judges HUNTER, Robert C. and GEER concur.

GRETCHEN J. PROPST, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

No. COA13-1072

Filed 3 June 2014

Collateral Estoppel and Res Judicata—multiple independent grounds for judgment—preclusive effect as to each issue

The Industrial Commission did not err in a Tort Claims Act case by granting summary judgment in favor of defendant on the grounds of immunity and the public duty doctrine based on collateral estoppel. Where a trial court bases its judgment on multiple independent grounds, each of which have been fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation.

Appeal by plaintiff from Order entered 18 May 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2014.

Rabon Law Firm, PLLC by Charles H. Rabon, Jr., and Marshall P. Walker, for plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Olga Vysotskaya, for the State.

STROUD, Judge.

Gretchen Propst ("plaintiff") appeals from an order entered 18 May 2012 by the Full Commission granting summary judgment in favor of the North Carolina Department of Health and Human Services ("defendant"). We affirm.

I. Background

Plaintiff filed a claim for damages under the Tort Claims Act on 9 September 2008. In that claim, she alleged that Dr. Bruce Flitt, the Gaston County Medical Examiner, negligently failed to perform his duties as medical examiner on 11 September 2005 when he signed a Medical Examiner's Report ("ME Report") that stated he had examined the body of plaintiff's son and included several inaccurate statements regarding her son's body. The ME Report stated that plaintiff's son's body was warm when examined and that he had brown eyes. Plaintiff claimed that these statements caused her substantial emotional distress because her son's eyes were blue and she had been told by the funeral home that her son's body had been stored in a refrigeration unit. She worried that the body she and her family had buried may not have been that of her son.

When they exhumed the body, they discovered that it was in fact plaintiff's son, but that her son had not been dressed in the burial attire she chose. She alleged that this discrepancy shows that Dr. Flitt and his assistants never actually viewed or examined her son's body, in violation of their duties. Plaintiff claimed that the failure of Dr. Flitt and his assistants to perform their duties in examining her son's body caused her severe emotional distress and "post traumatic stress syndrome." She sought $200,000 in damages.

On 30 July 2010, defendant filed a motion for summary judgment, contending that plaintiff's claim was barred by collateral estoppel because plaintiff had previously filed a negligence action against Dr. Flitt in his official and individual capacities in superior court. The superior court had granted summary judgment in favor of Dr. Flitt on grounds of immunity and the public duty doctrine by order entered 28 April 2010. Plaintiff did not appeal from the superior court's order. Defendant attached the pleadings, motions, and order from the prior suit to its summary judgment motion. Defendant further argued that even if the prior determination by the superior court did not preclude the issue from being contested in the present suit, defendant owed plaintiff no individual duty under the public duty doctrine.

The summary judgment motion was heard by Deputy Commissioner Glenn on 16 August 2010. Deputy Commissioner Glenn entered an order on 6 July 2011 denying defendant's motion for summary judgment. Defendant appealed to the Full Commission on 6 July 2011. The Full Commission granted defendant's motion for summary judgment by order entered 18 May 2012. It concluded that plaintiff's claim was barred by collateral estoppel because the superior court had already determined

that Dr. Flitt did not owe plaintiff any individual duty. It further concluded that even if it were not barred, plaintiff's claim fails because she has failed to show that Dr. Flitt owed her an individual duty, distinct from his duty to the public. However, due to an apparent clerical error, the order was not served on plaintiff until 28 May 2013. Plaintiff filed written notice of appeal to this Court on 25 June 2013.

II. Standard of Review

> The standard of review for an appeal from the Full Commission's decision under the Tort Claims Act shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.

Dawson v. N.C. Dept. of Environment and Natural Resources, 204 N.C. App. 524, 527, 694 S.E.2d 427, 430 (2010) (citation and quotation marks omitted).

> Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. The standard of review for summary judgment is de novo.

Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citations, quotation marks, and ellipses omitted).

III. Summary Judgment

The Industrial Commission granted summary judgment in favor of defendant because it concluded that plaintiff's claim was defeated by collateral estoppel and that Dr. Flitt did not owe any duty to plaintiff individually. Plaintiff argues that both of these conclusions were in error.

> Collateral estoppel applies when the following requirements are met: (1) the issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated;

> (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Urquhart v. East Carolina School of Medicine, 211 N.C. App. 124, 128, 712 S.E.2d 200, 204 (citation and quotation marks omitted), *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 389 (2011).[1]

> An issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined. A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical; if they are not identical, then the doctrine of collateral estoppel does not apply.

Williams v. Peabody, ___ N.C. App. ___, ___, 719 S.E.2d 88, 93 (2011) (citations, quotation marks, brackets, and footnote omitted).

Here, there is no dispute that the prior judgment was a final judgment on the merits,[2] that the issue of the public duty doctrine was actually litigated and decided in the prior suit, nor that there is sufficient identity of the parties.[3] However, plaintiff argues that the superior

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1. There has been some confusion in recent years over whether the "mutuality of parties" and privity is still required or not. *See, e.g.*, *In re K.A.*, ___ N.C. App. ___, 756 S.E.2d 837 (2014) (No. COA13-972) (acknowledging the confusion over whether mutuality is still required or not). In any event, as discussed below, there is no dispute that there is sufficient identity of parties for collateral estoppel to apply here.

2. The prior suit was resolved when the superior court granted summary judgment in favor of Dr. Flitt. "In general, a cause of action determined by an order for summary judgment is a final judgment on the merits." *Williams*, ___ N.C. App. at ___, 719 S.E.2d at 93.

3. Plaintiff's claims against defendant here are premised on the alleged negligence of Dr. Flitt and those he supervised, imputed to defendant through *respondeat superior*. Therefore, a judgment in favor of Dr. Flitt on the negligence claims bars the same claims being brought against defendant, his employer. *See Urquhart*, 211 N.C. App. at 129, 712 S.E.2d at 204-05 (holding that collateral estoppel applied where the prior judgment involved the plaintiff's suit against the state employee in his individual capacity and the subsequent suit was brought under the Tort Claims Act); *Kayler v. Gallimore*, 269 N.C. 405, 408, 152 S.E.2d 518, 521 (1967) ("[A] principal or master, sued for damages by reason of the alleged negligence of his agent or servant, may plead, in bar of such action, a judgment in favor of the agent or servant in a former action by or against the present plaintiff, which judgment establishes that the agent or servant was not negligent."); *Bullock v. Crouch*, 243 N.C. 40, 42, 89 S.E.2d 749, 751 (1955) ("[I]f the judgment in the action against the servant had terminated in favor of servant, since the defendants' liability was only derivative, no action could have been sustained against the defendants.")

court's determination on the public duty issue does not preclude her from contesting that issue in the present suit. She contends that because the superior court granted summary judgment both on the grounds of immunity and on the basis of the public duty doctrine, its determination of the duty issue was not *necessary* to its judgment, and therefore not entitled to preclusive effect.

The Restatement (Second) of Judgments supports plaintiff's position. The Second Restatement drafters comment that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27, cmt. i (1982). Nevertheless, plaintiff cites no North Carolina case adopting this rule, and we have found none. Other appellate courts around the country have split on whether to adopt this rule or the contrary rule from the First Restatement of Judgments, discussed below. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 251 (3d Cir. 2006) (observing that "[t]here is no consensus among the courts of appeals as to whether the First or Second Restatement offers the better approach").

We decline to follow the approach of the Second Restatement as to this issue because it is incompatible with the doctrine of collateral estoppel as it has been applied in this state.[4] The Second Restatement drafters explain their decision to give neither basis of a judgment with alternative bases preclusive effect as follows:

> First, a determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other one not even reached.

Id.

We are not convinced that these policy rationales justify a departure from the general rule that issues actually litigated and determined in a prior action preclude later relitigation of those issues. We have said that

4. The Restatements are persuasive, not binding authority, "[e]xcept as specifically adopted in this jurisdiction." *Hedrick v. Rains*, 344 N.C. 729, 729, 477 S.E.2d 171, 172 (1996).

> the prior judgment serves as a bar only as to issues actually litigated and determined in the original action. An issue is 'actually litigated,' for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and is in fact determined.

City of Asheville v. State, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citations, quotation marks, brackets, and emphasis omitted), *app. dismissed and disc. rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009). Under the rule urged by plaintiff and the Second Restatement, the parties could fully litigate two issues, either of which could independently support the trial court's judgment, but neither of which would have preclusive effect in a later case. A party would be free to relitigate either issue in a future case.

The First Restatement of Judgments suggests the opposite conclusion. The drafters of the First Restatement noted that when there are multiple independent grounds for a trial court's judgment, "it must be said either that both are material to the judgment or that neither is material." Restatement (First) of Judgments § 68, cmt. n (1942). They observed that "[i]t seems obvious that it should not be held that neither is material, and hence both should be held to be material." *Id.*

While this conclusion may not be *obvious*, as evidenced by the contrary conclusion in the later Restatement, we agree that both independent grounds of a prior judgment should have later preclusive effect, assuming all of the other elements of collateral estoppel are present. As the drafters of the Second Restatement recognized, "[t]he cases on this question of effect of alternative determinations are not numerous, and some are unclear in their rationale . . . . [T]he question is a close and difficult one." Restatement (Second) of Judgments § 27, Reporter's Note. To hold that a prior judgment is not preclusive on either ground on which it was based would undermine the entire purpose of the collateral estoppel doctrine, to "protect[] litigants from the burden of relitigating previously decided matters and promot[e] judicial economy by preventing needless litigation." *City of Asheville*, 192 N.C. App. at 17, 665 S.E.2d at 117 (citation and quotation marks omitted).

The illustration given by the drafters of the First Restatement explains why they came to this conclusion:

> A brings an action against B to recover interest on a promissory note payable to A, the principal not yet being due. B alleges that he was induced by the fraud of A to execute

> the note, and further alleges that A gave him a release under seal of the obligation to pay interest. The jury in answer to interrogatories finds that B was induced by A's fraud to execute the note, and also finds that A had given him a release under seal of the obligation to pay interest, and gives a verdict for B on which judgment is entered. After the note matures A brings an action against B for the principal of the note. The prior judgment is a defense to the action, since the finding that the execution of the note was procured by fraud is conclusive.

Restatement (First) of Judgments § 68, illus. 7. The Second Restatement uses this same illustration, but comes to the opposite conclusion. Restatement (Second) of Judgments § 27, illus. 15. Under the latter analysis, B would have had to relitigate the issue of fraud, as neither of the previous determinations would have preclusive effect. This result defeats the purpose of collateral estoppel previously discussed.

Additionally, this state's analysis as to what constitutes *dicta* supports the adoption of the rule of the First Restatement over that of the Second. The Second Restatement considered alternative grounds that support a judgment to be the equivalent of *dicta*. *See* Restatement (Second) of Judgments § 27, cmt. i. However, alternative, independent grounds for an appellate decision are not considered *obiter dicta* here. The Supreme Court has held that

> where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal.

Hayes v. City of Wilmington, 243 N.C. 525, 537, 91 S.E.2d 673, 682 (1956).

Moreover, we are not convinced that the possibility that the trial court erroneously decided one of the multiple grounds relied on outweighs the interests of judicial economy and the prevention of unnecessary relitigation. Our Supreme Court has explained that the doctrine of collateral estoppel applies even if the prior judgment may have been error:

> To be valid a judgment need not be free from error. Normally no matter how erroneous a final valid judgment may be on either the facts or the law, it has binding

> *res judicata* and collateral estoppel effect in all courts, Federal and State, on the parties and their privies.

King v. Grindstaff, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973). Therefore, we hold that where a trial court bases its judgment on multiple independent grounds, each of which have been fully litigated, and that judgment has not been appealed, the trial court's determination as to every issue actually decided has preclusive effect in later litigation.

Here, all elements of collateral estoppel are present. First, the issues involved in the present action are the same as those in the prior action. The issue of whether Dr. Flitt owed a duty to plaintiff is vital to plaintiff's negligence claim against defendant here, as it was in her claim against Dr. Flitt. Second, the issue of whether the public duty doctrine defeated the duty element of plaintiff's negligence claim was raised and actually litigated in the prior action. In Dr. Flitt's answer, he specifically pled the public duty doctrine as a defense. Plaintiff specifically and extensively briefed the issue of the public duty doctrine in her memorandum in opposition to Dr. Flitt's summary judgment motion in the superior court action. Further, the superior court specifically noted that Dr. Flitt was "entitled to summary judgment based on the public duty doctrine." Third, the issue of whether Dr. Flitt owed a duty to plaintiff was material to deciding plaintiff's negligence claim against him. *See Ray v. North Carolina Dept. of Transp.*, 366 N.C. 1, 5, 727 S.E.2d 675, 679 (2012) ("Because the public duty doctrine says that there is a duty to the public generally, rather than a duty to a specific individual, the doctrine operates to prevent plaintiffs from establishing the first element of a negligence claim—duty to the individual plaintiff."). Finally, as we held above, because the public duty doctrine was specifically relied on to support the trial court's judgment, and it alone could have supported the trial court's judgment, that issue was necessary and essential to the judgment.

We conclude that the superior court's summary judgment order collaterally estops plaintiff to contest the issue of the public duty doctrine. As a result, plaintiff cannot show that any duty was owed to her individually and her negligence claim against defendant must fail. *See Ray*, 366 N.C. at 5, 727 S.E.2d at 679. Therefore, we affirm the Industrial Commission's order granting defendant's motion for summary judgment.

IV. Conclusion

For the foregoing reasons, we conclude that plaintiff is precluded from contesting the issue of whether the public duty doctrine applies. Therefore, plaintiff cannot show that defendant or its employee, Dr.

Flitt, owed her any individual duty and her negligence claim fails as a matter of law. We accordingly affirm the Full Commission's order granting summary judgment to defendant.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

ELIZABETH McDUFFIE RUDDER, PLAINTIFF
v.
WILLIAM OVERTON RUDDER, DEFENDANT

No. COA13-424

Filed 3 June 2014

1. Domestic Violence—ex parte protective order—findings of fact—pre-printed form—minimally sufficient

The trial court did not err by entering an ex parte domestic violence protective order (DVPO) against defendant. The court's findings of fact marked on a pre-printed form were minimally sufficient to support its conclusions that defendant committed acts of domestic violence against plaintiff and that it clearly appeared that there was a danger of acts of domestic violence against plaintiff. The trial court's failure to mark the first box of Finding 2 was merely a clerical error.

2. Domestic Violence—one-year protective order—ex parte order expired—court lacked authority

The trial court erred by entering a one-year domestic violence protection order (DVPO) after an ex parte DVPO had been in effect for more than 18 months, but then expired without being renewed. The trial court did not have authority to enter the one-year DVPO that was based upon the same complaint as the ex parte DVPO.

Appeal by defendant from orders entered 23 November 2010 by Judge L. Walter Mills and 28 September 2012 by Judge Kirby Smith in Carteret County District Court. Heard in the Court of Appeals 23 September 2013.

No brief filed on behalf of plaintiff-appellee.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for defendant-appellant.

GEER, Judge.

Defendant William Overton Rudder appeals from an ex parte domestic violence protection order entered 23 November 2010 ("the ex parte DVPO") and a one-year DVPO entered 28 September 2012 ("the September 2012 DVPO"). Defendant primarily contends that the trial court erred in entering the September 2012 DVPO after the ex parte DVPO was in effect for more than 18 months, but then expired without being renewed. We hold that because at the time the ex parte DVPO expired without being renewed, it had been in effect for more than a year, the trial court did not have authority to enter the September 2012 DVPO that was based upon the same complaint. We, therefore, vacate the September 2012 DVPO. Because, however, we find defendant's arguments regarding the ex parte DVPO unpersuasive, we affirm that order.

Facts

On 23 November 2010, plaintiff Elizabeth McDuffie Rudder filed a complaint and motion for a DVPO against defendant, her husband. Plaintiff had permanently moved out of the marital home 14 November 2010. Plaintiff's verified complaint alleged:

> On November 1, 2010, I confronted Defendant about having an extra-marital affair. Defendant threw me on a couch, jumped on top of me and fractured my rib with his knee. The injury was documented by a physician. Defendant has attacked me physically on numerous occasions over the course of many years, including hitting me, throwing me on the floor and shoving me. Defendant encouraged me to kill myself by putting a gun in front of me and telling me to pull the trigger. Defendant has pointed a gun at me and said "click." Defendant has threatened to kill me and my immediate family.

The trial court entered an ex parte DVPO on the same day that plaintiff filed her complaint. The order found that defendant had committed acts of domestic violence against plaintiff, that there was a danger of future acts of domestic violence against plaintiff, and that defendant's conduct required that he surrender all firearms, ammunition, and gun permits. A "Notice of Hearing on Domestic Violence Protective Order" was issued, which scheduled a hearing on 6 December 2010 for the

purpose of determining "*whether the* [*23 November 2010 ex parte*] Order will be continued."[1] (Emphasis added.)

Thereafter, approximately 13 orders were entered continuing the hearing on the ex parte DVPO. The first continuance order was entitled "ORDER CONTINUING DOMESTIC VIOLENCE HEARING AND EX PARTE ORDER" and noted that "[t]his matter was scheduled for hearing for emergency relief pursuant to G.S. 50B-2."[2] This order also provided, in pre-printed text, that "this hearing is continued to the date and time specified below to allow for proper service upon the defendant." However, it is not contested that defendant was actually served on 23 November 2010, so it appears that this form was used for convenience, with little regard for its substantive content. In handwriting, the order stated that "[t]he parties agree to continue this matter to resolve the marital issues without prejudice to either party. The parties agree to not dissipate the marital assets except for reasonable living expenses." The order further specified that "[t]he Court orders that the ex parte order entered in this case is continued in effect until the date of the hearing set above."

Nearly all of the other continuance orders were on the same form and contained the same pre-printed language that the hearing was being continued to allow time for service on the defendant. Some of the continuance orders further identified, in handwriting, the reason for the continuances as being, for example, to allow, by consent, the parties time to "resolve the marital issues"; by consent, to address matters in other pending litigation involving the parties; based upon secured leave by counsel; and because of the inability of the trial court to hear the matter due to other cases on the calendar.

The final continuance order entered 17 May 2012 was on the same form and included the same language as the first continuance order: "This matter was scheduled for hearing for emergency relief pursuant to G.S. 50B-2." This order scheduled a hearing for 9:30 a.m. on 4 June 2012. On 4 June 2012, however, no hearing took place, the trial court did not enter an additional continuance, and the court did not renew the existing ex parte DVPO. The ex parte DVPO, therefore, expired on 4 June 2012.

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1. This order was on the form entitled "NOTICE OF HEARING ON DOMESTIC VIOLENCE PROTECTIVE ORDER," AOC-CV-305, Rev. 6/2000 Administrative Office of the Courts.

2. This order was on the form entitled "ORDER CONTINUING DOMESTIC VIOLENCE HEARING AND EX PARTE ORDER," AOC-CV-316, Rev. 12/04.

On 6 June 2012, defendant filed a motion pursuant to N.C. Gen. Stat. § 50B-3.1(f), requesting return of firearms seized from him pursuant to the ex parte DVPO. On 7 June 2012, plaintiff filed a Rule 60 motion, seeking relief from the 17 May 2012 continuance order "on the grounds of excusable neglect, clerical error, and mistake in that the date set for hearing this matter was explicitly intended to be heard during the June 4, 2012 *term* of court as opposed to the specific day of June 4, 2012." The record contains no indication that the trial court ever ruled on plaintiff's Rule 60 motion. Defendant, however, subsequently filed additional motions for return of his firearms on 12 June 2012 and 21 June 2012, using a *pro se* form.

The trial court calendared hearings on 31 August 2012 and 21 September 2012 to address various discovery-related motions in a related but separate divorce proceeding, as well as defendant's motion for return of firearms. At the hearing, plaintiff conceded that the *ex parte* DVPO had expired, but requested that the trial court nonetheless enter a one-year DVPO[3] based upon the underlying complaint. The trial court allowed plaintiff to present evidence to support the issuance of a one-year DVPO at the 31 August 2012 hearing. Defendant presented his evidence at the hearing on 21 September 2012.

On 28 September 2012, the trial court entered a one-year DVPO, finding that defendant had, nearly two years earlier, intentionally caused bodily injury to the plaintiff, placed her in fear of imminent serious bodily injury, and placed her in fear of continued harassment that rose to such a level as to inflict substantial emotional distress. Specifically, the trial court found:

> On November 1, 2010, the defendant shoved the plaintiff down on a couch and jumped on top of her. The defendant threatened to kill the plaintiff and her immediate family. The defendant pointed a gun at the plaintiff and informed her he could kill her without anyone ever knowing. The

3. N.C. Gen. Stat. § 50B-3 (2013) provides that "[p]rotective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year." We first note that this subsection, taken in context, clearly refers only to a DVPO entered after service of process and a hearing held after notice to the defendant, even though the general term "protective order" is used. N.C. Gen. Stat. § 50B-2 (2013) specifically addresses "temporary orders" and provides for a limited duration of an ex parte DVPO of 10 days, unless the ex parte order is continued by the trial court. We are, therefore, referring to this DVPO as a "one-year DVPO" to distinguish it from the ex parte DVPO, although we recognize that a DVPO entered after service and notice to the defendant could be entered for a fixed period of time less than one year.

> defendant placed a gun in front of the plaintiff and told her to pull the trigger and kill herself. Over the course of the marriage, the defendant physically assaulted the plaintiff and committed further acts of domestic violence.

Based on its findings, the trial court concluded that the "defendant has committed acts of domestic violence against the plaintiff," that "[t]here is danger of serious and immediate injury to the plaintiff," and that "[t]he defendant's conduct requires that he[] surrender all firearms, ammunition and gun permits." The court entered a DVPO effective for one year. Defendant timely appealed both the ex parte DVPO and the September 2012 DVPO to this Court.

Discussion

Initially, we note that the ex parte DVPO expired 4 June 2012, and the one-year DVPO was set to expire 28 September 2013, five days after this case was heard by this Court. This appeal is not, however, moot. *See Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (holding that defendant's appeal of expired DVPO was not moot because of " 'stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse[]' " and "the continued legal significance of an appeal of an expired domestic violence protective order" (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (1999))).

As explained in *Smith*, "there are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, . . . 'a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order].' " *Id.* (quoting *Piper*, 125 Md. App. at 753, 726 A.2d at 891). We, therefore, may properly review both the ex parte DVPO and the September 2012 DVPO.

I

[1] In reviewing the ex parte DVPO entered 23 November 2010, we determine " 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.' " *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (quoting *Burress v. Burress*, 195 N.C. App. 447, 449-50, 672 S.E.2d 732, 734 (2009)).

Defendant argues (1) that the trial court's findings of fact were insufficient to support its conclusion that "defendant has committed acts of domestic violence against the plaintiff" and (2) that specific facts do not support its conclusion that "it clearly appears that there is a danger of acts of domestic violence against the plaintiff." We disagree.

The trial court used pre-printed form AOC-CV-304, Rev. 8/09, entitled "EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION" for its order. The form contains 12 pre-printed "Additional Findings." Before each numbered finding is a box corresponding to the finding as a whole. Some of the pre-printed findings contain subparts with additional boxes to check, blank spaces to fill in, or space to provide additional information.

In this case, the trial court made the following relevant findings of fact by marking the boxes next to certain pre-printed provisions and adding the information set out below in italics:

> [_] 2. That on . . . *11-01-2010*, the defendant
>
> [x] a. . . . [x] intentionally caused bodily injury to [x] the plaintiff . . .
>
> [x] b. placed in fear of imminent serious bodily injury [x] the plaintiff [x] a member of the plaintiff's family [x] a member of the plaintiff's household
>
> [x] c. placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress [x] the plaintiff [x] a member of plaintiff's family [x] a member of plaintiff's household
>
> . . . .
>
> [x] 3. The defendant is in possession of, owns or has access to firearms, ammunition, and gun permits described below. . . .
>
> *The Defendant is in possession of hundreds of firearms and approximately 1000 boxes of ammunition which are spread through the marital residence.*
>
> [x] 4. The defendant

> [x] a. . . . [x] threatened to use a deadly weapon against the [x] plaintiff . . .
>
> [x] b. has a pattern of prior conduct involving the . . . [x] threatened use of violence with a firearm against persons
>
> [x] c. made threats to seriously injure or kill the [x] plaintiff . . .
>
> . . . .
>
> [x] e. inflicted serious injuries upon the [x] plaintiff . . . in that . . . :
>
> *Broken* [sic] *her rib.*

(Emphasis added to indicate information added by trial court to form.)

Defendant argues that by failing to mark the first box of Finding 2, which corresponds to Finding 2 as a whole, the trial court did not actually intend to make any of the findings marked under paragraph 2. It is apparent, however, that this omission was merely a clerical error.

" 'Clerical error' has been defined . . . as: 'An error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.' " *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *Black's Law Dictionary* 563 (7th ed. 1999)). Clerical errors include mistakes such as inadvertently checking the wrong box on pre-printed forms. *See In re D.D.J., D.M.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

Finding 2 on Form AOC-CV-304 corresponds to the definition of domestic violence set out in N.C. Gen. Stat. § 50B-1(a), which provides:

> (a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
>
> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.2 through G.S. 14-27.7.

The statute thus specifies several alternative ways in which one may commit an act of domestic violence.

The subparts of Finding 2 on Form AOC-CV-304 set out all the possible alternative findings that could support a finding of fact that the defendant committed an act of domestic violence. The form allows the trial court to indicate which alternatives apply by marking the relevant subparts. Thus, by checking the box next to Finding 2, the trial court indicates an ultimate finding of fact: that defendant committed an act of domestic violence. By marking the boxes next to the subparts of Finding 2, the trial court then provides more specific findings regarding how the defendant committed an act of domestic violence and against whom.

Here, the trial court provided the "date of most recent conduct" in the first line of Finding 2 and marked the subparts indicating what acts the defendant committed and against whom. Additionally, the trial court concluded as a matter of law that the defendant committed acts of domestic violence against the plaintiff. Under these circumstances, it is apparent that the trial court intended to mark the box next to Finding 2 and that its failure to do so was inadvertent and merely a clerical error. The error should, however, be corrected on remand. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.' " (quoting *State v. Linemann*, 135 N.C. App. 734, 738, 522 S.E.2d 781, 784 (1999))).

Defendant next argues that even if it is presumed that the trial court intended to mark Finding 2, the trial court's findings of fact are still insufficient. An ex parte DVPO may be issued "if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party . . . ." N.C. Gen. Stat. § 50B-2(c)(1). This Court has interpreted this provision to mean that "in order to issue an ex parte DVPO, the trial court must make findings of fact which include 'specific facts' which demonstrate 'that there is

a danger of acts of domestic violence against the aggrieved party[.]' " *Hensey*, 201 N.C. App. at 61, 685 S.E.2d at 546 (quoting N.C. Gen. Stat. § 50B-2(c)). Defendant argues that the ex parte DVPO in this case does not contain the required "specific facts."

In *Hensey*, the ex parte DVPO, which also was a pre-printed form order, did not itself set forth specific findings of facts in the DVPO, but rather appeared to incorporate by reference the allegations of the complaint. *Id.* at 62, 685 S.E.2d at 546. This Court concluded that "while it would be preferable for the trial court to set forth the 'specific facts' which support its order separately, instead of by reference to the complaint, the ex parte DVPO, read in conjunction with plaintiff's complaint, does provide sufficient information upon which we may review the trial court's decision to issue the ex parte DVPO." *Id.* at 64, 685 S.E.2d at 547.

In reaching its conclusion, the Court in *Hensey* rejected the defendant's argument that the ex parte DVPO must comply with Rule 52 of the Rules of Civil Procedure, which requires that a trial court sitting without a jury shall " 'find the facts specially.' " *Id.* at 62-63, 685 S.E.2d at 546-57. The Court concluded that ex parte orders under N.C. Gen. Stat. § 50B-2 "need not contain findings and conclusions that fully satisfy the requirements of [Rule 52]" because such a requirement "would be inconsistent with the fundamental nature and purpose of an ex parte DVPO, which is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm." 201 N.C. App. at 63, 685 S.E.2d at 547.

Here, in the space provided under Finding 2, the DVPO neither includes specific facts nor references the allegations of the complaint, although Finding 2 does specify the date of the most recent conduct by defendant. In addition, however, Finding 4 finds that defendant had threatened to use a deadly weapon against plaintiff, had a pattern of prior conduct involving the threatened use of violence with a firearm, had made threats to seriously injure the plaintiff, and had inflicted serious injuries on plaintiff by breaking her rib. While defendant argues that Finding 4 does not indicate whether defendant intentionally broke plaintiff's rib, that finding is included in Finding 2.

We hold that the combination of Finding 2 and Finding 4 are minimally adequate to supply the required "specific facts" necessary to support the conclusion that the defendant committed acts of domestic violence against the plaintiff and that "there is a danger of acts of domestic violence against the plaintiff." We, therefore, affirm the ex parte DVPO. We note, however, that the better practice would be to

include more specific facts under Finding 2 explaining the basis for the ultimate findings made by checking the boxes on the pre-printed form.

II

[2] Defendant next contends that the trial court erred by entering the September 2012 DVPO when the ex parte DVPO had expired after being in effect for more than a year. We agree.

In this case, the ex parte DVPO continued in effect for more than 18 months until it expired on 4 June 2012. We question whether the General Assembly intended for an ex parte DVPO to continue in effect for this length of time based on repeated continuances -- in this case, a total of 13. *See* N.C. Gen. Stat. § 50B-2(c)(5) ("Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. *A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown.* The hearing shall have priority on the court calendar."[4] (Emphasis added)). We need not, however, specifically address that issue in order to resolve this appeal.

The North Carolina Domestic Violence Act, set out in Chapter 50B of the General Statutes, specifies the procedural framework for the issuance of DVPOs. The statute defines a "protective order" as "any order entered pursuant to this Chapter upon hearing by the court or consent of the parties." N.C. Gen. Stat. § 50B-1(c). As this Court explained in *State v. Poole*, ___ N.C. App. ___, ___, 745 S.E.2d 26, 32, *appeal dismissed and disc. review denied*, ___ N.C. ___, 749 S.E.2d 885 (2013), because an ex parte DVPO is entered following a hearing, the phrase "protective order" when used in Chapter 50B encompasses both ex parte DVPOs and one-year DVPOs. Although the types of protection the two kinds of orders can provide are essentially the same, there are necessarily some procedural differences between an ex parte DVPO and a one-year DVPO.

As noted in *Hensey*, an ex parte DVPO "is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm." 201 N.C. App. at 63, 685 S.E.2d at 547. In contrast, the one-year DVPO is entered

4. The emphasized portion of this provision was added 1 October 2012 and is applicable to actions and motions filed on or after that date. 2012 N.C. Sess. Law 20 §§ 1, 3. Therefore, it is not applicable to this case. Nevertheless, it is indicative of the General Assembly's current intent to limit the length of time an ex parte DVPO may continue in effect.

only after notice to the defendant and an opportunity to participate in a full adversarial hearing. *Id.* at 61, 685 S.E.2d at 545. It is intended to address issues for a longer time period, although normally not more than three years, with temporary custody provisions limited to one year. *See* N.C. Gen. Stat. § 50B-3(b).

Unfortunately, Chapter 50B does not clearly distinguish between some of the characteristics of an ex parte order and a DVPO entered after notice to the defendant and an opportunity for a full adversarial hearing. However, reading the entire Chapter in context, it is apparent that N.C. Gen. Stat. § 50B-2 addresses the procedure and time limitations for ex parte or temporary orders, while the substantive protective provisions of any type of protective order are addressed by N.C. Gen. Stat. § 50B-3, and the time limitations of the one-year DVPO are addressed by N.C. Gen. Stat. § 50B-3(b).[5]

N.C. Gen. Stat. § 50B-3(b) specifies what relief a "protective order" may grant and, with respect to the time limitations for the one-year DVPO, provides:[6]

> Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

---

5. It would be absurd to read the provision of N.C. Gen. Stat. § 50B-3(b) that "protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year" as applying to an emergency order under N.C. Gen. Stat. § 50B-2(b) or an ex parte order under N.C. Gen. Stat. § 50B-2(c), since those sections include specific time requirements applicable to those orders. It would seem obvious that the statute would not permit the court to enter an ex parte order that lasted for a full year. But, as noted above, N.C. Gen. Stat. § 50B-1(c) (2013) also defines the term "protective order" broadly, to include "any order entered pursuant to this Chapter upon hearing by the court or consent of the parties."

6. The ex parte DVPO's time limitations are specifically addressed by N.C. Gen. Stat. § 50B-2(b) and (c).

In this case, we are addressing the plaintiff's request for the trial court to enter a one-year DVPO based upon an ex parte DVPO that had already remained in effect for more than a year based upon continuances of the hearing. Even if we assume, without deciding, that an ex parte DVPO may lawfully continue for more than a year through the mechanism of repeated continuances, in this case, the ex parte DVPO ultimately expired on 4 June 2012 when no order was entered continuing the ex parte DVPO in effect after that date.

We also note that N.C. Gen. Stat. § 50B-3(b) provides that even for the renewal of a one-year DVPO, the motion for renewal must be filed *before the expiration* of the existing order. When the motion to renew is filed prior to expiration of the one-year DVPO, the plaintiff must show "good cause" although the plaintiff need not show commission of an additional act of domestic violence after the entry of the original DVPO. This language implies that where even a one-year DVPO has expired, the plaintiff would need to allege and prove commission of an additional, more recent act of domestic violence to obtain a new order. That is, the plaintiff can rely upon the original acts that formed the basis for the issuance of the original ex parte DVPO and/or one-year DVPO for a limited time. Of course, the plaintiff is not prevented in any way from seeking a new DVPO in the event of new and additional acts of domestic violence, but the renewal and extensions of a DVPO based upon a particular act are limited by the statute.

The DVPO at issue here is clearly and exclusively based upon an act that occurred prior to the expiration of the ex parte order. The orders continuing the hearing on the ex parte order, including the one that set the matter for 4 June 2012, had scheduled the case "for hearing for emergency relief pursuant to G.S. 50B-2" — and not for entry of an independent order under N.C. Gen. Stat. § 50B-3. The orders referred back to the original ex parte order by noting that "[t]he Court orders that the ex parte order entered in this case is continued in effect until the date of the hearing set above." Ultimately, the ex parte order then expired by its own terms.

Applying N.C. Gen. Stat. § 50B-3(b), the ex parte DVPO had already been in effect for more than one year (the maximum permissible length of time even for a DVPO entered upon a full adversarial hearing under N.C. Gen. Stat. § 50B-2(c)(5)). We also note that no one-year DVPO that was subject to *renewal* under N.C. Gen. Stat. 50B-3 had ever been entered. Based upon the orders entered continuing the ex parte DVPO and setting this matter for hearing, upon expiration of the ex parte order after more than a year, the trial court no longer had jurisdiction under the original complaint to enter an order further extending the DVPO.

We note that this situation is distinguished from a case in which a plaintiff files a civil action or motion seeking a DVPO, but either because the plaintiff did not request an immediate ex parte order or because the trial court declined to issue an immediate ex parte order, the trial court has not entered an ex parte order and has scheduled a hearing upon the complaint or motion to consider issuance of a DVPO *after* service of process and notice of hearing to the defendant, under N.C. Gen. Stat. § 50B-2(b) (emphasis added):

> A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, *where no ex parte order is entered*, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

In fact, Form AOC-CV-305, Rev. 6/2000 has pre-printed language to provide notice of a hearing to the defendant in just that situation:

> 2. A hearing will be held before a district court judge at the date, time and location indicated below. At that hearing it will be determined whether emergency relief in protecting the plaintiff and the plaintiff's child(ren) should be granted.

This option was not checked in this case since an ex parte order was entered, and the first option, as noted above, was checked instead.

This case also does not present the issue whether a hearing upon a domestic violence complaint or motion, when no ex parte order was entered, could be continued repeatedly, even for more than a year, and we do not address that situation. In the case before us, plaintiff and the trial court proceeded as directed by the ex parte order issued under N.C. Gen. Stat. § 50B-2(c). As noted above, the ex parte DVPO was properly entered, remained in effect for 18 months by serial continuances of the

order, and then expired by its own terms. Thus, we hold that when an ex parte DVPO expires beyond the time limitations of N.C. Gen. Stat. § 50B-3(b) for a one-year DVPO without a motion to renew, the trial court no longer has authority to enter an order effectively further extending the expired DVPO, as the trial court would also be unable to extend even a one-year DVPO in this situation without a motion to renew.[7]

Because the trial court, in this case, lacked authority to enter the September 2012 order after the ex parte DVPO expired more than 18 months after its original entry, we vacate the September 2012 DVPO and remand for a hearing on defendant's motion for return of firearms. Because of our disposition of this appeal, we need not address defendant's remaining arguments regarding the September 2012 DVPO.

Affirmed in part, vacated in part, and remanded in part.

Chief Judge MARTIN and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
MAX TRACY EARLS, DEFENDANT

No. COA13-1128

Filed 3 June 2014

1. Evidence—testimony—minor child sex abuse victim—leading questions—fair opportunity to cross-examine

The trial court did not err in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecution to ask the 14-year-old victim leading questions, nor did it violate defendant's rights under the Sixth and Fourteenth Amendments. Leading questions were necessary to develop the witness's testimony. Further, the victim testified in open court and defendant had a full and fair opportunity to cross-examine her.

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7. As plaintiff here did not file a motion to renew under N.C. Gen. Stat. § 50B-3(b), we do not address whether an ex parte DVPO is actually subject to renewal in this manner, nor do we mean to suggest that it could be, particularly given the limitations of N.C. Gen. Stat. § 50B-2(c)(5).

2. Appeal and Error—preservation of issues—failure to cite authority

Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by allowing the prosecutor to read the younger victim's written statement to the jury, defendant waived this argument under N.C.R. App. P. 28(b)(6) by failing to cite any authority.

3. Appeal and Error—preservation of issues—failure to object—failure to argue plain error

Although defendant contended that the prosecutor improperly vouched for the younger victim's credibility by reading her statement to the jury in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case, he failed to preserve this issue by failing to object on this basis below and failing to argue plain error.

4. Appeal and Error—preservation of issues—failure to raise issue at trial—discretionary decisions not subject to plain error review

Although defendant contended that the trial court erred in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case by concluding that the younger victim was competent to testify, defendant never raised this issue below and discretionary decisions of the trial court are not subject to plain error review.

5. Constitutional Law—effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel based on defense counsel's failure to object to the introduction of a videotaped interview of a minor victim in a multiple indecent liberties with a child, two counts of incest, statutory rape, and rape of a child by an adult case. Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay and thus admissible.

6. Constitutional Law—due process—quoting Bible during sentencing

The trial court did not violate defendant's right to due process by quoting the Bible during sentencing. While the trial court should not have referenced the Bible or divine judgment in sentencing,

defendant cannot show that his rights were prejudiced in any way or that his sentence was based on the trial court's religious invocation.

Appeal by defendant from Judgments entered on or about 18 April 2013 by Judge Richard D. Boner in Superior Court, Catawba County. Heard in the Court of Appeals 6 March 2014.

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

M. Alexander Charns, for defendant-appellant.

STROUD, Judge.

Max Earls ("defendant") appeals from judgments entered after a Catawba County jury found him guilty of three counts of taking indecent liberties with a child, two counts of incest, one count of statutory rape, and one count of rape of a child by an adult. We conclude that there was no error at defendant's trial or sentencing.

I. Background

On or about 11 July 2011, defendant was indicted on three counts of taking indecent liberties with a child, two counts of incest, one count of statutory rape, and one count of rape of a child by an adult. Defendant pled not guilty and was tried by jury the week of 15 April 2013.

At trial, the State's evidence tended to show that in mid-to-late 2010, defendant was living with his wife and three daughters, Kate, Ellen, and Carol,[1] in Catawba County, NC. At the time, Kate was 13, Ellen was 11, and Carol was approximately 2. Kate and Ellen both testified at trial. Kate testified that defendant had sexually abused her by forcing her to engage in both vaginal and anal intercourse. Ellen testified that defendant made her take her clothes off and got into bed naked with her. She could not say aloud what he did to her after that, but while she was on the witness stand the prosecutor had her write down what happened. Ellen wrote that defendant had put his penis in her vagina. After the State rested, defendant presented his own evidence and testified on his own behalf. He denied that he ever touched his daughters inappropriately and claimed that they made up the story.

1. To protect the identities of the juveniles and for ease of reading we will refer to them by pseudonym.

The jury found defendant guilty of all charges. The trial court then consolidated the charges into two judgments and sentenced defendant to 300 to 369 months imprisonment with a consecutive sentence of 240 to 297 months imprisonment. Defendant filed timely written notice of appeal on 22 April 2013.

II. Guilt Phase

Defendant argues that the trial court erred in four ways during the guilt phase of his trial: (1) that the trial court erred in allowing the prosecution to ask the 14-year-old Ellen leading questions, which violated his rights under the Sixth and Fourteenth Amendments; (2) that the trial court erred by allowing the prosecutor to read Ellen's written statement to the jury; (3) that the prosecutor improperly vouched for Ellen's credibility by reading her statement to the jury; and (4) that Ellen was not competent to testify. We conclude that all of defendant's arguments are meritless and that several of them have not been properly preserved.

A. Leading Questions

[1] Defendant did object to one of the prosecutor's leading questions of Ellen on the basis of leading. We review the trial court's decision to overrule this objection for an abuse of discretion. *See State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) ("Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion.").

The prosecutor and Ellen had the following exchange leading to defendant's objection:

> [Prosecutor]: I'm going to show you what's marked as State's Exhibit 6. I'm going to ask you, when I was questioning you earlier and I asked you to write down what your father did to you, is this your writing?
>
> [Ellen]: Yes.
>
> [Prosecutor]: Okay. And you wrote that?
>
> [Ellen]: Yes.
>
> [Prosecutor]: And you wrote that while you were sitting on the witness stand?
>
> [Ellen]: Yes.
>
> [Prosecutor]: And this happened to you, is that true?
>
> [Ellen]: Yes.

[Prosecutor]: And your father did this to you, is that true?

[Defense Counsel]: Objection to the leading.

THE COURT: The objection is overruled.

[Prosecutor]: Is that true?

[Ellen]: Yes.

This question was the only one to which defendant objected. Any other objection to the prosecutor's questions has not been preserved. N.C.R. App. P. 10(a)(1). The control of witness examination is discretionary, *Riddick*, 315 N.C. at 756, 340 S.E.2d at 59, and not reviewable for plain error, *see State v. Norton*, 213 N.C. App. 75, 81, 712 S.E.2d 387, 391 (2011) (noting that "discretionary decisions of the trial court are not subject to plain error review.").

> The general rule is that leading questions should be asked only on cross-examination. However, a trial judge must exercise reasonable control over the mode of interrogating witnesses. Leading questions should be permitted on direct examination when necessary to develop the witness's testimony.

Riddick, 315 N.C. at 755, 340 S.E.2d at 59 (citations, quotation marks, and ellipses omitted).

Here, Ellen testified in response to a non-leading question that something bad happened between her and defendant. She testified that she was watching TV in her sister's basement bedroom when defendant came in and sat down on the bed next to her. She stated that he told her to undress and took his clothes off. The prosecutor asked what happened next, but Ellen did not respond. She had already been crying at several points throughout her testimony and it is clear from the transcript that she refused to look at anyone in the eye or answer questions about what happened after her father got into the bed with her naked.

In response, the prosecutor began asking her more leading questions, encouraging her to tell the truth and to say what happened. She responded to various questions about the people with whom she had discussed what had happened, but would not say what defendant did to her. Out of the presence of the jury, the prosecutor attempted to refresh Ellen's recollection by having her read a prior written statement she had made, but Ellen refused to look at it. The trial court instructed Ellen to answer both the prosecutor's and the defense attorney's questions. The court also warned the prosecutor that if Ellen refused to answer

questions on cross-examination, he would have to strike her testimony. When the jury returned, she continued not to respond to questions about what defendant did to her. While Ellen was still on the witness stand, the prosecutor had Ellen write down what defendant did to her. They then had the exchange discussed above.

> The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

State v. Greene, 285 N.C. 482, 492-93, 206 S.E.2d 229, 236 (1974).

Here, the prosecutor was attempting to ask a 14-year-old witness explicit questions about her father's sexual conduct toward her. She was clearly very reluctant to testify about it in detail and out loud. The prosecutor repeatedly urged Ellen to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what defendant did to her. Leading questions were clearly necessary here to develop the witness's testimony. Given the facts of this case, we cannot say that the trial court abused its discretion in permitting the prosecutor to ask Ellen leading questions. *See Riddick*, 315 N.C. at 756, 340 S.E.2d at 59.

Defendant also makes a brief argument that the prosecutor violated his right to confront his accuser under the Sixth and Fourteenth Amendments by asking Ellen leading questions. He cites no case holding that a trial court's decision to allow leading questions on direct examination implicates a criminal defendant's confrontation rights. Ellen testified in open court and defendant had a full and fair opportunity to cross-examine her, which he did. This argument is meritless.

B. Reading to the Jury

[2] Defendant next argues that it was error for the trial court to permit the prosecutor to read Ellen's in-court, written statement to the jury. The challenged statement was a one-line written statement about that which Ellen could not bring herself to say aloud: that defendant placed his penis in her vagina. It was made in court, before the jury, and defendant had an opportunity to cross-examine her about the statement, an opportunity he took advantage of. Other than a single reference—without a cite—to that which "Confrontation requires," he makes no argument that any rule of evidence, statute, or constitutional provision was violated by this manner of presentation. Therefore, we have no legal basis upon which to review this alleged error. *See* N.C.R. App. P. 28(b)(6). It is not the role of this Court to craft defendant's arguments for him. *Viar v. North Carolina Dept. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (stating that "[i]t is not the role of the appellate courts, . . . to create an appeal for an appellant").

C. Vouching for Credibility of the Witness

[3] Defendant further argues that the prosecutor vouched for Ellen's credibility by reading her in-court, written statement to the jury. The prosecutor never made any statement directly about Ellen's credibility. Defendant simply contends that the act of reading the statement itself was equivalent to vouching for her credibility. He did not object on this basis below and does not specifically argue on appeal that this alleged error would constitute plain error. Therefore, it has not been preserved for our review. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error.").

D. Ellen's Competency

[4] Defendant does argue that the admission of Ellen's testimony constituted plain error because she was incompetent to testify. As defendant notes, "the competency of a witness is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987) (citation, quotation marks, and emphasis omitted). Defendant never raised the issue of Ellen's competency below and "discretionary decisions of the trial court are not subject to plain error review." *Norton*, 213 N.C. App. at 81, 712 S.E.2d at 391. Therefore, this alleged error has not been preserved for our review.

III. Ineffective Assistance of Counsel

[5] Defendant next argues that his trial counsel rendered ineffective assistance of counsel by not objecting to the introduction of a videotaped interview of Ellen.

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Ballance, ___ N.C. App. ___, ___, 720 S.E.2d 856, 867 (2012) (citation and quotation marks omitted). Defendant cannot show that his trial counsel's performance fell below an objective standard of reasonableness or that the failure to object prejudiced him if the evidence to which he failed to object was admissible.

Here, the out-of-court videotaped statement was introduced to corroborate Ellen's testimony as a prior consistent statement and the trial court gave a limiting instruction to that effect. "A prior consistent statement may be admissible as non-hearsay even when it contains new or additional information when such information tends to strengthen or add credibility to the testimony which it corroborates. Out-of-court statements offered to corroborate a child's testimony regarding sexual abuse have been held to be non-hearsay." *State v. Treadway*, 208 N.C. App. 286, 290, 702 S.E.2d 335, 341 (2010) (citations and quotation marks omitted), *disc. rev. denied*, 365 N.C. 195, 710 S.E.2d 35 (2011). There is no colorable argument that this evidence was inadmissible and defendant makes none. Therefore, we hold that defendant has failed to show that he received ineffective assistance of counsel.

IV. Sentencing Phase

[6] Defendant next argues that the trial court violated his right to due process by quoting the Bible during sentencing.

> A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980).

The trial court heard arguments from both attorneys, but neither aggravating nor mitigating evidence was offered. The State asked for all sentences to run consecutively, while defendant asked for a single sentence. Defendant's only argument at the sentencing hearing was that it was a close case and that "he has been a caring father and husband and supportive." Before pronouncing its sentence, the trial court addressed defendant:

> Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we will keep them safe from harm the best as we're able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that's inflicted in these cases is incalculable. It's murder of the human spirit in a lot of ways. I'm going to enter a judgment in just a moment. But some day you're going to stand before another judge far greater than me and you're going to have to answer to him why you violated his law and I hope you're ready when that day comes.

Defendant correctly observes that taking into account the religious beliefs of either the trial judge or the defendant is an improper sentencing consideration. "Courts . . . cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it." *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991). However, a trial court's religious references during sentencing only violate due process "where impermissible personal views expressed at sentencing were the basis of the sentence." *United States v. Traxler*, 477 F.3d 1243, 1249 (10th Cir. 2007), *cert. denied*, 552 U.S. 909, 169 L.Ed. 2d 186 (2007).

As the Fourth Circuit observed in *Bakker*, "[t]o a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage. As the community's spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others." *Bakker*, 925 F.2d at 740 (citation, quotation marks, and footnote omitted). In that case, the Fourth Circuit remanded for a new sentencing hearing because it was concerned "that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed." *Id.* at 741.

In *Arnett v. Jackson*, 393 F.3d 681 (6th Cir. 2005), *cert. denied*, 546 U.S. 886, 163 L.Ed. 2d 193 (2005), the Sixth Circuit addressed a similar set of circumstances to those here. In *Arnett*, an Ohio state trial court sentenced the defendant to a fifty-one year prison term for pandering obscenity and ten counts of rape of a child. 393 F.3d at 684. The victim in that case was the daughter of defendant's live-in girlfriend. *Id.* at 683. At the sentencing hearing, the trial court castigated defendant for his crimes, emphasizing the long-term trauma he inflicted on the victim. *Id.* at 683-84. The sentencing court also stated,

> that passage where I had the opportunity to look is Matthew 18:5, 6. "And whoso shall receive one such little child in my name, receiveth me. But, whoso shall offend one of these little ones which believe in me, it were better for him that a millstone were hanged about his neck, and he were drowned in the depth of the sea."

Id. at 684. After quoting this passage from Matthew, the court pronounced its sentence. *Id.* Defendant appealed his sentence to the Ohio appellate courts. *Id.* The Ohio Court of Appeals vacated his sentence because of the trial court's comments. *Id.* The State appealed and the Ohio Supreme Court reversed the Court of Appeals, upholding his sentence. *Id.* After exhausting his direct appeals, the defendant filed a petition for writ of habeas corpus with the federal district court. *Id.* The federal district court found that the state courts had violated defendant's due process rights and ordered that he be released or resentenced. *Id.* at 685.

On appeal, the Sixth Circuit reversed the district court. *Id.* at 688. The appellate court concluded that

> There is nothing in the totality of the circumstances of Arnett's sentencing to indicate that the trial judge used the Bible as her "final source of authority," as found by

> the district court. Moreover, the Biblical principle of not harming children is fully consistent with Ohio's sentencing consideration to the same effect. If the trial judge had actually sentenced Arnett based upon a belief that God commanded that he be "drowned in the depth of the sea," we would expect the sentence imposed to be the maximum length possible. In reality, he was sentenced in the lower half of the sentencing range allowable under Ohio law.

Id. It accordingly held that the defendant's "due process rights were not violated by the judge's Biblical reference at sentencing." *Id.*

While the trial court here should not have referenced the Bible or divine judgment in sentencing, defendant cannot show that his rights were prejudiced in any way or that his sentence was based on the trial court's religious invocation. The trial court consolidated the convictions into two judgments: it consolidated the one conviction for rape of a child into the first judgment along with one count of indecent liberties and one count of incest; the remainder of the convictions were consolidated in the second judgment. The trial court sentenced defendant to 300 to 369 months imprisonment with a consecutive sentence of 240 to 297 months imprisonment. The most serious offense in the first judgment was rape of a child, which carries a 300 month mandatory minimum sentence, N.C. Gen. Stat. § 14-27.2A(b) (2009). The most serious offenses in the second judgment were Class B1 offenses. Defendant had a prior record level of 1. The presumptive range for a prior record level 1 offender convicted of a Class B1 felony was 192-240 months. Thus, the trial court sentenced defendant at the mandatory minimum for the first judgment and within the presumptive range for the second. *See* N.C. Gen. Stat. § 15A-1340.17 (2009).

The crimes of rape of a child and incest severely harm young children, often for the remainder of their lives. "[O]ur society has a long history of sternly punishing those people who hurt young children." *Arnett*, 393 F.3d at 687. The severe punishments imposed by our General Statutes for such crimes recognize this harm. The trial court's remarks similarly touched on this theme and were clearly aimed at lecturing defendant about the impact of his crimes on his daughters and on the community. In doing so, he acted as the "embodiment of public condemnation and social outrage." *Bakker*, 925 F.2d at 740.

"[W]e cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because"

of the trial court's religious invocation at sentencing. *State v. Bright*, 301 N.C. 243, 262, 271 S.E.2d 368, 380 (1980).[2] "In our opinion, the evidence in this case justified the sentence imposed." *Bright*, 301 N.C. at 262, 271 S.E.2d at 380. Nevertheless, we remind trial courts that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." *State v. Tice*, 191 N.C. App. 506, 516, 664 S.E.2d 368, 375 (2008).

V. Conclusion

For the foregoing reasons, we conclude that defendant has shown no prejudicial error at trial or sentencing and has failed to show that he received ineffective assistance of counsel.

NO ERROR.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
ANTONIO NEAL GRAY

No. COA13-1081

Filed 3 June 2014

1. Pretrial Proceedings—motion to continue—denied—evidence given to defense counsel at last minute

The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by denying defendant's motion to continue where the prosecutor presented defense counsel with a copy of statement made by an alleged co-conspirator, implicating defendant, at the very last minute. The statement did not significantly change the case to defendant's prejudice so as to require additional time to prepare for trial.

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2. *See also State v. Ledwell*, 171 N.C. App. 314, 321, 614 S.E.2d 562, 567 (2005) (holding that an error in sentencing was not prejudicial when defendant was sentenced in the presumptive range); *United States v. Salama*, 974 F.2d 520, 522 4th Cir. (1992) (holding that the trial court's improper statements regarding the defendant's nationality did not constitute a due process violation where "any impropriety of the district court's remarks did not infect the sentence."), *cert. denied*, 507 U.S. 943, 122 L.Ed. 2d 727 (1993).

2. Evidence—opinion testimony of detective—interpretation of text messages—no plain error

The trial court did not plainly err in a conspiracy to commit robbery with a dangerous weapon case by allowing testimony of a detective concerning his opinions, decisions, observations, and interpretation of text messages. Regardless of whether the admission of the testimony was error, given the overwhelming and uncontroverted evidence of defendant's guilt, the alleged error did not amount to plain error requiring a new trial.

3. Evidence—authentication—photographs of text messages—testimony—sufficient

The trial court did not err in a conspiracy to commit robbery with a dangerous weapon case by allowing the State to introduce into evidence photographs of text messages taken from an alleged co-conspirator's cell phone. Testimony from the detective who recovered the text messages from the phone and testimony from the person the co-conspirator was communicating with in the text messages was sufficient to authenticate the exhibit.

Appeal by defendant from judgments entered 5 April 2013 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 19 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sowerby, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

McCULLOUGH, Judge.

Antonio Neal Gray ("defendant") appeals from judgments entered upon his convictions for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. For the following reasons, we find no error.

I. Background

On 16 July 2012, defendant was arrested pursuant to warrants finding probable cause to believe defendant committed the following offenses on 11 July 2012: two counts of attempted robbery with a dangerous weapon, one count of conspiracy to commit robbery with a dangerous weapon, and one count of first degree burglary. On

11 September 2012 a Wake County Grand Jury indicted defendant on the charges in case numbers 12 CRS 215921 and 215922. Defendant pled not guilty and his cases came on for trial in Wake County Superior Court before the Honorable G. Wayne Abernathy on 3 April 2013.

At trial the State's evidence tended to show the following: Isai Ntirenganya was a car dealer and a club promoter in Raleigh. Through his role as a promoter, Mr. Ntirenganya met Alneisa McKoy, who expressed interest in doing some promotion work. On the evening of 11 July 2012, Mr. Ntirenganya met up with Ms. McKoy and her friend, Allison Smith, at a sweepstakes parlor and took them to his friend's home in a trailer park off New Bern Avenue to talk about promotion work. Mr. Ntirenganya's friend, Kory Clark, was the only one home at the time.

Mr. Ntirenganya and Mr. Clark both testified that they and the two women were just hanging out, talking about promotion opportunities, drinking, and smoking marijuana. Mr. Ntirenganya and Mr. Clark recalled that during this time, Ms. McKoy and Ms. Smith were on their phones texting, were giggling and whispering to each other, and were back and forth to the bathroom numerous times. Mr. Clark found their behavior suspicious.

At some point, Mr. Clark left the trailer to buy beer and cigarettes from a nearby convenience store. The women wanted to go with Mr. Clark and leave Mr. Ntirenganya by himself, but Mr. Clark left without them. When Mr. Clark returned several minutes later, he locked the door behind him.

Shortly thereafter, Mr. Ntirenganya and Ms. McKoy went to a back room in the trailer to talk. At that time, two men burst through the door that Mr. Clark had locked upon his return from the convenience store. Mr. Ntirenganya testified that someone jumped on his back and they tumbled to the floor. Mr. Ntirenganya recalled someone instructing him to "[g]et on the ground[]" and a female screaming "[s]omebody got a gun." The man that jumped on Mr. Ntirenganya's back was smaller than Mr. Ntirenganya and Mr. Ntirenganya was able to wrestle away from him and flee the trailer.

Mr. Clark testified that he heard the commotion and fled the trailer through another door. Mr. Clark did not see the intruders.

Both Mr. Ntirenganya and Mr. Clark indicated that nothing appeared to be missing from the trailer following the attempted robbery. Mr. Ntirenganya's wallet and keys, which were on top of cabinets near the door, appeared undisturbed.

In addition to Mr. Ntirenganya and Mr. Clark, Ms. Smith and Ms. McKoy testified at trial. Their testimony revealed that they planned to rob Mr. Ntirenganya with James Diaz and defendant, who they identified as the intruders. At the time, Ms. Smith was in a relationship with Mr. Diaz and Ms. McKoy was in a relationship with defendant. Although defendant did not initially want to take part in the robbery, he went along with the plan. Ms. Smith and Ms. McKoy each described the plan in detail and testified that they were communicating with Mr. Diaz and defendant through text messages to give directions to the trailer, to inform them how many people were in the trailer, and to let them know that the door to the trailer was unlocked. These text message conversations were admitted into evidence at trial.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court allowed defendant's motion as to count two in case number 12 CRS 215921, attempted robbery with a dangerous weapon from the person of Mr. Clark, and denied the motion as to the remaining charges. Defendant did not put on any evidence and the case was given to the jury.

On 5 April 2013, the jury returned verdicts finding defendant guilty of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. The trial court then entered judgments sentencing defendant to a term of 23 to 40 months for conspiracy to commit robbery with a dangerous weapon and a consecutive term of 59 to 83 months imprisonment for attempted robbery with a dangerous weapon and first degree burglary, which were consolidated for judgment. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises the following three issues on appeal: whether the trial court (1) erred in denying his motion to continue; (2) plainly erred in allowing testimony of a detective concerning his opinions, decisions, observations, and interpretation of text messages; and (3) erred in allowing the State to introduce text messages from Mr. Diaz's cell phone. We address each issue in order.

Motion to Continue

[1] The trial court granted defense counsel a twenty-four hour continuance on 2 April 2013. Then, as the State prepared to call defendant's case for trial on 3 April 2013, defense counsel renewed his motion to continue asserting he needed additional time to prepare for trial following the

late receipt of a statement by Ms. McKoy implicating Mr. Diaz as the possessor of the gun during the attempted robbery. Specifically, defense counsel argued he prepared for trial as if defendant possessed the gun during the attempted robbery and he needed extra time to prepare the defense following receipt of Ms. McKoy's statement, which defense counsel claimed changed the theory of the State's case against defendant to acting in concert.

The trial court rejected defendant's argument and denied the motion to continue. The trial court reasoned that Ms. McKoy's statement was duplicative, did not introduce any new actors or witnesses, and did not significantly change the State's case against defendant. The trial court explained that, under the law, it did not matter who possessed the gun; if one of the perpetrators possessed a gun, all perpetrators were guilty to the same extent. Additionally, the trial court noted it had already granted defendant a twenty-four hour continuance.

Now on appeal, defendant contends the trial court erred in denying his motion to continue. We disagree.

As this Court has recognized,

> "Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001) (citing *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). "'Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice.'" *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (quoting *Doby v. Lowder*, 72 N.C. App. 22, 24, 324 S.E.2d 26, 28 (1984)). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.'" *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996) (quoting *State v. Covington*, 317 N.C. 127, 129, 343 S.E.2d 524, 526 (1986)).

In re D.Q.W., 167 N.C. App. 38, 40-41, 604 S.E.2d 675, 676-77 (2004).

> "To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show 'how his case would have been

> better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion.' '[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance.' ' "[A] postponement is proper if there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts." ' "

Id. at 41, 604 S.E.2d at 677 (quoting *State v. McCullers*, 341 N.C. 19, 31–32, 460 S.E.2d 163, 170 (1995) (quoting *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986); *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986); and *State v. Tolley*, 290 N.C. 349, 357, 226 S.E.2d 353, 362 (1976) (other citation omitted))).

In support of his argument that the trial court erred, defendant cites two cases, *State v. Smith*, 178 N.C. App. 134, 631 S.E.2d 34 (2006) and *State v. Pickard*, 107 N.C. App. 94, 418 S.E.2d 690 (1992), in which trial courts denied the respective defendants' motions for continuances. This Court subsequently affirmed the trial courts' decisions in both of those cases. *Smith*, 178 N.C. App. at 142-44, 631 S.E.2d at 39-41; *Pickard*, 107 N.C. App. at 100-01, 418 S.E.2d at 693-94. Defendant then argues a different result is warranted in this case because it is distinguishable from *Smith* and *Pickard*. Specifically, defendant repeats the argument made before the trial court that, while Ms. McKoy's statement is less inculpatory of defendant, the statement was prejudicial to defendant because it changed the theory of the case against him at the eleventh hour.

Although the present case may be distinguished from *Smith* and *Pickard*, we are not convinced that the trial court erred in denying defendant's motion to continue. We agree with the trial court that Ms. McKoy's statement did not significantly change the case to defendant's prejudice so as to require additional time to prepare for trial beyond the twenty-four hour continuance already granted by the trial court. Thus, we hold the trial court did not abuse its discretion in denying defendant's motion to continue.

To the extent defendant argues the denial violated his constitutional rights, defendant was not prejudiced. As argued by the State, there is nothing in the record tending to show that the State implied it was proceeding to trial solely on the theory that defendant possessed the gun. In fact, defense counsel should not have been surprised by Ms. McKoy's statement. During defendant's bond hearing on 11 February 2013, months before trial, the State summarized the evidence against defendant. In that summary, the State indicated that Mr. Diaz possessed

the gun during the attempted robbery. Defense counsel was present at the hearing.

Moreover, there was contradictory testimony elicited by the State at trial from which the jury could have determined defendant possessed the gun during the attempted robbery. Ms. Smith testified that defendant possessed the gun while Ms. McKoy testified that Mr. Diaz entered the trailer with the gun.

Opinion Testimony

[2] At trial, the State called Detective Snowden of the Raleigh Police Department to testify. The State then questioned Detective Snowden about text messages between the perpetrators on the night of the attempted robbery. Detective Snowden testified about three separate text message conversations: a conversation between Ms. McKoy and defendant, a conversation between Mr. Diaz and Ms. Smith, and a conversation between Mr. Diaz and Ms. McKoy.

When questioned about the text messages between Ms. McKoy and defendant, Detective Snowden stated "it was clear . . . that [Ms. McKoy] had assisted [defendant] with the plan and execution of the attempted robbery. And it looked like directions were given to [defendant's] cell phone and allowing access to the residence." Detective Snowden also testified that the address provided to defendant by Ms. McKoy in the text messages corresponded to the trailer where the attempted robbery took place and it appeared defendant was asking Ms. McKoy if the door to the trailer was open. When questioned about his observations of the text messages between Mr. Diaz and Ms. Smith, Detective Snowden responded that they appeared to illustrate "the actual time line [sic] of the attempted robbery, along with, [he] guess[ed], the escape of Ms. Smith." Detective Snowden stated "[i]t was clear that [Ms. Smith] had helped her boyfriend, Mr. Diaz, plan and execute the attempted robbery." Detective Snowden further indicated that defendant's and Ms. McKoy's nicknames appeared in the text message conversation. When questioned about his observations of the third text message conversation between Ms. McKoy and Mr. Diaz, Detective Snowden stated, "it appeared that directions were being given, the doors were being asked to be unlocked, and then it seemed like they were trying to find Ms. Smith."

Detective Snowden then described his overall impression from the text messages as follows:

> Just looking at the text messages, again, like I said, it kind of gave a good timeline of what had occurred, that a

> robbery was being planned with Mr. Diaz and [defendant] involved, and that the girls were part of that robbery, and they were supposed to open a door. They were telling them how much money was there, how many people -- or how many victims might be there.
>
> Just -- all together, it just -- it kind of put everything in place as far as a robbery was going to be done, but, as described by the victims, it was botched, and nothing was gotten. And it seemed like, once Ms. Smith got lost, it also showed you they were trying to find her, you know, and direct her how to get to a certain spot to be picked up.

Defendant did not object to Detective Snowden's testimony at trial. Yet, now on appeal, defendant contends the trial court plainly erred in allowing Detective Snowden to testify regarding his opinions and observations of the text messages. We disagree.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2014).

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

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

Regardless of whether or not the admission of Detective Snowden's testimony concerning his opinion and observations from the text messages was error, given the overwhelming and uncontroverted evidence of defendant's guilt in the record, the alleged error does not amount to plain error requiring a new trial.

Text Messages

[3] As referenced, at trial, the State introduced photographs of text messages between Mr. Diaz and Ms. Smith and between Mr. Diaz and Ms. McKoy that were found on Mr. Diaz's cell phone following his arrest. Defendant did not initially object to the admission of the photographs of the text messages and they were admitted into evidence as the State's exhibits ten and twelve. At the request of the State, Detective Snowden read the text messages photographed in exhibit ten aloud in open court. Defendant did not object. However, immediately after exhibit twelve was admitted and the State requested that Detective Snowden read the photographed text messages between Mr. Diaz and Ms. McKoy in open court, defense counsel asked to be heard and objected to the admission of exhibit twelve based on lack of authentication. After hearing arguments, the trial court overruled defendant's objection.

Defendant now contends the trial court erred in allowing the photographs of the text messages between Mr. Diaz and the two women to be admitted into evidence.

At the outset, we note defendant's objection was untimely as to the admission of exhibit ten. Therefore, defendant has not preserved the issue for appeal. *See* N.C. R. App. P. 10(a)(1) (2014) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Nevertheless, the following analysis for exhibit twelve applies equally to exhibit ten.

In support of his argument that there was inadequate authentication, defendant cites *State v. Taylor*, 178 N.C. App. 395, 632 S.E.2d 218 (2006). In *Taylor*, the State sought to admit printouts or transcripts of text messages sent to and from the victim's cell phone. *Id.* at 412, 632 S.E.2d at 230. In order to authenticate the text messages, the State called employees of the cell phone company to testify concerning how the company kept records of its customers' text messages and how they are retrieved. *Id.* at 413, 632 S.E.2d at 230. This court held the combination of the employee's testimony and the circumstantial evidence within the text messages was sufficient to authenticate the evidence. *Id.*

Defendant now argues the same type of testimony was needed in this case to authenticate the photographs of the text messages admitted as exhibit twelve. We disagree.

The North Carolina Rules of Evidence provide that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2013). The rule further provides a nonexclusive list of ways to authenticate evidence, including "testimony of a witness with knowledge 'that a matter is what it is claimed to be.' " *Taylor*, 178 N.C. App. at 413, 632 S.E.2d at 230 (quoting N.C. Gen. Stat. § 8C-1, Rule 901(b)(1)).

In this case, Detective Snowden testified that he took pictures of text messages on Mr. Diaz's cell phone while searching the phone incident to Mr. Diaz's arrest. Detective Snowden then identified the photographs in exhibit twelve as screen shots of Mr. Diaz's cell phone and testified that they were in substantially the same condition as when he obtained them. Ms. McKoy, with whom Mr. Diaz was communicating in the text messages, also testified to the authenticity of exhibit twelve. Specifically, Ms. McKoy testified that she, Mr. Diaz, Ms. Smith, and defendant had planned to rob Mr. Ntirenganya. The plan was that she and Ms. Smith would meet up with Mr. Ntirenganya and communicate with Mr. Diaz and defendant through text messages to let them know what was going on. Ms. McKoy testified that she sent text messages to Mr. Diaz and defendant telling them where the trailer was located, how many people were in the trailer, and that the door was open. Ms. McKoy then identified exhibit twelve as the text message conversation between her and Mr. Diaz. Ms. McKoy further stated exhibit twelve was an accurate representation of her text message conversation with Mr. Diaz.

We hold the testimony in this case by Detective Snowden, who recovered the text messages from Mr. Diaz's cell phone, and Ms. McKoy, with whom Mr. Diaz was communicating in the text messages illustrated in exhibit twelve, was sufficient to authenticate exhibit twelve. Thus, the trial court did not err in admitting the photographs into evidence.

III. Conclusion

For the reasons discussed above, the trial court did not error in denying defendant's motion to continue or in allowing the photographs of the text messages into evidence at trial. Additionally, the trial court did not plainly error in allowing the testimony of Detective Snowden.

No Error.

Judges HUNTER, Robert C., and GEER concur.

STATE v. GURKIN

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

STATE OF NORTH CAROLINA
v.
ALBERT GREY GURKIN, SR.

No. COA13-1220

Filed 3 June 2014

1. Jurors—alleged misconduct—judicial inquiry into conduct—no abuse of discretion

The trial court did not abuse its discretion in a homicide case by declining to inquire into alleged improper discussions by prospective jurors. The trial court acted within its discretion in declining to conduct any further inquiry into the alleged improper discussions of prospective jurors and limiting the scope of its inquiry.

2. Jury—selection procedures—deviation form statutory procedure—no prejudice shown

The trial court did not plainly err in a homicide case by deviating from the statutory procedure governed by N.C.G.S. § 15A-1214 for passing jurors to defendant during jury selection. Although it was undisputed that the trial court violated the statutorily mandated procedure, defendant failed to show prejudice such as jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial. Furthermore, the deviation from the statutory procedure in this case did not constitute reversible error *per se*.

3. Homicide—jury instructions—omission of involuntary manslaughter instruction—not prejudicial

The trial court did not commit plain error in a murder case by omitting an instruction on involuntary manslaughter. In finding defendant guilty of second-degree murder, the jury necessarily found beyond a reasonable doubt that defendant acted with malice, rejecting the absence of malice necessary for involuntary manslaughter. Thus, it could not be said that had the jury been instructed on involuntary manslaughter, the jury would have reached a different verdict.

4. Homicide—jury instructions—self-defense—imperfect self-defense—no evidence to support either instruction

The trial court properly denied defendant's requested instructions on self-defense and imperfect self-defense in a murder case.

The evidence taken in the light most favorable to defendant failed to show any circumstances that would suggest that defendant reasonably believed it was necessary or reasonably necessary for him to kill his wife in order to avoid death or great bodily harm.

Appeal by defendant from judgment entered 7 February 2013 by Judge Wayland J. Sermons, Jr., in Martin County Superior Court. Heard in the Court of Appeals 19 March 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

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

McCULLOUGH, Judge.

Defendant appeals from judgment entered 7 February 2013 after a Martin County jury found him guilty of second-degree murder. For the following reasons, we find no prejudicial error.

I. Background

Defendant, Albert Grey Gurkin, Sr., was indicted for first-degree murder on 17 August 2009. Defendant was tried at the 28 January 2013 Criminal Session of Martin County Superior Court, the Honorable Wayland J. Sermons, Jr., presiding.

Prior to the start of jury selection, the trial court inquired as to whether counsel had any objections and no objections were raised. Jury selection began with the trial court selecting six prospective jurors for *voir dire*. All six prospective jurors were passed to the defense. The trial court excused one venire member and the defense accepted the remaining five. The trial court then directed the clerk to call seven prospective jurors. This modified process continued without objection until a full jury was accepted.

During the *voir dire* of prospective juror Ms. McNeil, McNeil stated she overheard some discussion in the jury room about the case. Specifically, she overheard a few prospective jurors discussing whether they knew defendant or what the case was about. During the State's *voir dire* questioning, the following exchange took place:

> MR. EDWARDS: Have you -- since this happened, do you recall having a conversation with anyone about the case?

JUROR NO. 7/MS. MCNEILL: Not really. Just, you know wondering what it was about when I was sitting in the jury room.

During defense counsel's *voir dire* questioning, the following exchange took place:

MR. DUPREE: You mentioned something that I'm going to ask you a couple of questions about. You said in the jury room where you've all got so much free time over the last few days there was some discussion about what was going on or what the case was about?

JUROR NO. 7/MS. MCNEILL: Yes, a little bit.

MR. DUPREE: What kind of discussion did you hear?

JUROR NO. 7/MS. MCNEILL: Did we — did anybody know him, you know, Grey, know him personally and what happened, that sort of thing. I know you said not to do that, but they did.

THE COURT: I sure did.

MR. DUPREE: Would you say that was quite a few people asking each other about —

JUROR NO. 7/MS. MCNEILL: No, not a lot. Just a few.

MR. DUPREE: Just people in your circle?

JUROR NO. 7/MS. MCNEILL: Just a little bit around me.

MR. DUPREE: Well, obviously, you knew, and you're an accomplished person who has had a long career, what the Judge's specific instructions were. Do you feel like that that disobeyance, that discussion, had any impact on you?

JUROR NO. 7/MS. MCNEILL: No, because nobody knew much about it.

MR. DUPREE: . . . In its entire capacity, do you think any of those discussions would have caused any impact on the ability to sit on this jury?

JUROR NO. 7/MS. MCNEILL: No.

MR. DUPREE: Now, other than asking about what was — if anybody knew him or knew them or whatever, what else was discussed that you heard?

> JUROR NO. 7/MS. MCNEILL: That's about it. It was the same thing. It was what I read in the paper or on the news.
>
> MR. DUPREE: They talked about that, the coverage that had been applied to the media?
>
> JUROR NO. 7/MS. MCNEILL: A little bit. But — (shaking her head back and forth.)

Based on these exchanges, defense counsel made a motion for mistrial. After the court asked defense counsel whether he intended to offer any evidence in support of his motion, he requested to examine the 57 remaining members of the jury pool that may have been in the room at the time of the alleged improper discussion. That request, along with the motion for mistrial, was denied. The trial court declined to excuse Ms. McNeill for cause and the defense used one of its peremptory challenges to excuse her.

The evidence at trial tended to show the following: defendant and Jewel Gurkin, the victim, had a contentious marriage. They would often go days without speaking to one another. A main point of contention was the contents of defendant's will. Defendant wanted to leave all of his money to Jewel and all of his land to his son, Grey Gurkin, Jr. Jewel was unhappy about defendant leaving the land to his son. Jewel told others about her troubles with defendant and that she feared "something was going to happen."

The night before Jewel's death, she and defendant engaged in a heated argument about defendant's will. The next morning, defendant went into the bathroom to shave and brush his teeth. While defendant was washing his eyes with a hot washcloth, Jewel touched defendant in his lower back with a stun gun. Defendant turned around and pushed Jewel up against the cabinets in an attempt to keep her from using the stun gun again. Defendant was able to use his left hand to push the stun gun into Jewel's side. Defendant had no memory of what he did with his right hand. Jewel "snatched back" and the stun gun burned defendant's fingers. According to defendant, the next thing he knew, they were on the floor.

Defendant noticed blood in the corner of Jewel's mouth and discovered she was not breathing. When defendant realized Jewel was dead, he wrapped her in a blanket, tied her hands and feet together, and carried her down to a pond on his property. He moved some sticks and limbs around and laid her on the ground. Police were alerted when Jewel failed to show up for work. They were unable to find her. That night, defendant

stayed with his son and told him what he had done. Sometime between midnight and 5:00 a.m., defendant moved and unwrapped the body so it could be found. After moving the body, defendant was immediately apprehended by the police, who had been searching for the body all day.

An autopsy revealed the cause of death to be strangulation. The state's expert testified that it can take approximately ten seconds of compression on the neck for a person to lose consciousness and approximately five minutes to cause death.

At the close of the evidence, the trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, and acquittal. Defense counsel requested instructions on self-defense and imperfect self-defense, which the trial court denied. The jury returned a verdict finding defendant guilty of second-degree murder and the trial court entered a judgment sentencing defendant to a term of 189 to 236 months in prison. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises the following issues on appeal: (1) whether the trial court abused its discretion by declining to inquire into alleged improper discussions by prospective jurors; (2) whether the trial court plainly erred in deviating from the statutory procedure for passing jurors to defendant during jury selection; (3) whether the trial court plainly erred in omitting an instruction on involuntary manslaughter; and (4) whether the trial court properly denied defendant's requested instructions on self-defense and imperfect self-defense.

A. Jury Misconduct

[1] Defendant first asserts that the trial court abused its discretion by declining to make an inquiry into alleged improper discussions by prospective jurors. Specifically, defendant argues that when such jury misconduct is alleged, the trial court must conduct an investigation into the alleged misconduct and does not have the discretion to decline to do so.

In reviewing a trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct, we review for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). The trial court's decision should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible. *Id.*

"The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight

on appeal." *Id.* at 83, 405 S.E.2d at 158. When jury misconduct is alleged, the trial court is vested with the "discretion to determine the procedure and scope of the inquiry." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996).

Defendant relies on *State v. Harris*, 145 N.C. App. 570, 551 S.E.2d 499 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002), for the contention that an absolute duty to investigate juror misconduct is imposed upon the trial court when such misconduct is alleged. Specifically, defendant cites to the following sentence: "Where juror misconduct is alleged . . . the trial court must investigate the matter and make appropriate inquiry." *Harris*, 145 N.C. App. at 576, 551 S.E.2d at 503. Defendant's reliance on this quote ignores the immediately following sentence from *Harris*: "However, there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation." *Id.* at 576-77, 551 S.E.2d at 503. Indeed, this Court has held that only "[w]hen there is *substantial reason to fear* that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (emphasis added). Further, "[a]n examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous." *Harris*, 145 N.C. App. at 577, 551 S.E.2d at 503.

Our Supreme Court has held that " '[i]n the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in *substantial and irreparable prejudice* to the defendant. It is within the discretion of the trial judge as to what inquiry to make.' " *Burke*, 343 N.C. at 149, 469 S.E.2d at 911 (emphasis added) (quoting *State v Willis*, 332 N.C. 151, 173, 420 S.E.2d 158, 168 (1992)).

The trial court acted within its discretion in declining to conduct any further inquiry into the alleged improper discussions of prospective jurors and limiting the scope of its inquiry to the lines of questioning quoted above. When asked by the court, defense counsel could not say how defendant was prejudiced. Ms. McNeill stated that from what she overheard, no prospective juror indicated that he or she either knew defendant or anything about the case. Based upon Ms. McNeill's responses and the trial court's observations, the trial court was satisfied that the alleged statements of prospective jurors did not give rise to a substantial reason to fear that the jury was prejudiced. It was well within the trial court's discretion when it limited its inquiry to a consideration of Ms. McNeill's *voir dire* and determined that there was no

prejudice to defendant. Accordingly, we hold that the trial court did not err in refusing to conduct any further inquiry.

B. Jury Selection Procedure

[2] Defendant next asserts that the trial court erred in deviating from the statutory procedure for passing jurors to defendant during jury selection. Defendant argues that deviation from the requirements of N.C. Gen. Stat. § 15A-1214 entitles him to a new trial. We disagree.

Although defendant failed to object to the procedure utilized at trial, "when a trial court acts contrary to a statutory mandate . . . the right to appeal the court's action is preserved." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192 (2006) (internal quotation marks omitted). In reviewing a trial court's deviation from the statutory procedure for the passing of jurors to the defendant where defendant failed to object to the procedure, we review for plain error. *State v. Stroud*, 147 N.C. App. 549, 564, 557 S.E.2d 544, 553 (2001). Our Supreme Court recently clarified how the plain error rule is to be applied in North Carolina:

> 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 internal quotation marks omitted). Further, the plain error rule is to be applied cautiously and only in exceptional cases, and the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks and citations omitted).

The procedure for passing prospective jurors to a defendant during jury selection is governed by N.C. Gen. Stat. § 15A-1214, which provides in pertinent part:

> (d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. . . .

. . . .

> (f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant. . . . This procedure is repeated until all parties have accepted 12 jurors.

N.C. Gen. Stat. § 15A-1214(d) and (f) (2013). It is undisputed that the trial court violated the statutorily mandated procedure for jury selection. Despite this violation, "a new trial does not automatically follow a finding of statutory error." *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742-43 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Our Supreme Court has "consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial." *Id.* at 406, 597 S.E.2d at 743.

The procedure for jury selection is designed to "ensure the empanelment of an impartial and unbiased jury." *Love*, 177 N.C. App. at 623, 630 S.E.2d at 241 (internal quotation marks omitted). Defendant, both in his brief and reply brief, asserts a claim of prejudice on the basis that the trial court deviated from the statutory procedure. However, defendant fails to show, nor does he argue, "jury bias, the inability to question prospective jurors, inability to assert peremptory challenges, nor any other defect which had the likelihood to affect the outcome of the trial." *Id.*

Defendant's basis for prejudice on appeal is that he exhausted his peremptory challenges. We are not persuaded by this argument. Defendant's bare assertion that he was prejudiced in this manner fails to meet his "heavier burden of showing that the error rises to the level of plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d 333.

Defendant also contends that deviation from the statutory procedure constitutes reversible error per se. To support this contention, defendant relies on *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987). However, whatever support defendant draws from Gray is limited to capital cases. Accordingly, because defendant has failed to show prejudice, we hold that the trial court's deviation from the statutory procedure does not warrant a new trial.

C. Instruction on Involuntary Manslaughter

[3] Defendant's third contention is that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary

manslaughter. Defendant argues that because the evidence suggests he acted with at most culpable negligence, the trial court should have instructed the jury on involuntary manslaughter. We disagree.

Because defendant did not request an instruction on involuntary manslaughter and did not object to the instructions given at trial, we review for plain error. *State v. McCollum*, 157 N.C. App. 408, 412, 579 S.E.2d 467, 469 (2003), *aff'd*, 358 N.C. 132, 591 S.E.2d 519 (2004). As noted above, the plain error rule is to be applied cautiously, and only in exceptional cases where a fundamental error occurred such that the error had a probable impact on the jury's finding that the defendant was guilty. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

The distinguishing difference between second-degree murder and manslaughter is the presence of malice in second-degree murder and its absence in manslaughter. *McCollum*, 157 N.C. App. at 412, 579 S.E.2d at 470. Defendant argues that the evidence showed he acted recklessly and with a disregard for human life and did not intend to kill Jewel. Thus, defendant argues, an instruction on involuntary manslaughter was necessary. However, malice can be implied where a defendant acted so recklessly or wantonly "as to manifest depravity of mind and disregard for human life. In such a case, the homicide cannot be involuntary manslaughter, even if the assailant did not intend to kill the victim." *Id.* at 412-13, 579 S.E.2d at 570 (internal quotation marks and citation omitted).

We find *McCollum* to be squarely on point with our case. In that case, as here, the trial court submitted first-degree murder, second-degree murder, voluntary manslaughter, and acquittal to the jury, who returned a verdict of second-degree murder. The defendant did not request an instruction on involuntary manslaughter, nor did he object to the lack of such an instruction. This Court held that when the jury returned a verdict of second-degree murder, it necessarily negated a finding of the absence of malice:

> When the jury convicted defendant of second-degree murder and rejected voluntary manslaughter, it necessarily found that defendant acted with malice. A finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter. Any asserted error in failing to instruct on involuntary manslaughter was harmless and does not rise to the level of plain error.

McCollum, 157 N.C. App. at 414, 579 S.E.2d at 471 (citation omitted). In finding defendant guilty of second-degree murder, the jury necessarily found beyond a reasonable doubt that defendant acted with malice,

rejecting the absence of malice necessary for involuntary manslaughter. The jury had an opportunity to find an absence of malice and did not. Thus, it cannot be said that had the jury been instructed on involuntary manslaughter, the jury would have reached a different verdict. Accordingly, we hold that the trial court did not plainly err in failing to instruct the jury on involuntary manslaughter.

D. Self-Defense and Imperfect Self-Defense Instruction

[4] Defendant's final argument is that the trial court erred in denying his request to instruct the jury on self-defense and imperfect self-defense. Because defendant requested jury instructions on self-defense and imperfect self-defense, we review *de novo*. *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50 (2010).

Perfect self-defense excuses a killing completely when it is shown at the time of the killing 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 the 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. Bush, 307 N.C. 152, 158, 297 S.E.2d 563, 568 (1982). An instruction on imperfect self-defense arises when only the first two of the above elements are shown. *Id.* at 159, 297 S.E.2d at 568.

A defendant is entitled to an instruction on self-defense only where 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." *Id.* at 160, 297 S.E.2d at 569. It is for the trial court to determine as a matter of law "whether there is any evidence that the defendant

reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm." *Id.* In determining whether a self-defense instruction should have been given, we examine the facts in the light most favorable to the defendant. *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993).

At no point during the trial did defendant testify that he thought it was necessary or reasonably necessary to kill Jewel in order to protect himself from death or great bodily harm. Defendant only testified that his wife was holding a stun gun and that he pushed her up against the bathroom cabinets to keep her from using the stun gun. Defendant was able to push the stun gun into Jewel's side and ultimately subdued her. He did not state that he feared for his life or that he feared he might suffer great bodily harm at any time during the altercation. Defendant's testimony does not suggest, neither explicitly nor implicitly, that it was necessary or reasonably necessary to kill his wife in order to avoid death or great bodily harm.

We find that the evidence taken in the light most favorable to defendant fails to show any circumstances that would suggest that defendant reasonably believed it was necessary or reasonably necessary for him to kill Jewel in order to avoid death or great bodily harm. Because defendant failed to satisfy the required elements for an instruction on self-defense or imperfect self-defense, we hold that the trial court did not err in refusing to submit those issues to the jury.

III. Conclusion

For the reasons stated above, we conclude that the trial court did not commit prejudicial error.

No prejudicial error.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
FRANCIS MARIUS HOGAN, JR., DEFENDANT

No. COA13-1284

Filed 3 June 2014

1. Confessions and Incriminating Statements—spontaneous statement—not custodial interrogation

The trial court did not err in an assault case by denying defendant's motion to suppress his statement to police. Defendant's statements in response to questions posed to the victim were spontaneous and not the result of custodial interrogation. Therefore, defendant was not subjected to custodial interrogation without the benefit of *Miranda* warnings.

2. Sentencing—prior record level—out-of-state conviction—felony

The trial court did not err in an assault case by calculating defendant's prior record level counting a New Jersey third-degree theft conviction as a Class I felony. New Jersey considers third-degree offenses to be the same as common law felonies and a certified criminal history record from New Jersey presented by the State that contained defendant's New Jersey Criminal History Detailed Record and listed defendant's theft convictions as felony convictions was sufficient under *State v. Lindsey*, 118 N.C. App. 549, to show that it was a felony. Furthermore, defendant failed to show that third-degree theft in New Jersey is substantially similar to a North Carolina misdemeanor.

Appeal by defendant from Judgment entered 12 March 2013 and Order entered 26 February 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 20 March 2014.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Lars F. Nance, for the State.

Michele Goldman, for defendant-appellant.

STROUD, Judge.

Francis Hogan, Jr. ("defendant") appeals from the judgment entered 12 March 2013 after he pled guilty to assault by strangulation and from

the order entered 26 February 2013 denying in part his motion to suppress statements he made to police. We affirm the trial court's order denying defendant's motion to suppress in part and find no error in sentencing.

I. Background

Defendant was indicted for assault on a female and assault by strangulation on 3 December 2012. The indictments alleged that defendant had assaulted Karen Teixeira by pushing her against a wall and by putting his hands around her neck and choking her. Defendant moved to suppress statements he made to police when they responded to the home that he and Ms. Teixeira shared.

On 16 September 2012, Deputy Reliford and Deputy Carroll of the Johnston County Sheriff's Office responded to a call reporting a domestic disturbance at a residence in Princeton. After they entered the house, they found defendant hiding in a closet which also contained "an engine and various engine parts" and the deputies were concerned that these objects may contain a hidden weapon. When defendant came out of the closet, Deputy Reliford put handcuffs on him and explained that he was doing this for "officer safety reasons." Defendant began acting "aggressively" toward Ms. Teixeira and her son and "telling them that he was going to have them removed from the home." Deputy Reliford walked defendant out to the back deck to help him calm down and to be able to talk to him "outside the presence of defendant's girlfriend, the victim." While they were on the back deck, Deputy Carroll left to respond to another call, thus leaving Deputy Reliford alone with defendant, the victim, and her son. On the back deck, Deputy Reliford began asking defendant questions about what had happened. Deputy Reliford did not advise defendant of his *Miranda* rights. Defendant made incriminating statements in response to Deputy Reliford's questions.

Deputy Reliford then asked Ms. Teixeira to come out to the back porch. He observed bruising on her neck and asked how she got the bruises. She stated that defendant put his hand around her neck and picked her up. She also stated that he had pushed her into a wall. Defendant then interjected that he put his hand around Ms. Teixeira's neck and squeezed and that he had pushed her into a wall. Deputy Reliford then placed defendant under arrest.

The trial court granted the motion in part and denied it in part. It concluded that defendant was in custody during his interactions with Deputy Reliford. It therefore suppressed the statements defendant made in response to Deputy Reliford's direct questions. However, it concluded

that defendant's second statement was "spontaneous," and not made in response to any questions posed to him by Deputy Reliford. It further concluded that asking Ms. Teixeira what happened in front of defendant was not the functional equivalent of interrogation. Therefore, the trial court denied defendant's motion to suppress those statements. It entered a written order finding the facts as summarized above on 26 February 2013.

Defendant entered an *Alford* guilty plea to assault by strangulation on 6 March 2013, but specifically reserved his right to appeal the partial denial of his motion to suppress. The State dismissed the assault on a female charge. On 12 March 2013, the trial court entered judgment sentencing defendant to a mitigated term of 9-20 months imprisonment, suspended for 30 months of supervised probation. That same day, defendant filed written notice of appeal from both the judgment and the order denying his motion to suppress in part.

II. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress his second statement to police because he was subjected to custodial interrogation without the benefit of *Miranda* warnings. He further contends that several of the trial court's findings of fact are unsupported by competent evidence.

A. Standard of Review

> It is well-established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. . . . [However,] the trial court's determination of whether an interrogation is conducted while a person is in custody . . . involves reaching a conclusion of law, which is fully reviewable on appeal.

State v. Crudup, 157 N.C. App. 657, 659, 580 S.E.2d 21, 23 (2003) (citations, quotation marks, and brackets omitted). Thus, we must first determine whether there is competent evidence to support the challenged findings of fact. We will then review *de novo* the trial court's conclusion of law as to whether defendant was subject to custodial interrogation. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely

substitutes its own judgment for that of the lower tribunal."(citations and quotation marks omitted)).

B. Findings of Fact

We first address defendant's challenge to the findings of fact. The trial court found that:

> 1. The defendant is charged with Assault on a Female and Assault by Strangulation.
>
> 2. On September 16, 2012, Deputy R.L. Reliford of the Johnston County Sheriff's Office responded to a domestic disturbance at [a residence] in Princeton.
>
> 3. The residence was the home of defendant and Karen Tiexeira [sic].
>
> 4. Upon entering the home, Deputies Paige Carroll and Reliford found defendant hiding in a closet and detained the defendant by putting him in handcuffs when he came out of the closet.
>
> 5. The closet in which defendant was hiding contained an engine and various engine parts. The deputies were concerned these objects may have contained a hidden weapon.
>
> 6. As the defendant stepped out of the closet, Deputy Reliford informed the defendant to put his hands up and then placed him in handcuffs. Deputy Reliford testified that he told the defendant that he was doing this for officer safety reasons.
>
> 7. During the time the defendant had been handcuffed, the defendant was acting aggressively toward his girlfriend and her son by telling them he was going to have them removed from the home.
>
> 8. In an effort to calm the defendant down, Deputy Reliford walked the defendant to the back deck to sit down so that he could speak with him about the incident outside the presence of the defendant's girlfriend, the victim.
>
> 9. At this time, Deputy Carroll left the residence in order to respond to another call.
>
> 10. After sitting down on the back deck, the defendant made incriminating statements regarding the domestic

> disturbance to Deputy Reliford in response to questioning by Deputy Reliford. Prior to this point, Deputy Reliford had not Mirandized the defendant.
>
> 11. Deputy Reliford asked the victim, Karen Tiexara [sic], to come out to the back deck where he observed red marks, swelling and bruising around her neck.
>
> 12. Deputy Reliford asked the victim how she got the marks on her neck and she responded by saying that Francis [defendant] put his hand around her neck several times and picked her up while he had his hand around her neck.
>
> 13. The victim also stated that the defendant had pushed her into a wall.
>
> 14. The defendant then spontaneously stated that he put his hand around . . . [his girlfriend's] neck and squeezed and that he pushed her into the wall.
>
> 15. Neither the victim nor Deputy Reliford were speaking to the defendant when he spontaneously uttered this statement.
>
> 16. Deputy Reliford then placed the defendant under arrest for Assault on a Female and Assault by Strangulation.

Defendant contends that finding 9 is unsupported by competent evidence because there was no evidence that Deputy Carroll left before defendant's girlfriend was asked to step outside. He also argues that findings 14 and 15 contain conclusions of law in that they characterize his statement as spontaneous. Deputy Carroll testified at the suppression hearing that she remained in the house a short time after defendant had been brought outside before receiving another call and leaving. Deputy Reliford testified that he brought defendant out to the back deck to speak with him and that after speaking about what happened, he opened the door and asked Deputy Carroll to send Ms. Teixeira out. Although the testimony of the officers was somewhat contradictory as to the timing of when Deputy Carroll left, it was proper for the trial court to resolve these evidentiary conflicts. *State v. Jones*, 161 N.C. App. 615, 623, 589 S.E.2d 374, 378 (2003) ("It is the trial court's duty to resolve any conflicts and contradictions that may exist in the evidence." (citation and quotation mark omitted)), *app. dismissed and disc. rev. denied*, 358 N.C. 379, 597 S.E.2d 770 (2004). Moreover, the exact timing of when Deputy Carroll left is not material to the legal issues. It is clear

that Deputy Carroll left the residence while Deputy Reliford was still trying to investigate what had happened, leaving just one officer with the responsibility of dealing with both defendant and Ms. Teixeira.[1]

Defendant also contends that the trial court's characterization of his statements as "spontaneous" were actually conclusions of law, not findings of fact. We agree. The issue of whether defendant's statements were spontaneous or in response to police interrogation is the central legal issue in question, as discussed below. *See State v. Hipps*, 348 N.C. 377, 395, 501 S.E.2d 625, 636 (1998), *cert. denied*, 525 U.S. 1180, 143 L.Ed. 2d 114 (1999). Therefore, we will consider all of the trial court's findings regarding the spontaneity of defendant's statements as conclusions of law.

C. Interrogation or Its Functional Equivalent

Next, we must determine whether the trial court correctly concluded that the questioning of defendant's girlfriend in his presence did not constitute the functional equivalent of questioning and that defendant's statements were spontaneous.

"The *Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation. 'Custodial interrogation' means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (citation and quotation marks omitted).

The trial court concluded that defendant was in custody during the entirety of his interactions with police. This determination has not been challenged by either party. The trial court concluded, however, that his statements to police after his girlfriend was brought outside were not in response to police interrogation. Specifically, the trial court concluded that defendant's statements were spontaneous and not in response to police questioning or its functional equivalent.

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term

1. Deputy Carroll also testified that normally two officers responded to calls for domestic disturbances for officer safety reasons. Deputy Reliford explained that he had previously "taken someone into custody and actually had to fight the other party. So they can get dangerous."

> "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Rhode Island v. Innis, 446 U.S. 291, 300-02, 64 L.Ed. 2d 297, 307-08 (1980) (footnotes omitted). "Volunteered statements of any kind are not barred by the Fifth Amendment." *State v. James*, 215 N.C. App. 588, 593, 715 S.E.2d 884, 888 (2011) (citation, quotation marks, and brackets omitted).

Defendant argues that asking his girlfriend what happened in front of him is akin to the coercive techniques discussed in *Innis* and *Miranda*.

> The questioned practices [in *Miranda*] included the use of lineups in which a coached witness would pick the defendant as the perpetrator, the so-called 'reverse line-up' in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, and a variety of psychological ploys, such as to posit the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.

Arizona v. Mauro, 481 U.S. 520, 526, 95 L.Ed. 2d 458, 466 (1987) (citations, quotation marks, ellipses, and brackets omitted). The *Miranda* court was concerned with the coercive nature of these practices. *In re D.A.C.*, ___ N.C. App. ___, ___, 741 S.E.2d 378, 383 (2013) (noting that "the sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion" (citation, quotation marks, and brackets omitted)).

Deputy Reliford's questioning of defendant's girlfriend was entirely unlike the coercive interrogation with which *Miranda* and its progeny are concerned. *See State v. Meadows*, 272 N.C. 327, 337, 158 S.E.2d 638, 644-45 (1968) ("The four cases decided by *Miranda* shared salient features, among which was incommunicado interrogation of individuals in a police-dominated atmosphere." (citation and quotation marks omitted)). The deputy was investigating an ongoing situation, attempting to figure out whether a crime was even committed. He asked defendant's girlfriend how she got the marks on her neck. She had not already incriminated defendant. The deputy could not have known what her response could be—she could have inculpated or exculpated defendant. In addition, since Deputy Carroll had to leave to respond to another call, only one officer was left to deal with both defendant and the victim. Although this case is a close one, we conclude that the deputy's question to Ms. Teixeira "did not constitute the functional equivalent of questioning because the officer's [question] did not call for a response from defendant and therefore cannot be deemed as reasonably likely to elicit an incriminating response from defendant." *State v. Gantt*, 161 N.C. App. 265, 269, 588 S.E.2d 893, 896 (2003), *disc. rev. denied*, 358 N.C. 157, 593 S.E.2d 83 (2004); *see also*, *Meadows*, 272 N.C. at 337, 158 S.E.2d at 645 ("A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occurrence calling for police investigation, including the questioning of those present, is a far cry from the 'in-custody interrogation' condemned in *Miranda*.").

This case is distinguishable from *State v. Fuller*, 270 N.C. 710, 155 S.E.2d 286 (1967), cited by defendant. In *Fuller*, the police were interviewing the witness to an assault in the presence of the defendant. *Fuller*, 270 N.C. at 713, 155 S.E.2d at 288. The officers warned defendant that anything he said or *did not say* in response to the witness' statement could be used against him. *Id.* at 713-14, 155 S.E.2d at 288. The witness said that the defendant had used a baseball bat to assault the victim. *Id.* at 713, 155 S.E.2d at 288. The officers then asked the defendant if he had anything to say in response. *Id.* The defendant stated, "Yes, I hit the man, but I did not think I hit him that hard." *Id.* The Supreme Court held that the statement was inadmissible because the police had incorrectly informed him that his silence could be used against him. *Id.* at 715, 155 S.E.2d at 289. The Court explained,

> To make a prisoner listen to an accuser with the admonition that if he talks or doesn't talk—to be damned if he does, and to be damned if he doesn't—is to put him in an

> impossible position. It violates the rights of the captive audience, which constitutes reversible error.

Id.

This case is distinguishable from *Fuller* in two important respects. First, and perhaps most importantly, the police in *Fuller* directly asked the defendant to respond to the witness' statement. Here, by contrast, Deputy Reliford did not ask defendant to say anything in response to Ms. Teixeira's statement. Second, the officers in *Fuller* warned the defendant that any response **or** *his silence* could be used against him, which "put him in an impossible position." *Id.* There was no such improper warning here. Therefore, we conclude that *Fuller* does not require suppression of defendant's statement.

For the foregoing reasons, we hold that the trial court correctly concluded that defendant's statements in response to those of Ms. Teixiera were spontaneous and not the result of custodial interrogation. The deputy's question of Ms. Teixiera was not the functional equivalent of questioning defendant. Therefore, we affirm the trial court's order denying defendant's motion to suppress these statements.

III. Sentencing

[2] Defendant next argues that the trial court erred in calculating his prior record level because it counted a New Jersey theft conviction as a Class I felony when it is not considered a felony under New Jersey law, and, in any event, should have been classified as a misdemeanor because it is substantially similar to a North Carolina misdemeanor.

Defendant was convicted on 9 February 1995 of fourth degree theft in Morris County, New Jersey. On 21 April 1995, he was convicted of third degree theft and fourth degree theft, also in Morris County, New Jersey. The trial court found that the 9 February 1995 conviction was substantially similar to misdemeanor theft in North Carolina and classified it as a Class 1 misdemeanor. The trial court found that the third degree theft conviction, by contrast, was a felony in New Jersey and classified it as a Class I felony.

Defendant argues that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not properly determine that third degree theft is a felony for sentencing purposes. It is true that the New Jersey criminal code does not use the term "felony." *State v. Smith*, 181 A.2d 761, 767 (N.J. 1962), *cert. denied*, 374 U.S. 835, 10 L.Ed. 2d 1055 (1963). Instead, all crimes are classified as a crime of the first, second, third, or fourth degree. N.J. Stat. Ann. § 2C:43-1

(2011). Other, more minor offenses are classified as "disorderly person offense[s]." *See* N.J. Stat. Ann. § 2C:43-8 (2011). Theft may be classified as a second, third, or fourth degree offense, or as a disorderly person offense, depending on the nature of the crime and the value of the property taken. N.J. Stat. Ann. § 2C:20-2 (2011). Defendant was convicted of a third degree theft offense.

Under New Jersey law, a court may sentence a defendant convicted of a third degree offense to a specific term of imprisonment between three and five years. N.J. Stat. Ann. § 2C:43-6 (2011). A crime of the fourth degree is punishable by up to 18 months imprisonment. *Id.* The New Jersey Supreme Court has held that crimes "punishable by imprisonment for more than a year in state prison" are comparable to common law felonies. *State v. Doyle*, 200 A.2d 606, 614 (N.J. 1964). New Jersey courts have clearly recognized that their third-degree crimes are felonies by a different name. *See United States v. Brown*, 937 F.2d 68, 70 (2d Cir. 1991) ("[U]nder New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies."); *Kaplowitz v. State Farm Mut. Auto Ins. Co.*, 493 A.2d 637, 640 (N.J. Super. Ct. Law Div. 1985) ("[O]ffenses that are punishable by more than one year in state prison should be treated as common law felonies.").

We recognize that there are several cases in which this Court has decided that New Jersey convictions cannot count as "felonies" for the purpose of habitual felon charges. *See*, *e.g.*, *State v. Lindsey*, 118 N.C. App. 549, 455 S.E.2d 909 (1995), *State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668 (2002), *disc. rev. dismissed and cert. denied*, 356 N.C. 681, 577 S.E.2d 896 (2003), and *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008). None of these cases analyzes the meaning of "misdemeanor" or "high misdemeanor" under New Jersey law.[2] They simply conclude that because the crimes were not "certified" as felonies under New Jersey law or called "felonies" they could not be considered felonies for purposes of the habitual felon statute. Applied to the sentencing context, the rule in these cases would suggest that the State can never use a New Jersey conviction to establish prior record points without proving that the offense is substantially similar to a North

2. New Jersey used to classify some serious crimes as misdemeanors or "high misdemeanors." *See*, *e.g.*, *State v. Sisler*, 827 A.2d 274, 276 (N.J. 2003) (noting that production of child pornography was classified as a "high misdemeanor"). Under the modern statutes, a "high misdemeanor" is equivalent to a crime of the third degree for sentencing, and to a crime of the first, second, or third degree for other purposes. N.J. Stat. Ann. § 2C:43-1(b); N.J. Stat. Ann. § 2C:1-4 (2011). A "misdemeanor" is equivalent to a crime of the fourth degree for sentencing. N.J. Stat. Ann. § 2C:43-1(a).

Carolina offense. There is no suggestion in the sentencing statutes that the Legislature intended to single out New Jersey convictions for such unfavorable treatment.

Even if we were to assume that we must apply these cases to N.C. Gen. Stat. § 15A-1340.14, this case is distinguishable in that the State presented a "certification" that third degree theft is considered a felony in New Jersey. In *Lindsey*, the first case in which we suggested that a New Jersey offense could not be considered a felony because it was not labeled as such, we hinted that the State could nevertheless show it was a felony by providing certification from some official that it was a felony. *Lindsey*, 118 N.C. App. at 553, 455 S.E.2d at 912.

Here, the State introduced a criminal history record from the "NLETS" system, containing defendant's "New Jersey Criminal History Detailed Record" (original in all caps). The printout contained a statement that "This record is certified as a true copy of the criminal history record information on file for the assigned state identification number" (original in all caps). The record listed defendant's theft convictions as "felony conviction[s]" (original in all caps). Therefore, even if the fact that New Jersey considers third degree offenses to be the same as common law felonies is alone insufficient, we hold that this certification is sufficient under *Lindsey*. Moreover, given our review of New Jersey law above, this certification appears to accurately reflect the law as understood by the courts of that state.

Finally, defendant contends that even if third degree theft is a felony in New Jersey, it is substantially similar to misdemeanor larceny in North Carolina and the trial court erred in failing to classify it as a misdemeanor. We disagree.

The principal error in defendant's argument is that he confuses what he is required to show to prove that an out-of-state felony is substantially similar to a North Carolina misdemeanor. Under N.C. Gen. Stat. § 15A-1340.14(e), if the State establishes that the defendant has an out-of-state felony conviction, it is by default considered a Class I felony, regardless of whether it is substantially similar to a North Carolina felony. *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009). The State is not required to show any substantial similarity in that context. *Id.* However, the defendant may still show that the out-of-state felony is substantially similar to a North Carolina misdemeanor. N.C. Gen. Stat. § 15A-1340.14(e). The defendant bears the burden of showing substantial similarity in that case. *State v. Crawford*, ___ N.C. App. ___, ___, 737 S.E.2d 768, 770, *disc. rev. denied*, ___ N.C. ___, 743 S.E.2d 196 (2013).

Here, defendant failed to show that third degree theft in New Jersey is substantially similar to a North Carolina misdemeanor. Essentially, he argues that because third degree theft is not substantially similar to felony larceny in North Carolina, it must be substantially similar to misdemeanor larceny. But that analysis flips the burden of proof. It is defendant who must show that third degree theft is substantially similar to misdemeanor larceny; the State is not required to show that it is more similar to felony larceny than misdemeanor larceny.

New Jersey defines "theft" as the "involuntary transfer of property; the actor appropriates property of the victim without his consent or with consent obtained by fraud or coercion." *State v. Talley*, 466 A.2d 78, 81 (N.J. 1983) (citation and quotation marks omitted). A person is guilty of third degree theft in New Jersey if

> (a) The amount involved exceeds $500.00 but is less than $75,000.00;
>
> (b) The property stolen is a firearm, motor vehicle, vessel, boat, horse, domestic companion animal or airplane;
>
> (c) The property stolen is a controlled dangerous substance or controlled substance analog as defined in N.J.S.2C:35-2 and the amount involved is less than $75,000.00 or is undetermined and the quantity is one kilogram or less;
>
> (d) It is from the person of the victim;
>
> (e) It is in breach of an obligation by a person in his capacity as a fiduciary and the amount involved is less than $50,000.00;
>
> (f) It is by threat not amounting to extortion;
>
> (g) It is of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant;
>
> (h) The property stolen is a person's benefits under federal or State law, or from any other source, which the Department of Human Services or an agency acting on its behalf has budgeted for the person's health care and the amount involved is less than $75,000.00;
>
> (i) The property stolen is any real or personal property related to, necessary for, or derived from research,

> regardless of value, including, but not limited to, any sample, specimens and components thereof, research subject, including any warm-blooded or cold-blooded animals being used for research or intended for use in research, supplies, records, data or test results, prototypes or equipment, as well as any proprietary information or other type of information related to research;
>
> (j) The property stolen is a New Jersey Prescription Blank as referred to in R.S.45:14-14;
>
> (k) The property stolen consists of an access device or a defaced access device; or
>
> (l) The property stolen consists of anhydrous ammonia and the actor intends it to be used to manufacture methamphetamine.

N.J. Stat. Ann. § 2C:20-2(3).

In North Carolina, a person commits misdemeanor larceny if he takes and carries away the property of another valued less than $1,000 with the intent to permanently deprive the rightful owner of it, unless one of the circumstances in N.C. Gen. Stat. § 14-72(b) applies, in which case it is a felony regardless of value. N.C. Gen. Stat. § 14-72 (2013); *State v. Sheppard*, ___ N.C. App. ___, ___, 744 S.E.2d 149, 151 (2013). Some of the circumstances of felony larceny are the same both in North Carolina and New Jersey. For instance, in both states, larceny from the person and larceny of a firearm constitute a more serious offense, regardless of value. *See* N.C. Gen. Stat. § 14-72(b)(1), (4); N.J. Stat. Ann. § 2C:20-2 (b)(2)(b), (d). As defendant correctly points out, there are many more ways to commit third degree theft in New Jersey than felony larceny in North Carolina. Yet, that is not the relevant question. Defendant was required to prove that third degree theft is substantially similar to misdemeanor larceny, not that it is dissimilar from felony larceny. Given the disparity in elements between our definition of misdemeanor larceny and New Jersey's definition of third degree theft, defendant cannot show that they are substantially similar.

We hold that the trial court did not err in concluding that third degree theft is not substantially similar to misdemeanor larceny. There are many elements of third degree theft not found in misdemeanor larceny. Several of these possible elements, such as theft from a person, would also make the larceny a felony in North Carolina. Therefore, the

New Jersey crime of third degree theft is not substantially similar to North Carolina's misdemeanor larceny. In sum, there was no error in defendant's sentencing.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendant's motion to suppress in part and find no error in sentencing.

AFFIRMED; NO ERROR.

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

STATE OF NORTH CAROLINA
v.
GARRY JEROME JAMISON

No. COA13-1328

Filed 3 June 2014

1. Assault—inflicting serious bodily injury—evidence sufficient—definition given in charge

The trial court did not err by denying defendant's motion to dismiss a charge of assault inflicting serious bodily injury where the evidence was sufficient to show that the victim suffered a serious bodily injury. Review was limited to the evidence presented at trial that supported the definition of serious bodily injury given to the jury. This evidence, particularly the victim's ongoing trouble with her hand and eye, provided substantial evidence of a "permanent or protracted condition that causes extreme pain" and a "permanent or protracted loss or impairment of the functions of a bodily member or organ."

2. Burglary and Unlawful Breaking or Entering—sufficiency of evidence—breakings

There was sufficient evidence of a breaking presented at trial to withstand a motion to dismiss on the charge of first-degree burglary where the uncontroverted testimony at trial established that the screen door was closed and that the victim was attempting to close the front door when defendant forced his way into the home.

3. Appeal and Error—preservation of issues—issue not raised at trial—misinterpretation of statutory provisions

The merits of defendant's argument were reviewed on appeal notwithstanding his failure to object at trial where defendant contended that the trial court erred in its interpretation and application of statutory provisions.

4. Sentencing—assault on female—assault inflicting serious bodily injury

Defendant should not have been punished for committing an assault on a female where he was also convicted and sentenced for assault inflicting serious bodily injury. The prefatory clause of N.C.G.S. § 14-33(c) unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault.

Appeal by defendant from judgments and commitments entered 12 April 2013 by Judge J. Thomas Davis in Cleveland County Superior Court. Heard in the Court of Appeals 10 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Garry Jerome Jamison ("Defendant") appeals from judgments and commitments adjudging him guilty of first degree burglary, assault inflicting serious bodily injury, and assault on a female. Defendant contends that the trial court erred in denying his motion to dismiss the charges of assault inflicting serious bodily injury and first degree burglary. Defendant also contends that the trial court erred in allowing him to be convicted of both assault inflicting serious bodily injury and assault on a female based on the same underlying conduct. For the following reasons, we hold that the trial court properly denied Defendant's motion to dismiss, but erred in convicting and sentencing Defendant for both categories of assault.

I. Factual & Procedural History

The facts of Defendant's case are not in dispute. Evidence presented at trial showed the following.

In April or May of 2012, Defendant's nine year relationship with his then-girlfriend, Amber Price, ended. During their relationship, Defendant and Ms. Price had two children together. After their break-up, Defendant moved out and interacted with Ms. Price only to arrange visitation with the children.

On 25 August 2012, however, Defendant telephoned Ms. Price repeatedly in order to see her the following day, Ms. Price's birthday. Ms. Price refused to see Defendant and told him that she was spending time at her parents' house with the children. That evening, while the children were with their grandparents, Ms. Price went to celebrate her birthday at her best friend Brittney Stevens' house. In addition to Ms. Price and Ms. Stevens, Ms. Stevens' two children and the children's father were present at the home.

Around 11:40 p.m., Defendant called Ms. Price demanding that she come get him and spend time with him for her birthday. Ms. Price again refused. Defendant told Ms. Price that if he found out that she was not at home with the children, he would kill her. While Ms. Price believed Defendant's threat to be credible, she remained at the party because she did not think Defendant knew that she was at Ms. Stevens' home. Ms. Price's testimony revealed, however, that she often celebrated her birthday with Ms. Stevens, a fact that was well-known by Defendant.

Sometime around midnight, Ms. Price heard a voice she recognized as Defendant's shouting profanities and making noise outside of Ms. Stevens' home. Upon hearing Defendant's voice, Ms. Price immediately attempted to close the front door to keep Defendant out of the house. Testimony indicated that the screen door was already closed, but not the front door itself. While Ms. Price attempted to close the front door, Defendant forced his way through the door and entered the home. Ms. Price, fearful for her life, attempted to run from Defendant, but could not escape. Defendant grabbed Ms. Price by the hair, knocked her to the ground, and began to beat her.

Meanwhile, Ms. Stevens took her two children and placed them in her car, where they remained with their father during the incident. While outside, Ms. Stevens heard Ms. Price screaming for help. Ms. Stevens went back into the house and attempted to place herself between Defendant and Ms. Price. Defendant continued to kick and beat Ms. Price, but did not harm Ms. Stevens. After the beating, Defendant told Ms. Stevens that it was nothing against her or her family, but that Ms. Price was a "lying bitch." Thereafter, Defendant left the premises and Ms. Stevens called the police. Defendant was subsequently arrested on 6 September 2012.

On 11 and 12 April 2013, Defendant was tried in Cleveland County Superior Court on charges of first degree burglary, assault inflicting serious bodily injury, and assault on a female. Defendant was convicted of all three crimes. The trial court sentenced Defendant to an active sentence of 64–89 months imprisonment for the first degree burglary. With respect to the assault convictions, Defendant received an additional consecutive sentence of 16–29 months imprisonment, which was suspended by the trial court for 36 months of supervised probation. Defendant gave timely notice of appeal in open court.

II. Jurisdiction

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

III. Analysis

Defendant challenges the trial court's judgments with three arguments on appeal: (1) that there was insufficient evidence of a "serious bodily injury" presented at trial to support the charge of assault inflicting serious bodily injury; (2) that there was insufficient evidence of a "breaking" to support the charge of first degree burglary; and (3) that the trial court erred in entering a judgment for assault inflicting serious bodily injury and for assault on a female based on the same underlying conduct. We address each of Defendant's arguments in turn.

A. Evidence Supporting a "Serious Bodily Injury"

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of assault inflicting serious bodily injury because the evidence presented at trial was not sufficient to show that Ms. Price, in fact, suffered a "serious bodily injury." We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890 (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). "In making its determination, the trial court must consider all evidence

admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135 (1995).

The crime of assault inflicting serious bodily injury requires a showing of two elements: "(1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 619 (2002) (quotation marks and citation omitted). Pertinent here, the General Assembly has defined a "serious bodily injury" as a "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4 (2013). In interpreting this statutory language, we have previously held that "the General Assembly intended for N.C.G.S. § 14-32.4 to cover those assaults that are especially violent and result in the infliction of extremely serious injuries." *Williams*, 150 N.C. App. at 503, 563 S.E.2d at 619. Thus, a "serious bodily injury" as set forth in N.C. Gen. Stat. § 14-32.4 "requires proof of more severe injury than the 'serious injury' element of other assault offenses." *Id.* at 503, 563 S.E.2d at 619–20.

Accordingly, our task in reviewing the record below is to determine whether there is substantial evidence that Ms. Price suffered an injury rising to this level of severity. However, in making this determination, we do not consider the entire definition set forth in N.C. Gen. Stat. § 14-32.4. Rather, "we are limited to that part of the definition set forth in the trial court's instructions to the jury." *Id.* at 503, 563 S.E.2d at 620. Here, the trial court instructed the jury as follows:

> Serious bodily injury is injury that creates or causes a permanent or protracted condition that causes extreme pain or permanent or protracted loss or impairment of the functions of any bodily member or organ.

"It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury." *Id.* Thus, we limit our review to the evidence presented at trial that supports the definition of "serious bodily injury" given to the jury.

Viewing the evidence presented at trial in a light most favorable to the State, we hold that there is substantial evidence that Ms. Price suffered a "serious bodily injury" from Defendant's assault. Ms. Price testified that the beating left her with broken bones in her face, a broken

hand, a cracked knee, and an eye so beat up and swollen that she still could not see properly out of it at the time of trial. She indicated that she had a footprint and other bruises on her face, as well as bruises on her neck, stomach, and back. Ms. Price testified that she had "been stomped everywhere." She reported having to go back to the hospital for a second time because of pain and dizziness. She indicated that her pain lasted for five to six weeks after the attack and that she still had pain in her hand. She stated, "my hand and my eye hurt all of the time." Photographs of Ms. Price's injuries were also admitted into evidence to supplement her testimony.

Brittney Stevens also testified concerning Ms. Price's injuries. Ms. Stevens indicated that the beating left Ms. Price bloody at the scene of the crime. Ms. Stevens reported that Ms. Price wore sunglasses for several weeks to hide bruising and black eyes.

Ms. Price's mother corroborated the testimony given by Ms. Price and Ms. Stevens and added that Ms. Price had bloodshot eyes and a tooth filling that came loose as a result of the beating. The mother also stated that Ms. Price had trouble writing with her injured hand. Joseph Mullen, Ms. Price's emergency room physician, characterized Ms. Price's injuries as "serious."

We believe the foregoing evidence to be more than sufficient to withstand a motion to dismiss. This evidence, particularly Ms. Price's ongoing trouble with her hand and eye, provides substantial evidence of a "permanent or protracted condition that causes extreme pain" and a "permanent or protracted loss or impairment of the functions of a bodily member or organ." Accordingly, Defendant's argument is without merit.

B. Evidence Supporting a "Breaking"

[2] Defendant's second argument on appeal is that there was insufficient evidence of a "breaking" presented at trial to withstand a motion to dismiss on the charge of first degree burglary.

Again, in reviewing the sufficiency of the evidence on a motion to dismiss, our task is to determine whether, when viewed in a light most favorable to the State, there is substantial evidence of each element of the offense charged. *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

> To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. If the burglarized

> dwelling is occupied it is burglary in the first degree; if unoccupied, it is burglary in the second degree.

State v. Wilson, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976) (internal citations omitted); *see also* N.C. Gen. Stat. § 14-51 (2013). Furthermore, "[i] f any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present." *Wilson*, 289 N.C. at 539, 223 S.E.2d at 316 (quotation marks and citations omitted).

Here, uncontroverted testimony at trial established that the screen door was closed and that Ms. Price was attempting to close the front door when Defendant forced his way into the home. Pursuant to *Wilson*, we hold that this testimony provides substantial evidence that a "breaking" occurred.

Defendant acknowledges that this controlling precedent warrants our holding on this issue. Nevertheless, Defendant wishes to preserve this argument for a later appeal to our Supreme Court. Accordingly, we find no error in the trial court's first degree burglary judgment and note Defendant's objection for purposes of later appellate review.

C. Judgments and Commitments for Two Categories of Assault

[3] Defendant's third argument on appeal is that the trial court erred when it sentenced Defendant for assault inflicting serious bodily injury and assault on a female based on the same underlying conduct. Specifically, Defendant argues that the plain language of our assault statutes mandates punishment only for the more serious crime.

At the outset, we acknowledge that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1). Here, Defendant admits that he did not object to the trial court entering a consolidated judgment and commitment for both assaults. However, " '[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial.' " *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000)), *cert. denied*, 531 U.S. 1130 (2001). Accordingly, because Defendant contends that the trial court erred in its interpretation and application of statutory provisions, we review the merits of Defendant's argument notwithstanding his failure to object at trial.

[4] "Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Assault on a female is a statutory crime in North Carolina:

> *Unless the conduct is covered under some other provision of law providing greater punishment*, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:
>
> . . . .
>
> (2) Assaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c) (2013) (emphasis added). Defendant argues that the plain language of the prefatory clause contained in this statute, *i.e.*, "[u]nless the conduct is covered under some other provision of law providing greater punishment," reveals an intent by our General Assembly to limit a trial court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct. Here, because Defendant was also convicted and sentenced for assault inflicting serious bodily injury, a felony, Defendant argues that he should not be punished for committing an assault on a female. *Compare* N.C. Gen. Stat. § 14-33(c) (classifying assault on a female as a Class A1 misdemeanor), *with* N.C. Gen. Stat. § 14-32.4 (classifying assault inflicting serious bodily as a Class F felony). We agree.

As our Supreme Court has stated,

> [t]he intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (second and third alterations in original) (internal quotation marks and citations omitted).

Here, Defendant's interpretation of the assault on a female statute comports with its plain language. The prefatory clause unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault. Furthermore, this interpretation is consistent with previous decisions of our appellate courts dealing with other statutes that contain identical prefatory language. *See*, *e.g.*, *id.* at 304–05, 698 S.E.2d at 69–70 (collecting cases).

Accordingly, because Defendant was convicted and sentenced for both categories of assault in the court below, the trial court acted contrary to the statutory mandate of N.C. Gen. Stat. § 14-33(c).

IV. Conclusion

For the foregoing reasons, we arrest judgment in 12 CRS 54858 (assault on a female) and remand for resentencing in 12 CRS 54860 (assault inflicting serious bodily injury). Otherwise, we find no error.

Judgment Arrested and Remanded in part; No Error in part.

Judges STROUD and DILLON concur.

STATE OF NORTH CAROLINA
v.
PHILLIP MARK JONES

No. COA13-1181

Filed 3 June 2014

1. Jurisdiction—subject matter—venue—satellite-based monitoring hearing

Defendant's argument in a satellite-based monitoring (SBM) case that the trial court lacked subject matter jurisdiction over him because the State failed to present any evidence that he was a resident of the county in which the hearing was held was dismissed under *State v. Mills*, 754 S.E.2d 674 (2014). The requirement that the SBM hearing be held in the county in which defendant resided related to venue, not subject matter jurisdiction, and defendant's failure to raise the issue before the trial court waived his ability to raise it for the first time on appeal.

2. Satellite-based monitoring—highest level of supervision and monitoring—additional findings not supported—remaining finding not sufficient

A majority of the trial court's "additional findings" of fact in a satellite-based monitoring case were not supported by competent evidence. The remaining supported "additional finding[,]" coupled with defendant's assessment as a "moderate-low" risk for committing another sexual offense, did not support the trial court's order that he enroll in the highest level of supervision and monitoring.

Appeal by defendant from order entered 7 February 2013, *nunc pro tunc* to 25 January 2013, by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 22 April 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

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

HUNTER, Robert C., Judge.

Defendant Phillip Mark Jones appeals the order requiring him to enroll in satellite-based monitoring ("SBM") for the duration of his post-release supervision. On appeal, defendant argues that: (1) the trial court lacked subject matter jurisdiction to order SBM because the State presented no evidence that defendant was a resident of Craven County at the time of the SBM hearing; and (2) the trial court's "additional findings" supporting the highest possible level of supervision and monitoring were not supported by competent evidence.

After careful review, we reverse the SBM order.

Background

On 15 January 1998, defendant pled guilty to statutory rape; the trial court sentenced him to 173 months to 217 months imprisonment ("the 1998 offense"). While defendant was serving his prison sentence, the North Carolina Department of Public Safety ("DPS") sent him notice that it had scheduled an SBM determination hearing in Craven County Superior Court after making the initial determination that defendant fell into a category that made him eligible for SBM. DPS claimed that it made that determination based on defendant's 1998 conviction in Craven County which "involv[ed] the physical, mental, or sexual abuse of a

minor." Defendant acknowledged that he received the notice by signing the letter on 9 October 2012.

Prior to the SBM hearing, defendant submitted to a STATIC-99 assessment, the tool used by the Division of Adult Correction for assessing a sexual offender's likelihood for reoffending. Defendant earned a score of three points, which indicated a "moderate-low" risk of reoffending. The results of the STATIC-99 were submitted to the trial court at defendant's SBM hearing.

The trial court held the SBM hearing on 25 January 2013. Defendant stipulated that he had received notice of the hearing. As for the prior conviction, the State submitted evidence showing that, in 1994, defendant had been initially charged with first degree sex offense; however, the prosecuting attorney had reduced the charge to assault on a female, to which defendant pled guilty (94 CR 1252) ("the 1994 offense"). In defendant's file, the trial court noted that there was a 1997 report from Dorothea Dix Hospital evaluating defendant; the psychiatric evaluation was completed before his 1998 trial for statutory rape. Although the trial court reviewed the Dix report, it "ascribe[d] no significance" to it given that it was over fifteen years old. The trial court asked defendant's probation officer how defendant was "doing" on probation; the officer reported that defendant has reported to all his office appointments, has not missed a curfew, and has been paying the money he owes.

On a standard, preprinted AOC form, the trial court made the following findings: (1) defendant was convicted of a reportable conviction; (2) defendant fell into at least one of the categories requiring SBM; (3) the District Attorney scheduled a hearing in the county in which defendant resided and provided adequate notice of the hearing; and (4) defendant's 1998 conviction involved the physical, mental, or sexual abuse of a minor. The trial court made two "additional findings": (1) there was a short period of time from the conclusion of defendant's supervision for the "prior sexual offense" in 94 CR 1252 to reoffending ("additional finding no. 1"); and (2) there was a similarity between the victims in both age and sex ("additional finding no. 2"). Based on these "additional findings," the trial court ordered that defendant enroll in the highest possible level of supervision and monitoring until his post-release supervision ended for the 1998 offense (at some point in October 2017). Defendant filed timely notice of appeal.

Standard of Review

For SBM enrollment, "the trial court is statutorily required to make findings of fact to support its legal conclusions." *State v. Morrow*,

200 N.C. App. 123, 126, 683 S.E.2d 754, 757 (2009), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010). On appeal, this Court "review[s] the trial court's findings of fact to determine whether they are supported by competent record evidence[.]" *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009). Moreover, the Court reviews the trial court's conclusions of law for "legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Clark*, 211 N.C. App. 60, 70, 714 S.E.2d 754, 761 (2011).

Arguments

I. Subject Matter Jurisdiction

[1] First, defendant argues that the trial court lacked subject matter jurisdiction over him to order SBM. Specifically, defendant contends that the State failed to present any evidence that defendant was a resident of Craven County at the time of the hearing; therefore, the trial court's finding that the hearing was held in the county of defendant's residence was not supported by competent evidence. Based on *State v. Mills*, __ N.C. App. __, 754 S.E.2d 674 (2014), we dismiss defendant's argument.

Pursuant to N.C. Gen. Stat. § 14-208.40B(b), "[i]f the [DOC] determines that the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a), the district attorney, representing the [DOC], shall schedule a hearing in superior court for the county in which the offender resides." Defendant argues that although he did not challenge the location of the hearing before the trial court, this issue may be raised for the first time on appeal since it addresses subject matter jurisdiction.

In support of his argument, defendant cites two unpublished cases. However, this Court's recent published opinion in *Mills*, is controlling. In *Mills*, the defendant did not argue at his SBM hearing that it was not being held in the county of his residence. On appeal, the defendant contended that: (1) he could raise this issue for the first time on appeal because it involved subject matter jurisdiction; and (2) there was no competent evidence presented at the hearing that defendant resided in Buncombe County, where the SBM hearing occurred. *Id.* at ___, 754 S.E.2d at 677. After noting that SBM hearings are civil in nature, the *Mills* Court rejected the defendant's characterization of his argument as one challenging subject matter jurisdiction; instead, the Court concluded that "while the superior court has subject matter jurisdiction over SBM hearings, the requirement that the hearing be held in the superior court in the county in which the offender resides relates to venue." *Id.* Thus, the defendant could not raise his venue challenge for the first time on appeal because it had been waived. *Id.*

Similarly, here, when defendant stipulated that he had received notice of the hearing, he did not raise any argument that he was not a resident of Craven County. Because the requirement that the SBM hearing be held in the county in which defendant resided relates to venue, not subject matter jurisdiction, *id.*, defendant's failure to raise the issue before the trial court waived his ability to raise it for the first time on appeal, and this argument is dismissed.

II. The "Additional Findings"

[2] Next, defendant challenges the two "additional findings" the trial court made in requiring defendant enroll in the highest level of supervision and monitoring. Specifically, with regard to "additional finding no. 1," defendant contends that there was no evidence that defendant had committed a "prior sexual offense" or that the present offense was committed within a "short period of time from [the] conclusion of supervision" for the 1994 conviction of assault on a female. Additionally, defendant alleges that there was no evidence presented that the victims in the 1994 and 1998 offenses were similar in age and sex, which was noted in the trial court's "additional finding no. 2." Consequently, defendant argues that because these findings were not supported by competent evidence and defendant was assessed as a "moderate-low" risk, the trial court erred in ordering him to enroll in the highest level of supervision and monitoring. We agree.

"This Court has previously held that a DOC risk assessment of 'moderate,' *without more*, is insufficient to support the finding that a defendant requires the highest possible level of supervision and monitoring." *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (quoting *Kilby*, 198 N.C. App. at 369–70, 679 S.E.2d at 434). A trial court may order a defendant receive the highest level of supervision and monitoring if it "makes 'additional findings' regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings." *Id.* (citing *State v. Morrow*, 200 N.C. App. 123, 130–34, 683 S.E.2d 754, 760–62 (2009), *aff'd per curiam*, 364 N.C. 424, 700 S.E.2d 224 (2010)). However, if a defendant is assessed as a "moderate" risk and the State presented no evidence to support findings of a higher level of risk or to support the requirement for "the highest possible level of supervision and monitoring[,]" the trial court's order must be reversed. *Kilby*, 198 N.C. App. at 370-71, 679 S.E.2d at 434. In contrast, if the State presented any evidence at the SBM hearing that would support the highest level, "it would be proper to remand this case to the trial court to consider the evidence and make additional findings." *Id.* at 370, 679 S.E.2d at 434.

A. "Additional Finding No. 1" – Short Period of Time between Conclusion of Supervision for Defendant's "Prior Sexual Offense" and Reoffending

First, defendant contends that there was no competent evidence introduced at the hearing to support the trial court's finding that defendant was convicted of a "prior sexual offense" or that the 1998 offense was committed within a short period of time from the conclusion of supervision for the 1994 offense.

At the SBM hearing, the State introduced evidence that, although defendant had initially been charged with first degree sex offense in 1994 (94 CR 1252), that charge was reduced and defendant pled guilty to assault on a female. The crime of assault on a female is not a sexual offense, a point which the State concedes. Therefore, that part of the trial court's finding—that defendant had been convicted of a "prior sexual offense"—was not supported by competent evidence.

With regard to defendant's contention that there was no competent evidence presented to support the trial court's "additional finding" that there was a short period of time between the conclusion of his probation for the 1994 nonsexual offense before he committed the 1998 sexual offense, his argument is without merit. Initially, it should be noted that the trial court classified defendant's probation as "supervised" for the 1994 offense. However, there is no evidence in the record to support this classification; the ACIS print-out submitted to the trial court for defendant's 1994 offense only indicated that defendant received three years of probation. Notwithstanding this classification, the ACIS print-out clearly indicated that defendant was sentenced to two years imprisonment on 30 March 1994 for assault on a female, but that sentence was suspended and defendant was placed on three years of probation. The offense date for the 1998 sexual offense was 19 August 1997, approximately three years and five months after defendant was sentenced for the 1994 nonsexual offense. While defendant is correct in that it is not exactly clear when defendant ended his probation for the 1994 offense, the print-out supports a finding that a short amount of time elapsed between the end of probation for the 1994 offense, sometime around April 1997, and the date of offense for the 1998 conviction, August 1997. Accordingly, part of "additional finding no. 1"—that defendant committed the 1998 offense soon after his probation for the 1994 offense ended—was supported by competent evidence. Thus, it may be considered when determining whether the trial court's determination that defendant requires the highest level of supervision and monitoring "reflect[s] a correct application of law to the facts found." *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432.

B. "Additional Finding No. 2" – "Similarity in Victims' Age and Sex"

Initially, it should be noted that the State concedes, and we agree, that the trial court's "additional finding no. 2"—similarity of victims in age and sex—was not supported by competent record evidence because the only documents establishing this finding were the 1997 Dorothea Dix documents. Citing *State v. Mixion*, 110 N.C. App. 138, 150, 429 S.E.2d 353, 370 (1993), since those documents were not offered into evidence before the trial court nor did defendant stipulate to their contents, the State concedes that the evidence was insufficient to support this finding. Therefore, it may not provide support for the trial court's determination that defendant required the highest level of monitoring and supervision.

C. Does the Evidence that Defendant Committed the 1998 Offense Within a Short Period After Completing Probation for the 1994 Nonsexual Offense Along with his "Moderate-Low" Risk of Reoffending Support the Trial Court's Determination That Defendant Required the Highest Level of Supervision and Monitoring?

Finally, we must determine whether the "additional finding" that there was a short period of time between the end of probation for the 1994 offense, a nonsexual offense, and committing a sexual offense supports the conclusion that defendant requires the highest possible level of supervision and monitoring. We conclude that this "additional finding" does not, and the trial court's determination is "not a correct application of the law to the facts found," *Id.* at 367, 679 S.E.2d at 432. A defendant's "risk of reoffending" is based on the risk of the defendant committing another sexual offense. Here, the only conviction that the trial court may use in accessing defendant's risk of reoffending is the 1998 offense since that offense constitutes the only sexual offense defendant was convicted of; in contrast, the 1994 offense was a nonsexual offense and does not indicate any increased risk that he would commit another sexual offense. Consequently, this finding does not support a conclusion that defendant is at a high risk of reoffending and does not support a conclusion that defendant requires the highest possible level of supervision and monitoring.

Furthermore, we conclude that the State presented no other evidence to support the trial court's determination. *See id.* (noting that if "evidence was presented which could support findings of fact which could lead to a conclusion that 'the defendant requires the highest possible level of supervision and monitoring[,]' . . . it would be proper to

remand this case to the trial court to consider the evidence and make additional findings"). The fact that defendant was originally charged with a sexual offense, established by the ACIS print-out indicating this initial charge, but pled to the lesser, nonsexual offense of assault on a female would not support a determination that defendant required the highest level of supervision and monitoring. In other words, the underlying facts of the 1994 offense may not be considered by the trial court in determining the level of supervision and monitoring a defendant requires for purposes of SBM. In support of this conclusion, we note that this Court has repeatedly held that the underlying facts of a defendant's conviction may not be used to determine whether the defendant committed an aggravated offense under section 14-208.6(1a). *See State v. Boyett*, __ N.C. App. __, __, 735 S.E.2d 371, 380 (2012) ("In determining whether a particular crime constitutes an aggravated offense, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction.") (internal quotation marks omitted); *State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) ("[W]hen making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction."). Thus, applying this analysis, we hold that the trial court may only consider the offense of which a defendant was convicted for purposes of determining what level of supervision and monitoring a defendant requires for SBM.

In summary, since the State presented no other evidence which could tend to support a determination of a higher level of risk that would require the highest level of supervision and monitoring other than his STATIC-99 score of moderate-low risk, the trial court's order must be reversed. *See Kilby*, 198 N.C. App. at 370-71, 679 S.E.2d at 434 (reversing the SBM order when the State presented no evidence which tended to support a determination of a higher level of risk than the 'moderate' rating assigned by the DOC). In fact, it should be noted that the only other evidence submitted at the SBM hearing supported the opposite conclusion. Specifically, defendant's probation officer indicated that defendant was fully cooperating with his post-release supervision, which might support a finding of a lower risk level, but not a higher one. Additionally, although he had not found work at the time of the SBM hearing, he was living with his mother and father, and his father attended the hearing, indicating some familial support. Thus, given that the only "additional finding" supported by competent evidence—that defendant committed the 1998 sexual offense shortly after ending probation for the 1994

nonsexual offense—would not support a higher level of risk and that the State presented no other evidence showing that defendant required the highest level of monitoring and supervision, we reverse the trial court's SBM order.

Conclusion

Because the State presented no evidence other than defendant's moderate-low STATIC-99 risk assessment to support a finding that defendant required the highest level of supervision and monitoring, we reverse the SBM order.

REVERSED.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA
v.
KALAN JOHN LUCAS, DEFENDANT

STATE OF NORTH CAROLINA
v.
SHAQUILLE OQKWONE RICHARD, DEFENDANT

No. COA13-784

Filed 3 June 2014

1. Burglary and Unlawful Breaking or Entering—second-degree—evidence of entry—insufficient

Defendants' convictions for second-degree burglary were vacated where the evidence failed to raise more than a mere suspicion or conjecture that defendants entered the home.

2. Burglary and Unlawful Breaking or Entering—second degree—insufficient evidence of entry—sufficient evidence of intent—felonious breaking or entering

A conviction for second-degree burglary was remanded for entry of judgment on felonious breaking or entering where there was insufficient evidence of entry into the home but sufficient evidence of defendants' intent to commit a felony. The State's failure to prove that either defendant actually entered the home, in no way

detracted from the sufficiency of the evidence of defendants' intent to commit a felony within the residence.

3. Burglary and Unlawful Breaking or Entering—instructions—failure to charge on first-degree trespass

Defendants did not demonstrate that the trial court's failure to instruct the jury regarding first-degree trespass in a burglary and breaking or entering prosecution was error, much less plain error, where the evidence did not permit a reasonable inference disputing the State's contention that defendants intended to commit a felony.

4. Larceny—instructions—failure to define—no plain error

Although defendants contended that the trial court committed plain error by failing to define larceny to the jury, given that the State's case identified larceny as the specific felony that defendants intended to commit, the jury did not need a formal definition of the term larceny. There was evidence permitting the inference that defendants intended to steal property and there was no evidence suggesting that defendants intended to merely borrow the property.

5. Damages and Remedies—restitution—evidence not sufficient to support award

Restitution orders were remanded where defendants contended that the evidence was not sufficient evidence to support the award and the State conceded error.

6. Constitutional Law—effective assistance of counsel—failure to request instructions

Defense counsel's failure to request a jury instruction defining larceny and an instruction on first-degree trespass did not constitute ineffective assistance of counsel in a prosecution for second-degree burglary. It was determined elsewhere in the opinion that the trial court did not commit plain error in its instructions to the jury.

Appeal by defendants from judgments entered 27 March 2013 by Judge Reuben F. Young in Cumberland County Superior Court. Heard in the Court of Appeals 11 December 2013.

Roy Cooper, Attorney General, by Richard H. Bradford, Special Deputy Attorney General, and Susannah P. Holloway, Assistant Attorney General, for the State.

Unti & Lumsden LLP, by Margaret C. Lumsden, for defendant-appellant Lucas.

Guy J. Loranger for defendant-appellant Richard.

DAVIS, Judge.

Co-defendants Kalan John Lucas ("Lucas") and Shaquille Oqkwone Richard ("Richard") (collectively "Defendants") appeal from their convictions for second-degree burglary and conspiracy to commit second-degree burglary. On appeal, Defendants argue that the trial court erred in (1) denying their motions to dismiss the second-degree burglary charges for insufficient evidence; (2) failing to instruct the jury regarding the definition of larceny and on the offense of first-degree trespass; and (3) entering a restitution order that was not supported by competent evidence. Defendants also contend that their trial counsel provided ineffective assistance of counsel by failing to request the above-referenced jury instructions. After careful review, we vacate Defendants' convictions for second-degree burglary and remand for resentencing for felonious breaking or entering. We also vacate the trial court's restitution orders and remand to the trial court for rehearing on that issue.

Factual Background

The State presented evidence at trial which tended to establish the following facts: On 27 November 2011 at approximately 2:30 a.m., Nina Moore ("Mrs. Moore") awoke to the sound of "erratic knocking" and the doorbell ringing at the front door of the home in Fayetteville, North Carolina that she shared with her husband, Lynard Moore ("Mr. Moore"). From a window, Mrs. Moore observed a man wearing a dark-colored hooded sweatshirt standing at the front door. Mrs. Moore also saw another man sitting in the driver's seat of a white car parked outside their home. Mrs. Moore woke up Mr. Moore and informed him that there was someone at the door and that she thought "he needed to get his gun." Mr. Moore retrieved a gun from their safe, proceeded down the hallway, and saw that the front door had been kicked open. Mr. Moore fired three or four shots into the front entranceway. At that point, a man ran out of the house and jumped into a white car, which Mr. Moore identified as a Mercury Grand Marquis. The car then "sped away" out of the Moores' neighborhood.

Mrs. Moore called the police and informed them what had occurred. Officer Leonard Honeycutt ("Officer Honeycutt") of the Fayetteville Police Department arrived at the Moores' home, took statements from Mr. and Mrs. Moore, and issued a "be on the lookout" for a white Mercury Grand Marquis and a man wearing a "dark hoody or toboggan" and dark tennis shoes. Shortly thereafter, Officer Honeycutt received a dispatch

regarding "a suspicious white vehicle" parked in front of a residence on Windlock Drive in a neighborhood approximately two miles away from the Moores' home.

Steven Pavel ("Mr. Pavel") was sitting on the front porch of his home on Birchcreft Drive when he noticed a white sedan approaching the corner of Birchcreft Drive and Windlock Drive. The driver parked the car, and the vehicle's two occupants remained inside the vehicle for several minutes. Mr. Pavel then witnessed two men exit the vehicle and approach "the first house off from the corner." Because Mr. Pavel believed that the men's actions seemed suspicious, he went inside and observed them through his window. When the men "start[ed] to walk up to the first house, casing the house and all," Mr. Pavel called 911. Mr. Pavel observed the men walk past the first home, which was vacant, and attempt to open the door of a vehicle that was parked in the next driveway.

The men then approached the second house, which was also unoccupied due to the fact that the owners, Wesley Meredith and Jennifer Meredith (collectively "the Merediths"), were out of town. It appeared to Mr. Pavel that one of the men was trying to strike the side patio door of the Merediths' home.

Mr. Pavel remained on the phone with the 911 dispatcher and related that the men had walked back down the driveway and reentered their car. After sitting in the car for several minutes, the men exited the vehicle again and walked around to the back of the Merediths' house. A few minutes later, Mr. Pavel saw both men "running around from the back of the house." The men then jumped into their car and sat there for several minutes. Officer Honeycutt and Officer Michael Tackema ("Officer Tackema") arrived at the scene and apprehended the two men. At trial, Officers Honeycutt and Tackema identified these men as Defendants.

Officers Honeycutt and Tackema detained and searched both Defendants, and Officer Honeycutt found tube socks in their vehicle, which he noted were "very common for breaking and entering artists and thieves to put on their hands" because they were less conspicuous than gloves. Officers Honeycutt and Tackema then proceeded to inspect the area surrounding the home. They observed that the outer pane of a double-pane sliding glass door on the side of the house had been shattered. A fire pit bowl and two concrete landscaping bricks were lying on the ground near a back bedroom window that was also shattered. Several similar bricks were lying on the floor inside the bedroom where the window had been broken. There was soot covering the fire pit bowl and the back bedroom window, and the blinds hanging from that

window were "somewhat ajar." The officers did not detect any soot on Defendants or their vehicle but did locate a shard of glass on Lucas's person that appeared to be similar to the glass found at the scene.

Defendants were subsequently charged with first-degree burglary and conspiracy to commit first-degree burglary at the Moores' residence and second-degree burglary and conspiracy to commit second-degree burglary at the Merediths' residence. The matter came on for a jury trial on 25 March 2013 in Cumberland County Superior Court. On 27 March 2013, the jury returned verdicts finding Defendants (1) not guilty of first-degree burglary or conspiracy to commit first-degree burglary; and (2) guilty of second-degree burglary and conspiracy to commit second-degree burglary. The trial court entered judgments on the jury's verdicts, sentencing Defendants to a presumptive-range term of 13 to 16 months imprisonment for second-degree burglary and a consecutive presumptive-range term of 6 to 8 months imprisonment for conspiracy to commit second-degree burglary. Defendants gave notice of appeal in open court.

Analysis

I. Motion to Dismiss

[1] Defendants first argue that the trial court erred in denying their motion to dismiss the second-degree burglary charges. Specifically, Defendants contend that the evidence presented at trial was insufficient to show the elements of (1) entry; and (2) intent to commit a felony.

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 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. Ros*e, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed.2d 818 (1995).

To survive a defendant's motion to dismiss a charge of second-degree burglary, the State must provide substantial evidence that the defendant committed a (1) breaking (2) and entering (3) of an unoccupied dwelling

house or sleeping apartment of another (4) in the nighttime (5) with the intent to commit a felony therein. *State v. Brown*, ___ N.C. App. ___, ___, 732 S.E.2d 584, 586-87 (2012); N.C. Gen. Stat. § 14-51 (2013). Because Defendants only challenge the sufficiency of the evidence regarding entry and intent to commit a felony, we limit our analysis to those two elements. *See State v. Davis*, 198 N.C. App. 146, 151, 678 S.E.2d 709, 713-14 (2009) (explaining that where defendant challenges sufficiency of evidence as to some elements "but does not challenge the State's evidence of the other elements of the crime," this Court examines only the sufficiency of the evidence concerning the challenged elements).

> [E]ntry, for the purposes of burglary, is committed by the insertion of any part of the body for the purpose of committing a felony. Thus, an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony . . . .

State v. Bumgarner, 147 N.C. App. 409, 415, 556 S.E.2d 324, 329 (2001) (citation, quotation marks, and brackets omitted).

Our Supreme Court has further explained that "entry is the act of going into the place *after a breach has been effected*," *State v. Gibbs*, 297 N.C. 410, 418, 255 S.E.2d 168, 174 (1979) (citation and quotation marks omitted and emphasis added), and that "the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense," *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 756 (2008) (citation and quotation marks omitted).

In *State v. Watkins*, ___ N.C. App. ___, 720 S.E.2d 844, *disc. review denied*, ___ N.C. ___, 724 S.E.2d 509 (2012), the defendant argued that the evidence presented at trial showing that he and his accomplice used the end of a shotgun to break a townhouse window, heard movement within the residence, and immediately fled the scene was insufficient to establish the entry element of burglary. We agreed, explaining that the entry element requires the defendant to "either physically enter the residence, however slight, or commit the burglary by virtue of [an] instrument." *Id.* at ___, 720 S.E.2d at 849 (citation, quotation marks, and brackets omitted). We further noted that to constitute an entry through the use of an instrument, the instrument itself must be "used to commit a felony within the residence" rather than merely to make an opening into the residence. *Id.* at ___, 720 S.E.2d at 849. Consequently, our analysis of North Carolina case law as well as leading treatises on criminal law led us to conclude that

> the fact that defendant broke a window of the residence in the nighttime with an instrument — even if the instrument itself crossed the threshold — is not sufficient to find him guilty of burglary. . . . [V]iewing the evidence in the light most favorable to the State, it appears only that defendant broke a window of the residence with an instrument to facilitate a subsequent entry. Such evidence does not support the trial court's submitting a case of burglary to the jury.

Id. at ___, 720 S.E.2d at 850.

We believe that the evidence in the present case compels the same result. At trial, the State introduced circumstantial evidence tending to show that Defendants used landscaping bricks and a fire pit bowl to break a back window of the Merediths' home. Although there was soot covering the fire pit bowl and the broken window, law enforcement officers did not find soot on the person of either Defendant or within the interior of the home. Several landscaping bricks were found inside the bedroom where the window had been broken, but there was no evidence that anything within the home had been tampered with or was missing.

While Officer Honeycutt testified that the blinds hanging from the broken window were "somewhat ajar" and "parted enough that entry could have been made with a hand or body part," the State neither offered evidence that Defendants had *actually crossed* the threshold of the home nor introduced evidence permitting a reasonable inference of such actual entry. The lack of evidence on this issue distinguishes the present case from *State v. Salters*, 137 N.C. App. 553, 528 S.E.2d 386, *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000), in which we held that evidence of a splintered door frame and broken lock in the residence at issue coupled with testimony that a suitcase discovered to be missing from inside the residence was seen in the defendant's possession was sufficient to allow the inference that the defendant had entered the home. *Id.* at 557, 528 S.E.2d at 390.

Nor did the State provide evidence that the landscaping bricks found inside the home were used for a purpose beyond creating an opening in the window. *See Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 849 ("[W]here the State's evidence seeks to establish an entry by the defendant's use of an instrument, the defendant can only be guilty of burglary if the instrument that crossed the threshold was itself used to commit a felony within the residence."). Although a shard of glass was discovered on Lucas's person, we cannot agree with the State's contention that

this amounted to substantial evidence of entry where law enforcement officers testified that there was glass "all over the ground" outside the Merediths' residence.

As such, we believe that this evidence failed to raise more than a mere suspicion or conjecture that Defendants entered the home. See *State v. McDowell*, ___ N.C. App. ___, ___, 720 S.E.2d 423, 424 (2011) ("A motion to dismiss should be granted . . . when the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt." (citation and quotation marks omitted)). Accordingly, we vacate Defendants' convictions for second-degree burglary.

[2] However, because we conclude, for the reasons discussed below, that there was sufficient evidence to establish Defendants' intent to commit a felony, we remand to the trial court for entry of judgment on felonious breaking or entering. "To support a conviction for felonious breaking [or] entering under N.C. Gen. Stat. § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Jones*, 188 N.C. App. 562, 564-65, 655 S.E.2d 915, 917 (2008) (citation, quotation marks, and brackets omitted); *see Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 850 ("For conviction of felonious breaking or entering, a violation of G.S. 14-54(a), it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent."); *State v. Barnett*, 113 N.C. App. 69, 75-76, 437 S.E.2d 711, 715 (1993) (concluding that although evidence was insufficient to sustain burglary conviction, jury — in convicting defendant of burglary — "necessarily found facts which establish felonious breaking [or] entering, i.e., the breaking [or] entering of a building with intent to commit any felony or larceny therein").

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 475, 666 S.E.2d 648 (2008). Intent to commit a felony may be inferred from the defendant's acts and conduct during the subject incident. *State v. Allah*, ___ N.C. App. ___, ___, 750 S.E.2d 903, 907 (2013).

Here, the State offered testimony from Mr. Pavel describing Defendants' behavior during the incident. Mr. Pavel explained that Defendants were "casing" the neighborhood and "pull[ing] on the door

handles" of cars that were parked in driveways. Mr. Pavel testified that he described their conduct as "casing" to the 911 dispatcher because "it's just not normal activity for someone to be walking from house to house to see if it's occupied or not" or to try to open the doors of various cars parked in the driveways.

A "fundamental theory" in the context of both burglary and breaking or entering is that absent "evidence of other intent or explanation for breaking and entering . . . the usual object or purpose of burglarizing a dwelling house at night is theft." *State v. Hedrick*, 289 N.C. 232, 236, 221 S.E.2d 350, 353 (1976) (citation and quotation marks omitted); *see State v. McBryde*, 97 N.C. 393, 396, 1 S.E. 925, 927 (1887) ("The intelligent mind will take cognizance of the fact that people do not usually enter the dwelling of others in the night-time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and, when there is no explanation or evidence of a different intent, the ordinary mind will infer this also.").

Although — as discussed above — the State failed to prove that either Defendant actually entered the home, we do not believe that this in any way detracts from the sufficiency of the evidence regarding Defendants' intent to commit a felony within the residence. Because a reasonable juror could infer from Defendants' conduct that they broke the back bedroom window with the intent to commit the felony of larceny once inside, we hold that there was substantial evidence of felonious intent and that the entry of judgment on felonious breaking or entering is appropriate. As such, we remand to the trial court "for the pronouncement of a judgment as upon a verdict of guilty of felonious breaking or entering." *Watkins*, ___ N.C. App. at ___, 720 S.E.2d at 850 (citation, quotation marks, and brackets omitted).[1]

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1. In addition to challenging his conviction for second-degree burglary, Defendant Richard also argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to commit second-degree burglary based on the insufficiency of the evidence regarding entry and intent to commit a felony. However, he offers no argument that the State failed to prove that there was an agreement or understanding between him and Lucas to commit second-degree burglary. *See State v. Dalton*, 122 N.C. 666, 672, 471 S.E.2d 657, 661 (1996) ("A criminal conspiracy is an agreement between two or more people to commit a substantive offense."); *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 ("It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime."), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). Because he does not challenge the sufficiency of the evidence of such an agreement between him and Lucas and because completion of the substantive offense is not necessary for a conviction of conspiracy to commit second-degree burglary, Defendant Richard's argument on this issue is overruled.

II. Jury Instructions

In its charge to the jury, the trial court gave instructions regarding second-degree burglary, felonious breaking or entering, and misdemeanor breaking or entering. The trial court did not instruct the jury on the offense of first-degree trespass, and Defendants contend that the failure to give such an instruction constituted error. Defendants also assert that the trial court erred by failing to expressly define the crime of larceny when it instructed the jury that second-degree burglary is the breaking and entering into an unoccupied dwelling house without the consent of the owners during the nighttime with the intent "to commit a felony or larceny therein." Defendants acknowledge that they did not object to the trial court's instructions and are, therefore, limited to plain error review on appeal. Under plain error review, Defendants bear the burden of showing that "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 517, 723 S.E.2d 326, 333 (2012) (citation and quotation marks omitted).

A. Failure to Instruct on First-Degree Trespass

[3] First-degree trespass is a lesser-included offense of felonious breaking or entering. *State v. Owens*, 205 N.C. App. 260, 266, 695 S.E.2d 823, 828 (2010). Unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires evidence that the defendant entered or remained on the premises or in a building of another without authorization. N.C. Gen. Stat. § 14-159.12 (2013).

A trial court "must submit a lesser-included offense to the jury when, and only when, there is evidence from which the jury can find that the defendant committed the lesser-included offense." *State v. Liggons*, 194 N.C. App. 734, 742, 670 S.E.2d 333, 339 (2009) (citation, quotation marks, and brackets omitted). "The trial court is not . . . obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999). In *Hamilton*, this Court concluded that the trial court was not required to submit the lesser-included offense of first-degree trespass to the jury in the defendant's trial for felonious breaking or entering because the defendant "did not testify or present any evidence that he broke or entered for any non-felonious purpose." *Id.* at 321, 512 S.E.2d at 85.

As in *Hamilton*, the evidence in the present case does not permit a reasonable inference that would dispute the State's contention that

Defendants intended to commit a felony. There was no evidence presented that supported an alternative explanation for Defendants' presence at the Merediths' home. Thus, in the absence of any evidence disputing the State's theory that Defendants "cased" the neighborhood and shattered the Merediths' window in the hope of stealing from the home.

B. Failure to Define Larceny

[4] Citing *State v. Foust*, 40 N.C. App. 71, 251 S.E.2d 893 (1979), Defendants contend that the trial court committed plain error by failing to define larceny to the jury given that the State's case identified larceny as the specific felony that Defendants intended to commit. *In State v. Simpson*, 299 N.C. 377, 261 S.E.2d 661 (1980), however, our Supreme Court held that this Court's ruling in *Foust* — that the trial court's failure to define larceny in a burglary prosecution premised on intent to commit larceny was prejudicial and required a new trial — was "too broad" and that "[t]he extent of the definition [of larceny] required depends upon the evidence in the particular case." *Id.* at 384, 261 S.E.2d at 665.

In this case, the evidence established that in the early morning hours of 27 November 2011, Defendants were "casing" houses and attempting to gain entry into vehicles in various driveways. Defendants' behavior, as witnessed by Mr. Pavel, indicated that they were examining the homes and vehicles so that they could steal property from them. No evidence was offered to suggest that Defendants' conduct was motivated by some other purpose or plan or that Defendants were looking for property to which they had some bona fide claim of right. *See id.* at 384, 261 S.E.2d at 665 ("In the case before us, there was no necessity for any definition or explanation of the word 'larceny' because there was no evidence suggesting that the [stolen property] was borrowed, or taken for some temporary purpose, or otherwise negating a taking with felonious intent to steal."). Thus, because there was evidence presented at trial permitting the inference that Defendants intended to steal property and there was no evidence suggesting that Defendants intended to merely borrow the property, we are satisfied that "the jury did not need a formal definition of the term 'larceny' to understand its meaning and to apply that meaning to the evidence." *Id.* (concluding that term "larceny" may be used as shorthand statement of its definition, i.e., to steal or to take and carry away goods of another with intent to permanently deprive owner of those goods where there is no "direct issue as to the intent or purpose of the taking" (citation and quotation marks omitted)).

As such, we conclude that "[t]he use of the word 'larceny' as it is commonly used and understood by the general public was sufficient in

this case to define for the jury the requisite felonious intent needed to support a conviction" and that "[t]here is no reasonable possibility that [the] failure to define 'larceny' contributed to defendant's conviction or that a different result would have likely ensued had the word been defined." *Id.* Consequently, Defendants have failed to meet their burden of establishing plain error.

III. Restitution

[5] Defendants next contend that the trial court erred in ordering them to pay restitution in the amount of $575.00 without sufficient evidence to support the award. It is well established that "[t]he amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing." *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). On appeal, this Court reviews *de novo* whether the restitution ordered by the trial court is supported by competent evidence. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011).

The State concedes error on this issue, acknowledging that there was no evidence presented regarding the monetary value of the property damage caused by Defendants. Restitution "is not intended to punish defendants but to compensate victims," and the amount ordered must be based on "something more than a guess or conjecture." *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986). Accordingly, we vacate the trial court's restitution orders and remand for a rehearing on this issue. *See Mauer*, 202 N.C. App. at 552, 688 S.E.2d at 778 (vacating restitution order and remanding for rehearing where no evidence was introduced at trial or sentencing to support amount of restitution ordered).

IV. Ineffective Assistance of Counsel

[6] Finally, Defendants claim that their defense counsel's failure to request a jury instruction defining larceny and an instruction on first-degree trespass constitutes ineffective assistance of counsel. We disagree.

"A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003). Here, we have already determined that the trial court did not commit plain error in its instructions to the jury because (1) the trial court was

not required to expressly define larceny under the facts of this case; and (2) Defendants were not entitled to an instruction regarding first-degree trespass. Accordingly, we cannot conclude that their trial counsel's failure to request these instructions constituted ineffective assistance of counsel. *See State v. Land*, ___ N.C. App. ___, ___, 733 S.E.2d 588, 595 (2012) (holding that "[s]ince the trial court did not commit plain error when failing to give the instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions"), *aff'd per curiam*, 366 N.C. 550, 742 S.E.2d 803 (2013).

Conclusion

For the reasons stated above, we conclude that Defendants' second-degree burglary convictions and the trial court's restitution orders must be vacated. We remand to the trial court for entry of judgment and resentencing as to each Defendant on the charges of felonious breaking or entering and for rehearing on the issue of restitution.[2]

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.

2. We also note that the judgments entered by the trial court mistakenly list Defendants' conspiracy offenses as conspiracy to commit breaking or entering of a building rather than conspiracy to commit second-degree burglary. While the judgments reflect the correct class of felony for conspiracy to commit second-degree burglary (Class H), the trial court should amend the offense descriptions upon remand so that the record may "speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

STATE OF NORTH CAROLINA
v.
STEVEN RIGIL McCANLESS

No. COA13-1292

Filed 3 June 2014

1. Evidence—admission of anime images—overwhelming—evidence of guilt—no reasonable possibility of different result

The trial court did not commit prejudicial error in a sexual offenses with a child case by admitting evidence of seven anime images taken from defendant's computer. Even assuming arguendo that the trial court erred in admitting the images, given the overwhelming evidence of defendant's guilt, no reasonable possibility existed that a different result would have been reached at trial absent the admission of the anime images.

2. Joinder—sexual offenses—sufficient evidence—transactional connection

The trial court did not abuse its discretion in a sexual offenses with a child case by joining 3 September 2010 offenses and 1 July 2011 offenses for trial. The evidence was sufficient to constitute a transactional connection between the acts.

3. Confessions and Incriminating Statements—to law enforcement officers—voluntary

The trial court did not err in a sexual offenses with a child case by denying defendant's motion to suppress statements made by him to law enforcement officers. The unchallenged findings of fact were sufficient to conclude that defendant's statements were voluntary.

Appeal by defendant from judgments entered 20 May 2013 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Paul Louis Bidwell and Douglas A. Ruley, for defendant.

ELMORE, Judge.

On 17 May 2013, a jury found Stephen Rigil McCanless (defendant) guilty of attempted sexual offense by an adult with a child and indecent liberties with a child. Judge Mark E. Powell sentenced defendant to consecutive terms of 157-198 months and 13-16 months active imprisonment. Defendant appeals. After careful consideration, we find no prejudicial error.

I. Facts

The State indicted defendant for offenses that allegedly occurred on 3 September 2010 and 1 July 2011. The State alleged that on 3 September 2010, defendant, who was fifty-seven-years-old at the time, "expose[d] his private parts in a public place, the Goodwill Store . . . in the presence of another person, [M.S.,]" and committed indecent liberties with her. The State also charged defendant with the sexual offense of a child occurring on 1 July 2011 by "engag[ing] in a sexual act with [K.C.][,]" first degree kidnapping, and another count of indecent liberties.

Before trial, both parties filed motions with the trial court. The State made a motion to join the September and July offenses for trial pursuant to N.C. Gen. Stat. § 15A-926(a). Defendant filed a motion *in limine* to exclude "almost comic book form" Japanese anime images that depicted sexually suggestive pictures of a young girl. The images were found on a computer that was seized by law enforcement officers from defendant's home during the criminal investigation. Defendant also filed a motion to suppress statements made by him to officers of the Asheville Police Department on 6 July 2011. Defendant told officers that he was at a Salvation Army Store on 1 July 2011, interacted with a young girl, pulled her pants down, touched her leg and vagina, and "motorboated" (blowing air from a person's mouth on to the skin of another) the girl in her buttock area. He also divulged facts implicating his involvement with M.S. at the Goodwill Store in September 2010 by stating that he may have "flashed" someone. The trial court granted the State's motion to join and denied both defendant's motion *in limine* and motion to suppress.

II. Analysis

a.) Admission of Images

[1] Defendant first argues that the trial court committed prejudicial error by admitting evidence of seven anime images taken from defendant's computer. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1443 (2013):

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

Thus, our standard of review is "whether a reasonable possibility exists that the evidence, if excluded, would have altered the result of the trial." *State v. Anderson*, 177 N.C. App. 54, 62, 627 S.E.2d 501, 505 (2006). Important to our analysis is our Supreme Court's holding that "the presence of [other] overwhelming evidence of guilt" can render the erroneous admission of evidence harmless. *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted).

We need not answer the question of whether the trial court erred in admitting this evidence in order to dispose of this issue on appeal. Even assuming *arguendo* that the trial court erred in admitting the images, we conclude that the error was not prejudicial as to defendant's convictions of attempted sexual offense and indecent liberties with a child against K.C. on 1 July 2011.

At trial, the State offered evidence that on 1 July 2011, seven-year-old K.C., K.C.'s mother, and K.C.'s adult sister arrived at the Salvation Army Store. K.C. testified that she walked into the furniture room alone, sat down in a lawn chair, defendant approached her, and he used his finger to touch the inside of her "pee-pee" or "front part[,]" which were words used to describe her vagina. Thereafter, defendant took K.C. behind a grill, and she stated that defendant pulled her pants and underwear down, "put his tongue on my butt and started licking the inside of my butt." K.C.'s version of events remained consistent when she subsequently told her mother, Detective John Rikard, Nurse Alicia Eifler and Dr. Cindy Brown. Cassie York, a customer at the store, testified that she observed defendant with one knee on the ground as he stood next to K.C. Another customer, Wenona Rogers, testified that she saw K.C. with her pants partially down as defendant had his tongue on K.C.'s butt while "fondling" her. Two store employees, Gary King and Sharon Brown, heard K.C. say that defendant licked her buttock. Furthermore, K.C.'s adult sister testified that she went to locate K.C. and saw defendant "kneeling" in front of K.C. and pulling her pants up.

After K.C.'s sister confronted defendant to ask him what he was doing, he ran out of the store and drove away in a truck. During his interview with police, defendant admitted to patting K.C. on the leg, pulling her pants down, touching her buttock and vagina, and said that "I'm not looking for sex from a child. . . . I'm pretty sure I'm not, but I -- I'd like to find out for sure." This overwhelming evidence of defendant's guilt presented by the State defeats defendant's contention that a reasonable possibility exists that a different result would have been reached at trial had the trial court barred admission of the anime images from the jury. Accordingly, any error, if any, was not prejudicial to defendant.

b.) Joinder of Offenses

[2] Defendant also argues that the trial court erred in joining the 3 September 2010 offenses and the 1 July 2011 offenses for trial because "[t]here [w]as [i]nsufficient [t]ransactional [c]onnection [b]etween [t]hese [o]ffenses." We disagree.

"[T]he trial judge's decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal." *State v. Williams*, 355 N.C. 501, 529-30, 565 S.E.2d 609, 626 (2002) (citation and quotation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision."). "[T]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *State v. Peterson*, 205 N.C. App. 668, 672, 695 S.E.2d 835, 839 (2010) (citation and quotation omitted).

Under N.C. Gen. Stat. § 15A-926 (2013), "[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In ruling on a motion to join, the trial court "must first determine if the statutory requirement of a transactional connection is met." *Williams* at 529, 565 S.E.2d at 626 (citation omitted). The presence or absence of a transactional connection "is a

fully reviewable question of law." *Id.* (citation omitted). The trial court "should consider (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case." *Peterson* at 672, 695 S.E.2d at 839 (citation and quotation omitted). Joinder "is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be determined as of the time of the trial court's decision and not with the benefit of hindsight." *State v. Silva*, 304 N.C. 122, 127, 282 S.E.2d 449, 453 (1981).

We first note that although the trial court dismissed the charge of indecent liberties with a child against M.S. at the close of the State's evidence and the jury found defendant not guilty of felony indecent exposure against M.S., those facts are irrelevant in analyzing whether the trial court abused its discretion at the time it entered the order for joinder of the offenses. *See id.* at 127, 282 S.E.2d at 452 ("Although the conspiracy charge, the actual link connecting the armed robbery and larceny charges, was dismissed at the close of the evidence, that fact . . . cannot enter into our consideration of whether [the trial judge] abused his discretion in allowing joinder.").

The evidence in the two cases show resemblances in victim, location, motive, and modus operandi. Just like the circumstances surrounding the acts against K.C. on 1 July 2011 as described above, the alleged acts against M.S. on 3 September 2010 were similar. Four-year-old M.S. and her mother were inside a Goodwill store. M.S. and her mother became separated by a clothing rack, and M.S. testified that a man showed her his "bummy." By the time M.S. told her mother what happened, the alleged perpetrator had already left the store. In sum, the State's theory alleged that in each case defendant's victim was a prepubescent young girl, the acts occurred within months of one another in a donation store while the girl was momentarily alone, defendant immediately fled the store after committing the act, and defendant exerted acts of sexual misconduct. This evidence was sufficient to constitute a transactional connection between the acts such that joinder of the offenses was not an abuse of discretion.

c.) Motion to Suppress

[3] In his last argument on appeal, defendant contends that the trial court erred in denying his motion to suppress statements made by him to law enforcement officers because they were not voluntary. Again, we disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). If a finding of fact is not challenged on appeal, it is "presumed to be supported by competent evidence and is binding on appeal." *State v. Taylor*, 178 N.C. App. 395, 401, 632 S.E.2d 218, 223 (2006) (citation and quotation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The voluntary nature of a statement is determined by the "totality of the circumstances[.]" *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992) (citation omitted). We consider the following factors, none of which is determinative: "the defendant's mental capacity; whether the defendant was in custody at the time the confession was made; and the presence of psychological coercion, physical torture, threats, or promises." *Id.* (citation omitted).

We initially note that defendant does not challenge any of the trial court's findings of fact as being unsupported by competent evidence. Instead, he merely states that the findings only addressed "some of the statements made by the detectives" and were "undermined" by other testimony. However, "the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. McArn*, 159 N.C. App. 209, 211, 582 S.E.2d 371, 373 (2003) (citation and quotation omitted). Thus, in the case *sub judice*, the trial court's findings of fact are binding on appeal, and our sole task is to determine whether these findings support the trial court's legal conclusion that defendant's statements to law enforcement officers were voluntary.

While defendant argues that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere[,]" the trial court's findings indicate the contrary:

> 23. Information was given to the Defendant regarding several topics including the Child Medical Examination (CME) performed on the minor child following the incident of July 1, 2011 and the Sexual Assault Kit involving saliva residue and DNA upon the minor child. Rikard wanted the Defendant to believe that DNA testing implicated the Defendant however the detective never lied

> to the Defendant by stating that the officer had received DNA testing implicating the Defendant with the minor child. Officer Rikard informed the Defendant that the CME was performed on the minor child but did not tell the Defendant that the test results of the CME had not been received by the officers[.]
>
> . . .
>
> 24. Officer Loveland informed the Defendant that there was a video of the incident, without indicating exactly what information the video revealed[.]
>
> . . .
>
> 29. Detective Rikard followed standard interrogation procedure with the Defendant which included sharing some information with the Defendant to elicit a response and withholding other information thereby allowing the Defendant to speak if he wished to do so on the topic being discussed.
>
> 30. The profanity used by Rikard was not continuous, ongoing or in a manner which was used to intimidate the Defendant over an extended period of time. The profanity used by Rikard did not appear to have a significant effect upon the Defendant and his statements to the officers.
>
> . . .
>
> 35. The officers did not tell the Defendant the entire contents of the Goodwill Store video nor were they obligated to do so.

Moreover, the trial court found that:

> Defendant arriv[ed] at the police department on his own volition, [was] under no compulsion to remain in the interview room, [was] not being restrained in any manner, was not intimidated by a show of force of the officers, display of any type of weapons, promise of reward, leniency or any other inducement. In addition the interview room was open, the Defendant was left alone, departed the police department alone when the interview was completed, and was offered amenities such as drinking water and bathroom facilities. The interview was not excessively

> long in duration and there is no indication the Defendant was incommunicado from friends or family. . . . There is no evidence that the Defendant was under any physical or mental impairment nor was he under the influence of controlled substances, medications, or alcohol during this interview[.]

These findings are sufficient to conclude that defendant's statements were voluntary. *See State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 125 (2002) (holding that defendant's statements to police were voluntary where defendant was offered cigarettes and refreshments, had the freedom to use the rest room without being accompanied by an officer, was never restrained or handcuffed during questioning, did not remain in the interview for a prolonged period of time, and did not receive threats or pressure to give a statement). Thus, the trial court did not err in denying defendant's motion to suppress and admitting his statements at trial.

III. Conclusion

In sum, we expressly decline to address whether or not the trial court actually erred by denying defendant's motion *in limine* to preclude the State from presenting jurors with the anime images found on defendant's computer. Even assuming arguendo that the trial court erred, the images did not prejudice defendant due to other overwhelming evidence of his guilt. Furthermore, the trial court did not err in joining the September and July offenses for trial because a transactional connection was present between the acts. Finally, the trial court's denial of defendant's motion to suppress and subsequent admission of defendant's statements was free of error as his statements were voluntary.

No prejudicial error.

Judges McCULLOUGH and DAVIS concur.

STATE v. McCOY

[234 N.C. App. 268 (2014)]

STATE OF NORTH CAROLINA
v.
PIERCE McCOY, DEFENDANT

No. COA13-933

Filed 3 June 2014

1. Evidence—authentication—handwriting—self-authenticating affidavit—comparison to buy ticket

The trial court did not commit error or plain error in a possession of a firearm by a felon case by allowing the signature on defendant's affidavit of indigency to be compared to the signature on the buy ticket for a firearm sold to a pawn shop. Defendant's affidavit was a self-authenticating document pursuant to N.C.G.S. § 8C-1, Rule 902, and there was enough similarity between the signature on the affidavit and the signature on the buy ticket that the jury could reasonably infer that the signature on the buy ticket was genuine.

2. Firearms and Other Weapons—possession of by felon—sufficient evidence of possession

The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to dismiss. The State presented sufficient evidence from which the jury could conclude that defendant actively possessed the gun which was sold to the pawn shop.

3. Firearms and Other Weapons—possession of by felon—jury instructions—prior conviction—not plain error

Although the trial court erroneously instructed the jury in a possession of a firearm by a felon case that defendant had previously been convicted of the same crime, in light of the evidence of defendant's guilt, the trial court's statement did not have a probable impact on the jury's finding that the defendant was guilty.

Appeal by defendant from judgment entered on or about 19 February 2013 by Judge R. Allen Baddour in Superior Court, Durham County. Heard in the Court of Appeals 23 January 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Melody Hairston, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of possession of firearm by felon. For the following reasons, we find no error.

I. Background

Defendant was charged with possession of a firearm by a felon based upon an investigation conducted by Officer Charles Britt of the fraud unit of the Durham Police Department Investigations Bureau. Officer Britt testified that he "download[s] pawn [shop] files every morning and check[s] for stolen property[.]" "[A]t the end of every month [Officer Britt] run[s] all firearms that are pawned at the pawn shops in Durham. Then [Officer Britt] check[s] to see if either persons that have sold or pawned firearms are convicted felons." In 2011, Officer Britt picked up a buy transaction ("buy ticket")[1] for a firearm which listed defendant's name and date of birth. Defendant had previously been convicted of a felony. At defendant's trial the State admitted exhibits, including the buy ticket, a DVD, and an affidavit of indigency ("affidavit"). A jury found defendant guilty of possession of a firearm by a felon, and the trial court entered judgment upon the conviction. Defendant appeals.

II. Defendant's Signature

[1] Defendant first contends that "the trial court committed error or plain error in allowing the signature on the affidavit to be compared to the signature on the buy ticket where the signatures on the documents were not sufficiently authenticated nor ruled to be sufficiently similar to each other in violation of . . . [defendant's] rights." (Original in all caps.) Defendant's arguments are based upon the comparison of his signature on the buy ticket and his affidavit; defendant claims that each signature required authentication by either an expert in handwriting analysis or by a witness who was familiar with his handwriting based upon knowledge gained outside of this case in order for the jury to be able to compare them. Defendant is correct that no witness testified who could identify the signatures as an expert or based upon familiarity with defendant's

1. The "buy transaction" is actually a piece of paper signed by the individual selling property to the pawn shop. It is documentary evidence that the individual is selling property to the pawn shop. The director of operations of the pawn shop testified that "[a] buy transaction and a pawn transaction are two different things. . . . A pawn is when you're actually leaving your merchandise in exchange for money for an extended period of time; 30 days. A buy transaction, you're literally relinquishing your rights to the merchandise immediately[.]"

signature outside of the case, but we disagree with defendant that such testimony was necessary.

A. Affidavit of Indigency

The State's last witness was "a Deputy Clerk with the Durham County Superior Criminal Division." Through the Deputy Clerk the State admitted "a certified, true copy" of the affidavit which was signed by defendant and had his date of birth on it. The affidavit was "SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE" a Deputy Clerk of Superior Clerk who also signed the document, which is a self-authenticating document pursuant to North Carolina General Statute § 8C-1, Rule 902, and thus the affidavit did not need to be authenticated pursuant to Rule 901. *See* N.C. Gen. Stat. § 8C-1, Rules 901 and 902 (2011). As such, the trial court did not err in admitting the affidavit without consideration of North Carolina General Statute § 8C-1, Rule 901.

B. Comparison of Defendant's Signature

> In determining the authenticity of a document, it is a well-settled evidentiary principle that a jury may compare a known sample of a person's handwriting with the handwriting on a contested document without the aid of either expert or lay testimony. However, before handwritings may be submitted to a jury for its comparison, the trial court must satisfy itself that there is enough similarity between the genuine handwriting and the disputed handwriting, such that the jury could reasonably infer that the disputed handwriting is also genuine.

State v. Owen, 130 N.C. App. 505, 509, 503 S.E.2d 426, 429 (1998) (citations and quotation marks omitted) (citing *State v. LeDuc*, 306 N.C. 62, 291 S.E.2d 607 (1982)), *disc. review denied and appeal dismissed*, 349 N.C. 372, 525 S.E.2d 187-88 (1998).

In *State v. LeDuc*, the case cited in *Owen*, *id.*, the Supreme Court noted that the "preliminary determinations[,]" both of whether one of the handwritings was genuine and whether the genuine and disputed handwritings were similar, were to be made by the trial court. 306 N.C. 62, 74, 291 S.E.2d 607, 614 (1982), *overruled on other grounds*, *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Yet the Court also stated that "[b]oth of these preliminary determinations by the trial judge are questions of law fully reviewable on appeal." *Id.* Thus in *LeDuc*, this Court itself made "these preliminary determinations[.]" *Id.* ("In the instant case, the samples shown to the jury for comparison with the

disputed charter were given by the defendant himself. Having examined these samples with the disputed signature on the charter, we are satisfied that there is enough similarity between them for the documents to have been submitted to the jury for its comparison.") In *Owen*, this Court noted that both the trial court and this Court itself had compared the genuine and disputed handwritings. *See Owen*, 130 N.C. App. at 509, 503 S.E.2d at 429-30.

Thus, we must review the evidence to determine if there was "enough similarity between them for the documents to have been submitted to the jury for its comparison." *LeDuc*, 306 N.C. at 74, 291 S.E.2d at 614. The "known sample" of the signature, found on defendant's self-authenticating affidavit, *see* N.C. Gen. Stat. § 8C-1, Rule 902, shows the signature of "Pierce E. McKoy[.]"[2] Notable about the signature on the affidavit is the inclusion of the middle initial followed by a period and that the "c" in "McKoy" is underscored with a zigzag line. On the buy ticket which has the disputed signature, the signature is also by "Pierce E. McKoy[,] including the middle initial followed by a period, and the "c" in "McKoy" underscored by a zigzag line. In fact, all of the letters are formed in essentially the same way and the signatures are nearly identical. We are "satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting, that the jury could reasonably infer that the disputed handwriting is also genuine[.]" *LeDuc*, 306 N.C. at 74, 291 S.E.2d at 614. Thus, the buy ticket with the disputed signature was properly admitted, and the jury was free to compare the signature on it with the signature on the self-authenticating affidavit. *See id.* Accordingly, this argument is overruled.

III. Motion to Dismiss

[2] Defendant next contends that the trial court erred in denying his motion to dismiss. Defendant argues that the State failed to present sufficient evidence that he either actually or constructively possessed the gun which was sold to the pawn shop.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might

2. We note that the judgment and documents in the record spell defendant's name McCoy with a "c" rather than a "k" as in McKoy.

> accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Teague, 216 N.C. App. 100, 105, 715 S.E.2d 919, 923 (2011) (citation omitted), *disc. rev. denied and appeal dismissed*, 365 N.C. 547, 720 S.E.2d 684 (2012).

> There are two elements to possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm. It is uncontested that defendant had been convicted of a felony prior to the date in question. Therefore, the only element we must consider is possession.
>
> > Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.

State v. Mitchell, ___ N.C. App. ___, ___, 735 S.E.2d 438, 442-43 (2012) (citations and quotation marks omitted).

Here, as in *Mitchell*, defendant does not contest that he has previously been convicted of a felony, so possession is the only element at issue on appeal. *See id.* at ___, 735 S.E.2d at 443. Taken in a light most favorable to the State, *see Teague*, 216 N.C. App. at 105, 715 S.E.2d at 923, the State presented a DVD showing a man consistent with defendant's appearance placing a gun on the pawn shop counter. The State's evidence also included a buy ticket with both defendant's name and date of birth on it along with defendant's affidavit uncontestably signed by defendant. A director of operations for the pawn shop explained that the individual signing the buy ticket at issue here is "literally relinquishing [his] rights to the merchandise immediately[,]" in this case the gun. As discussed above, the jury could find based upon comparison of the signatures on the affidavit and the buy ticket that the same person signed both of them, meaning that the person who placed the gun on the counter of the pawn shop, sold the gun to the pawn shop, and filled out the buy ticket, was the defendant. This evidence would permit the jury to

find that the defendant actually possessed the gun when he brought it to the pawn shop to sell it. This was substantial evidence upon which to deny defendant's motion to dismiss, *see Mitchell*, ___ N.C. App. at___, 735 S.E.2d at 443; *Teague*, 216 N.C. App. at 105, 715 S.E.2d at 923, and therefore overrule this argument.

IV. Jury Instructions

[3] Before defendant's trial he stipulated in writing as to his prior felony conviction. When the trial court was instructing the jury it stated,

> [O]n February 10th, 2000, in Durham County Superior Court, the defendant pled guilty to the felony of possession of a firearm by a felon that was committed on July 2nd, 1999, in violation of the laws of the State of North Carolina. The defendant and the State have stipulated to this prior conviction. So, for purposes of . . . this trial you are to find this element to be proved beyond a reasonable doubt." Defendant contends it was error for the trial court to instruct the jury in this manner, and the State agrees.

Defendant failed to object at trial, but now contends it was plain error for the trial court to inform the jury he had previously been convicted of the crime possession of a firearm by a felon. In light of the evidence as noted above, we are not convinced that the trial court's statement that defendant had previously been convicted of the same crime "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, we overrule this argument.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

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

STATE OF NORTH CAROLINA
v.
OMAR ANDRE McFARLAND, DEFENDANT

No. COA13-1234

Filed 3 June 2014

1. Constitutional Law—due process—homeless person—sex offender—failure to report change of address—statute not void for vagueness

The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender even though defendant contended that the statute was so vague that it violated due process. The fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

2. Sexual Offenders—failure to report change of address—homeless person—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge under N.C.G.S. § 14-208.11 for failing to report a change of address as a sex offender. The State presented sufficient evidence, taken in the light most favorable to the State, that defendant was residing at some address different from the one last registered without notifying the local sheriff of a change in address.

3. Sexual Offenders—failure to report change of address—insufficient conclusions of law

Although the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress did not require a new trial in a failing to report a change of address as a sex offender case, the case was remanded for the trial court to make appropriate conclusions of law based upon the findings of fact with regard to defendant's motion to suppress.

Appeal by defendant from Judgment entered on or about 28 June 2013 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Court of Appeals 6 March 2014.

Attorney General Roy A. Cooper III, by Assistant Attorney General Laura E. Parker, for the State.

James N. Freeman, Jr., for defendant-appellant.

STROUD, Judge.

Omar McFarland ("defendant") appeals from the judgment entered after a Forsyth County jury found him guilty of failing to report a change of address as a sex offender. We find no error at trial, but remand for the trial court to make conclusions of law with regard to defendant's motion to suppress as required by statute.

I. Background

Defendant was indicted in Forsyth County for failing to report a change of address as required by the sex offender registration statutes and for having attained habitual felon status. Defendant pled not guilty and proceeded to jury trial on 26 June 2013. Before trial, defendant filed a written motion to suppress statements he made to the police, which he contended were obtained in violation of his constitutional rights. The trial court denied the motion from the bench without explanation or oral findings of fact. The trial court then entered a written order with findings of fact on 24 June 2013.

At trial, the State's evidence tended to show that defendant was a convicted sex offender. Prior to being released from prison, defendant was given a notice of the rules applicable to sex offenders upon release, including the statutory requirement that he notify the sheriff's office of a change of address. Defendant signed the notice and indicated that he intended to reside at the Samaritan Ministries homeless shelter. He was released from prison on 9 October 2012. On 10 October 2012, defendant went to the Forsyth County Sheriff's Office to register as a sex offender. When he registered, defendant was given a more extensive notice of the rules that apply to sex offenders, which he signed. He initialed by each rule. One of the rules listed concerned changes of address. It explained that

> [w]hen an offender that is required to register changes addresses, they must appear in person and provide written notification of this address change to the Sheriff in the county where they have most currently registered. This in-person notification must be made to the county Sheriffs within 3 business days of the address change. The offender must also register with the new Sheriff. I shall report the address or a detailed description of every location I reside or live at. I understand I must report a location even if it does not have a street address.

Defendant initialed this notice, indicating that he had read and understood it.

On 26 October 2012, Deputy R.C. Holland of the Forsyth County Sheriff's Office went to the Samaritan Ministries shelter to verify defendant's address. The shelter's records indicated that defendant had stayed there previously, but not since 2008. Deputy Holland reported his findings to Detective Gargiulo of the Sex Offender Registry Unit. Detective Gargiulo waited three days to allow defendant the opportunity to appear and change his address. On 30 October 2012, Detective Gargiulo secured a warrant for defendant's arrest.

The detective attempted to get in touch with defendant, unsuccessfully at first. Detective Gargiulo was able to speak with defendant on the phone on 7 November 2012 and asked him to come to the Sheriff's Office. Defendant came into the office that same day. He was escorted to an unsecured interview room and was not handcuffed. He was not informed that a warrant for arrest had been issued. Detective Gargiulo and Corporal Sales then spoke with defendant about where he had been living. Defendant objected at trial to the admission of his statements, renewing the same objections raised by his motion to suppress. The trial court again overruled the objections.

Defendant at first said that he was staying at the Samaritan Ministries shelter. When confronted with evidence that he had not been staying there, in violation of the sex offender registration statutes, he explained that he was staying with various people and moving from place to place. Defendant asked how he could have an address when he was homeless. Detective Gargiulo explained that he had to notify the Sheriff's Office every time he changed residences. At the end of the interview, defendant was placed under arrest and served with the arrest warrant.

At the close of the State's evidence, defendant moved to dismiss the charges on the basis that N.C. Gen. Stat. § 14-208.11 (2011) was void for vagueness as applied to him and on the ground that the State had failed to present sufficient evidence. The trial court denied defendant's motion. The jury found defendant guilty of violating N.C. Gen. Stat. § 14-208.11. Defendant then pled guilty to having attained habitual felon status, explicitly reserving his right to appeal the underlying conviction. The trial court found three mitigating factors and no aggravating factors. The trial court sentenced defendant to a mitigated range term of 58-82 months imprisonment. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss. First, he contends that N.C. Gen. Stat. § 14-208.11 (2011) is void for vagueness. Second, he argues that even if the statute is constitutional, the State failed to present sufficient evidence. We disagree.

A. Standard of Review

We review the denial of a motion to dismiss premised on the alleged unconstitutionality of the criminal statute and the insufficiency of the evidence *de novo*. *State v. Buddington*, 210 N.C. App. 252, 254, 707 S.E.2d 655, 656 (2011); *State v. Fisher*, ___ N.C. App. ___, ___, 745 S.E.2d 894, 901, *disc. rev. denied*, ___ N.C. ___, 752 S.E.2d 470 (2013). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Highsmith*, 173 N.C. App. 600, 605, 619 S.E.2d 586, 590 (2005) (citation and quotation marks omitted).

B. Void for Vagueness

Defendant argues that the trial court erred in denying his motion to dismiss because N.C. Gen. Stat. § 14-208.11 (2011) is void for vagueness as applied to him. He contends that because he is homeless, a person of ordinary intelligence person could not know what "address" means in his case. We hold that the statute is not so vague that it violates due process.

Defendant moved to dismiss the charge against him on the basis that the statute is void for vagueness. Therefore, he has properly preserved this constitutional challenge. *Cf. State v. Fox*, 216 N.C. App. 153, 158-59, 716 S.E.2d 261, 266 (2011) (declining to consider the defendant's argument that the sex offender registration statute was void for vagueness where he failed to raise the constitutional issue at trial).

Defendant was indicted for violating N.C. Gen. Stat. § 14-208.11(a)(2), which establishes that a person required to register under the sex offender registration statute commits a Class F felony if he "[f]ails to notify the last registering sheriff of a change of address as required by this Article." N.C. Gen. Stat. § 14-208.9(a) (2011) states, in relevant part, that "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county

with whom the person had last registered." The statute does not define the term "address." Defendant contends that the absence of a definition makes the change-of-address requirement void for vagueness as applied to him because he was homeless, so he had no "address."

"To satisfy due process, a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement. The void-for-vagueness doctrine embraces these requirements." *Skilling v. United States*, 561 U.S. 358, 402, 177 L.Ed. 2d 619, 656 (2010) (citation, quotation marks, and brackets omitted). The North Carolina Supreme Court has "expressed an almost identical standard." *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L.Ed. 2d 783 (1999). Our Supreme Court has explained that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (citations and quotation marks omitted), *aff'd*, 403 U.S. 528, 29 L.Ed. 2d 647 (1971).

"Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met." *Id.* "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306, 170 L.Ed. 2d 650, 670 (2008). Moreover, "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, [though] due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266, 137 L.Ed. 2d 432, 442-43 (1997) (citations omitted). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267, 137 L.Ed. 2d at 443.

Our Supreme Court clearly and unambiguously defined the term "address" as used in N.C. Gen. Stat. § 14-208.11 well before defendant was released from prison in October 2012. The Supreme Court explained that

> [r]esidence simply indicates a person's actual place of abode, whether permanent or temporary. Thus, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. Notably, a person's residence is distinguishable from a person's domicile. . . . Beyond mere physical presence, activities possibly indicative of a person's place of residence are numerous and diverse, and there are a multitude of facts a jury might look to when answering whether a sex offender has changed his or her address.

State v. Abshire, 363 N.C. 322, 331-32, 677 S.E.2d 444, 450-51 (2009) (citations and quotation marks omitted).

Further, this Court has applied the Supreme Court's definition of "address" in a case where, as here, the defendant was homeless. In *State v. Worley*, we held that "everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." *State v. Worley*, 198 N.C. App. 329, 338, 679 S.E.2d 857, 864 (2009). We noted that "[t]he purpose of the sex offender registration program is to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." *Id.* at 334-35, 679 S.E.2d at 862 (citation and quotation marks omitted). As a result, we rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes, reasoning that a contrary holding would render "such individuals . . . effectively immune from the registration requirements found in current law as long as they continued to 'drift.' " *Id.* at 338, 679 S.E.2d at 864.

Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. *See Lanier*, 520 U.S. at 267, 137 L.Ed. 2d at 443. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. *Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under N.C. Gen. Stat. § 14-208.9 and that under N.C. Gen. Stat. § 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes

be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses. *See Williams*, 553 U.S. at 306, 170 L.Ed. 2d at 670.

Here, the notice actually given to defendant by the local sheriff's office when he registered, and signed by defendant, reflected this obligation. The statement initialed by defendant stated, "I shall report the address or a detailed description of every location I reside or live at. I understand I must report a location even if it does not have a street address."

We hold that N.C. Gen. Stat. § 14-208.11 is not void for vagueness as applied to defendant because a person of ordinary intelligence in defendant's circumstances would understand what was required of him. *See Burrus*, 275 N.C. at 531, 169 S.E.2d at 888. Therefore, the trial court did not err in denying defendant's motion to dismiss on this basis.

C. Sufficiency of the Evidence

[2] Defendant next argues that even if the statute is not void for vagueness the State failed to present sufficient evidence that he changed addresses. He acknowledges that the State presented evidence that he was not residing at his registered address, the Samaritan's Ministries homeless shelter, but reasons that the State never presented any evidence of where he was actually residing because he was moving from place to place and had no permanent "address." But that is not what the State is required to prove.

> [T]he offense of failing to notify the appropriate sheriff of a sex offender's change of address contains three essential elements: (1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant willfully fails to notify the last registering sheriff of the change of address, not later than the third day after the change.

State v. Fox, 216 N.C. App. 153, 156-57, 716 S.E.2d 261, 264-65 (2011) (citations, quotation marks, ellipses, and brackets omitted). Defendant does not contest that he was required to register and that he never notified the last registering sheriff of a new address. He simply contends that because he had no new address, the State cannot show that it changed.

The State is not required to show what defendant's new address was. The State is simply required to show that defendant changed his address. Defendant's argument is similar to the one we rejected in

Worley, that a homeless defendant has no residence and therefore no "address." *See Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. The State can show that defendant changed his address simply by showing that he was no longer residing at the last registered address because "everyone does, at all times, have an 'address' of some sort." *Id.*

Here, the evidence showed that defendant registered his address as the Samaritan Ministries, but that defendant had not been living there for at least the two weeks prior to 26 October 2012. Defendant registered his address on 10 October 2012 as Samaritan Ministries. When Deputy Holland went to verify defendant's address he discovered that Samaritan Ministries had no record of defendant having stayed there for over two years. Two employees from Samaritan Ministries testified that they had no record of defendant staying with them in October 2012. They further testified that everyone who stayed with them had to be signed in. The registration card maintained by the shelter showed that defendant's card had not been stamped since 2008. Thus, there was substantial evidence showing that defendant conducted none of the "activities of life" consistent with residency at the homeless shelter after being released from prison. *Abshire*, 363 N.C. at 332, 677 S.E.2d at 451.

As explained in *Worley*, everyone, at all times, has some address for purposes of the sex offender registration statutes, even if it changes daily. *Worley*, 198 N.C. App. at 338, 679 S.E.2d at 864. Thus, proof that defendant was not living at his registered address is proof that his address had changed. *See id.* at 337, 679 S.E.2d at 863 ("At an absolute minimum, the record contains evidence tending to show that Defendant left Lee Walker Heights on or before 10 August 2005 and failed to report a new address until 16 September 2005.").

We conclude that the State presented sufficient evidence, taken in the light most favorable to the State, that defendant was residing at some address different from the one last registered without notifying the local sheriff of a change in address. Therefore, we hold that there was sufficient evidence that defendant violated N.C. Gen. Stat. § 14-208.11(a)(2) and that the trial court did not err in denying defendant's motion to dismiss.

III. Motion to Suppress

[3] Defendant argues that the trial court erred in denying his motion to suppress his videotaped statement to the police because the officers failed to properly give the *Miranda* warnings. We remand so that the trial court may make adequate conclusions of law, as required by statute.

Defendant moved to suppress his statements under the Fifth and Sixth Amendments to the United States Constitution and Article 1, sections 19, 23, and 24 of the North Carolina Constitution. The trial court heard the motion before trial on 24 June 2013. It denied the motion orally in court and entered an order with written findings on 24 June 2013. Defendant objected to Detective Gargiulo's testimony regarding what he said during the interview and to the admission of the DVD of the interview. Therefore, his challenges to the admission of these statements have been fully preserved.

The trial court made the following findings, none of which are contested by defendant:

> 1. Defendant Omar Andre McFarland is a convicted sex offender required to comply with North Carolina's sex offender registry.
>
> 2. On October 20, 2012, Detective Paolo Gargiulo of the Forsyth County Sheriff's Office obtained a warrant for Defendant McFarland's arrest for failing to comply with the sex offender registry change of address requirements.
>
> 3. Forsyth County Deputy Ron Lewis tried unsuccessfully to serve the warrant on Defendant McFarland on November 7, 2012, but he did inform friends and family members of the Defendant that the Defendant should contact the Sheriff's Office. Deputy Lewis did not tell any of the friends or family that there was a warrant out for the Defendant.
>
> 4. Later that afternoon on November 7, 2012, Defendant McFarland called the Sheriff's Office, spoke with Detective Gargiulo and arranged a meeting for the next morning (November 8) at 9am. Detective Gargiulo did not tell Defendant he had a warrant.
>
> 5. Defendant McFarland came, on his own, to the sheriff's office November 8, 2012, signed in and was escorted to an unsecured interview room. He was not under arrest, but the interview was recorded by video.
>
> 6. Defendant McFarland entered the interview room alone, but was soon joined by Detective Gargiulo and Forsyth County Corporal B. Sales, both of whom were dressed in plain clothes. Neither gave Defendant any *Miranda* warnings.

> 7. Corporal Sales closed the interview room door, but it remained unlocked. Detective Gargiulo told Defendant, "the door is open—just getting some privacy." No officer was guarding the inside or outside of the interview room.
>
> 8. At the end of the interview when he was arrested, the Defendant was frisked and placed in handcuffs. Prior to then, he was unrestrained.

The trial court then cited a variety of legal standards from applicable case law, but never made a conclusion about whether defendant was in custody at the relevant time, nor did it ever apply the law it cited to the facts of this case. At the hearing, the trial court announced that it was going to deny the motion, but made no oral findings or conclusions.

> N.C. Gen. Stat. § 15A–977(f) (2011) provides that when a trial court rules on a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." We have interpreted this statute as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the appropriate standard of review on appeal is as follows: The trial court's ruling on the motion to suppress is fully reviewable for a determination as to whether the two criteria . . . have been met.
>
> If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact, contrary to the mandate of section 15A–977(f), is fatal to the validity of its ruling and constitutes reversible error.

State v. Morgan, ___ N.C. App. ___, ___, 741 S.E.2d 422, 424-25 (2013) (citations, quotation marks, and brackets omitted).

This case is unusual because although the trial court made a number of relevant findings of fact, the trial court did not give any explanation for denying defendant's motion from the bench and did not include any conclusions of law in its written order. The "conclusions of law" in the written order were simply statements of law such as "4. It is important to consider circumstances such as a 'police officer standing guard at the

door, locked doors, or application of handcuffs' in determining whether an individual is in custody. *State v. Buchanan*, 353 N.C. 332 (2001)."

Generally, a conclusion of law requires "the exercise of judgment" in making a determination, "or the application of legal principles" to the facts found. *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010) (citations and quotation marks omitted). Not one of the "conclusions" here applied the law to the facts of this case. Although we can imagine how the facts as found by the trial court would likely fit into the legal standards recited in the section of the order which is identified as "conclusions of law," based upon the trial court's denial of the motion, it is still the trial court's responsibility to make the conclusions of law. The mandatory language of N.C. Gen. Stat. § 15A-977(f) ("The judge must set forth in the record his findings of facts *and conclusions of law*." (emphasis added)) forces us to conclude that the trial court's failure to make any conclusions of law in the record was error.

"Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial." *State v. Neal*, 210 N.C. App. 645, 656, 709 S.E.2d 463, 470 (2011) (citation and quotation marks omitted).

> If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial.

Id. at 656-57, 709 S.E.2d at 470-71. We have found no other prejudicial error at defendant's trial. Therefore, the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress does not require that we order a new trial. *See State v. Booker*, 306 N.C. 302, 313, 293 S.E.2d 78, 84-85 (1982). We remand for the trial court to make appropriate conclusions of law with regard to defendant's motion to suppress.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss. Nevertheless, the trial court failed to make adequate conclusions of law to justify its decision to

deny defendant's motion to suppress his statement. Therefore, we must remand to allow the trial court to make appropriate conclusions of law based upon the findings of fact.

NO ERROR in part; REMANDED.

Judges CALABRIA and DAVIS concurs.

STATE OF NORTH CAROLINA
v.
MICHAEL KEVIN McGEE

No. COA13-1161

Filed 3 June 2014

Motor Vehicles—misdemeanor death by motor vehicle—involuntary manslaughter—bail bondsmen—not authorized to violate motor vehicle laws based on status

The trial court did not err in an involuntary manslaughter and misdemeanor death by motor vehicle case by instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest. Defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status. The trial court's instruction to the jury did not lessen the State's burden of showing that defendant's violation of North Carolina motor vehicle laws was intentional, willful, wanton, or reckless.

Appeal by defendant from judgment entered 20 February 2013 by Judge Edwin G. Wilson, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 18 February 2014.

Roy Cooper, Attorney General, by Amanda P. Little, Assistant Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest. Defendant was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. The trial court's instruction to the jury did not lessen the State's burden of showing that defendant's violation of North Carolina motor vehicle laws was intentional, willful, wanton, or reckless.

I. Factual and Procedural History

On the morning of 31 August 2010, Michael Kevin McGee (defendant), a bail bondsman, called 911 and advised law enforcement that he was pursuing George Mays (Mays), a person who had failed to appear in court. This pursuit was at a high rate of speed in the Salem Church Road area of Goldsboro. Defendant's fiancée, Anecia Neal, was in the front passenger seat of defendant's car. Defendant requested assistance from law enforcement in apprehending Mays. He was traveling at speeds between 80 and 100 miles per hour in his pursuit of Mays. Ivan Carter, another bail bondsman, was also pursuing Mays, in a separate vehicle.

Salem Church Road is a two-lane road with a 45 miles per hour speed limit. Mays passed a vehicle operated by Brenda Cox, in a zone marked with a double yellow line. Defendant also attempted to pass Cox's vehicle, but did so at a curve, and lost control of his vehicle, which went down an embankment.

Ms. Neal was trapped inside the vehicle, with serious injuries. After being transported to Wayne Memorial Hospital, Ms. Neal died of her injuries.

On 7 May 2012, defendant was indicted for one count of involuntary manslaughter and one count of misdemeanor death by motor vehicle. On 20 February 2013, a jury found defendant guilty of involuntary manslaughter. He was sentenced to a term of 13 to 16 months imprisonment. This sentence was suspended and defendant was placed on supervised probation for 36 months. The court imposed a 3 month term of special probation in the Department of Adult Correction as an intermediate sanction.

Defendant appeals.

II. Jury Instruction

In his only argument on appeal, defendant contends that the trial court erred in instructing the jury that in the course of pursuing a

defendant, a bail bondsman may not violate North Carolina motor vehicle laws. We disagree.

A. Standard of Review

The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). The standard of review set forth by this Court for reviewing jury instructions is as follows:

> This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and quotations omitted).

B. Analysis

In its instructions to the jury, the trial court stated that: "[b]ail bondsmen can make an arrest; however they may not violate the motor vehicle laws of North Carolina to do so." Defendant objected to this instruction. On appeal, defendant makes three arguments concerning the trial court's jury instructions: (1) a bail bondsman may violate North Carolina motor vehicle laws when apprehending a principal; (2) whether the reasonableness of the means utilized by a bail bondsman in apprehending a principal is a question of fact for the jury; and (3) whether the trial court lessened the State's burden of proof by peremptorily instructing the jury that a bail bondsman cannot violate North Carolina motor vehicle laws in the process of arresting a principal.

1. Violation of State Motor Vehicle Laws

North Carolina common law has long recognized that a bail bondsman has sweeping powers to apprehend a principal and may use such force as is reasonably necessary in that process. *State v. Mathis*, 349 N.C. 503, 512, 509 S.E.2d 155, 160 (1998). This right of apprehension, however, is limited and does not give a bail bondsman unlimited powers.

N.C. Gen. Stat. § 20-145 states:

> [S]peed limitations . . . shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies, nor to vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performances of their duties . . .

N.C. Gen. Stat. § 20-145 (2013). The General Assembly created specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles. There is no similar statutory provision that exempts a bail bondsman from complying with applicable speed limits when pursuing a principal. Contrary to defendant's argument that a bail bondsman may use reasonable means, including exceeding applicable speed limits, to apprehend a principal, a bail bondsmen is like any other citizen in that he or she must follow the state motor vehicle laws. If the General Assembly had intended to exempt bail bondsmen from complying with applicable speed limits when pursuing a fugitive, it could have easily included such a provision in N.C. Gen. Stat. § 20-145. It is not the role of the courts to create exceptions to the motor vehicle laws enacted by the General Assembly.

In this case, defendant pursued Mays at speeds exceeding the posted speed limits by 30 to 55 miles per hour. We note that defendant's conduct in this case appears to have violated several other motor vehicle safety statutes as well. However, because the trial court submitted the charge of involuntary manslaughter to the jury based solely upon defendant's conduct in operating his vehicle at a speed greater than was reasonable and prudent under conditions then existing, we restrict our analysis to that specific conduct.

Speed restrictions have been enacted "for the protection of persons and property and in the interest of public safety, and the preservation of human life." *State v. Norris*, 242 N.C. 47, 53, 86 S.E.2d 916, 920 (1955). While N.C. Gen. Stat. § 20-145 exempts police officers from speed laws when pursuing a violator of the law, even this exemption does not apply to those driving "carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due circumspection and at a speed or in any manner so as to endanger or be likely to endanger any person or property[.]" *Id.* "An intentional, willful, or wanton violation of

a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *Id.* at 54, 86 S.E.2d at 921. Furthermore, "[c]ulpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Id.*

2. Reasonableness Standard for Bail Bondsman Actions

In *State v. Mathis*, our Supreme Court stated that bail bondsmen may "use such force as is reasonably necessary to overcome the resistance of a third party who attempts to impede their privileged capture of their principal." *Mathis*, 349 N.C. at 514, 509 S.E.2d at 162. Defendant relies on this statement of the law to argue that his right to apprehend Mays is only limited by reasonableness and thus, whether the means used in his attempted apprehension of Mays was reasonable is a question of fact for the jury to decide.

The elements of involuntary manslaughter are: "(1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence." *State v. Davis*, 198 N.C. App. 443, 446, 680 S.E.2d 239, 242 (2009) (quoting *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997)). Culpable negligence is "[a]n intentional, willful, or wanton violation of a statute or ordinance, designed for the protection of human life or limb," or "such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Norris*, 242 N.C. at 54, 86 S.E.2d at 921.

There are limitations upon the rights of bail bondsmen to use reasonable force in the apprehension of a principal where the rights of third parties are affected. For example, when pursuing a principal into the home of a third party, the bail bondsman may only enter the third party home if the principal also resides there. *Mathis*, 349 N.C. at 513, 509 S.E.2d at 161. Bail bond agreements contain the principal's consent for the bail bondsmen to "enter the residence of his principal and to seize him." *Id.* However, the principal cannot contract away the rights of third parties. Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

3. Jury Instructions and the State's Burden of Proof

The trial court instructed the jury, concerning the charge of involuntary manslaughter, as follows:

> The Defendant has been accused of involuntary manslaughter, which is the unintentional killing of a human being by culpable negligence.
>
> Now I charge that for you to find the Defendant is guilty of involuntary manslaughter, the State must prove three things beyond a reasonable doubt:
>
> First, that the Defendant violated the law of this state governing the operation of motor vehicles by operating a vehicle at a greater speed than is reasonable and prudent under the conditions then existing. *Bail bondsmen can make an arrest; however, they may not violate the motor vehicle laws of North Carolina to do so.*
>
> Second, that the Defendant's violation constituted culpable negligence. The violation of a motor vehicle law which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the law, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the law must be accompanied by reckless of probable consequences of a dangerous nature, when tested by the rule of reasonable foresight, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others.
>
> Third, the State must prove that the Defendant's intentional, willful, wanton or reckless violation of the law proximately caused the victim's death.

(Emphasis added).

The trial court properly instructed the jury that "[b]ail bondsmen can make an arrest; however, they may not violate the motor vehicle laws of North Carolina to do so." This addition to the North Carolina Pattern Jury Instruction for voluntary manslaughter (NCPJI-Criminal 206.55) did not instruct the jury as to whether the defendant violated any motor vehicle laws. Rather, the instruction clarified that a bail bondsman's right to arrest a principal does not include the right to violate

motor vehicle laws. The issue that was presented to the jury was whether the defendant violated N.C. Gen. Stat. §20-141(a), the general statutory speed restrictions, by driving at a greater speed than was reasonable and prudent given the circumstances. The jury had to find that defendant violated this motor vehicle law in order to convict defendant of involuntary manslaughter or misdemeanor death by vehicle. In instructing the jury concerning this essential element of the charged crimes, the trial court did not invade the province of the jury because the jury still maintained the right to decide whether or not defendant violated that law.

Finally, the added jury instruction did not decrease the State's burden of proof relating to that element of the charged crime. The State's burden was not the reasonableness standard advocated by defendant, but rather a culpable negligence standard requiring willful, wanton, or negligent conduct. The additional language simply advised the jury that defendant's status as a bail bondsman did not exempt him from compliance with the motor vehicle laws of this State. This Court has held that it must "consider the instructions in the context of how a reasonable juror might interpret the words." *State v. Flaherty*, 55 N.C. App. 14, 23, 284 S.E.2d 565, 571 (1981) (citations and quotations omitted). A reasonable juror would read the challenged instruction as a clarification of the law at issue, not a directive that defendant violated state motor vehicle laws in his pursuit of Mays. The jury maintained discretion to decide whether defendant violated the applicable statute, whether that conduct rose to the level of intentional, willful, wanton or reckless conduct, and whether this conduct proximately caused the victim's death.

We hold that the trial court's jury instructions were proper. Defendant's arguments are without merit.

IV. Conclusion

The trial court did not err in instructing the jury that bail bondsmen cannot violate North Carolina motor vehicle laws in order to make an arrest.

NO ERROR.

Judges McGEE and ERVIN concur.

STATE OF NORTH CAROLINA
v.
WINSTON HARVEY STEPHENS, JR.

No. COA14-8

Filed 3 June 2014

1. Indecent Liberties—with student—bill of particulars—instructions

The trial court did not err in a prosecution for indecent liberties with a student by not instructing the jury on the actus reus of each charge according to the amended bills of particulars filed by the State. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses, and the amended bills of particulars reflected his testimony.

2. Indecent Liberties—with student—definition of enrollment—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a prosecution for indecent liberties with a student where defendant contended that the victim was not enrolled during the summer when the incidents took place. There was evidence from the school principal and the victim's mother that the victim remained enrolled during the summer, even though the academic year was over.

Appeal by defendant from judgments entered 6 May 2013 by Judge V. Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 6 May 2014.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Mark Montgomery for defendant.

HUNTER, Robert C., Judge.

Defendant Winston Harvey Stephens, Jr. appeals the judgments entered after a jury convicted him of three counts of indecent liberties with a student. On appeal, defendant argues that: (1) the trial court erred in not instructing the jury on the specific acts set out in the amended bills of particulars; and (2) the trial court erred in denying defendant's motion to dismiss because the victim was not a "student" at the time of the incidents.

After careful review, we find no error.

Background

The State's evidence at trial tended to establish the following: In the spring of 2011, J.B.[1] was a sophomore at East Forsyth High School ("East Forsyth"). Defendant was East Forsyth's music teacher. J.B. claimed that he met defendant when he was attending Madrigal workshops, choral training workshops for students at East Forsyth; defendant was the director of the Madrigals. J.B. auditioned for and was accepted into the Madrigals program which would begin in the fall semester. At trial, J.B. claimed that defendant contacted him to see whether J.B. would be interested in helping him during the summer. Specifically, defendant needed a page turner and assistant to help him record music for "Joseph and the Amazing Technicolor Dream Coat," a musical scheduled to be performed at Reynolds High School ("Reynolds") during a special Summer Enrichment Program ("SEP"). After he agreed, J.B. claimed that defendant picked him up every morning and brought him home in the afternoon, around 3:00. This occurred over a two-week period in July 2011; the performance of the musical occurred on three days at the end of July.

At trial, J.B. gave detailed testimony regarding numerous alleged incidents of inappropriate sexual conduct between defendant and J.B. Specifically, J.B. claimed that the first incident occurred in the recording room at Reynolds. J.B. testified that defendant grabbed his arm and kissed it before giving him a full-frontal hug that lasted ten to twenty seconds. J.B. also described two incidents of "cuddling" that happened in the recording room at Reynolds; J.B. stated that he laid on the couch with his back to defendant's stomach while defendant would brush his hair and hold him tightly. J.B. claimed that these incidents lasted anywhere from fifteen minutes to an hour. J.B. also alleged that two other incidents of "cuddling" occurred at J.B.'s apartment—one on the couch in the living room and one on J.B.'s bed.

J.B. testified that incidents of full-frontal hugging happened on a consistent basis during the two-week period at Reynolds. He also alleged that defendant kissed him on his arm, cheek, and neck ten to fifteen times and on his mouth twice. All these incidents allegedly occurred in the recording room, orchestra pit, or on the stage deck at Reynolds. J.B. also claimed that defendant hugged him in the bathroom at Reynolds.

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1. To protect the identity of the minor victim, we have used initials.

J.B. further testified that several incidents occurred in defendant's car on the way to and from the SEP at Reynolds. Specifically, J.B. claimed that he and defendant would hold hands, defendant would brush his hair at stoplights, and defendant would lean over and kiss his neck and cheek daily. J.B. alleged that one final "cuddling" incident occurred on the couch in defendant's office at East Forsyth.

At trial, J.B. also provided a great deal of testimony regarding intimate communications between himself and defendant. Specifically, in one email, defendant referred to J.B. as a "stud muffin" and a "manly man." He also claimed to "love feeling [J.B.'s] soft skin when [their] arms touch[ed]." Furthermore, J.B. described the pet names they had for each other and the gifts they exchanged with each other.

In October, after school had resumed, J.B. told his mother about the incidents. She withdrew him from the Madrigals course but did not report the incidents to the school. Eventually, J.B. spoke with the Kernersville Police Department about the allegations after he was called to the principal's office and questioned.

On 25 June 2012, defendant was indicted for three counts of indecent liberties with a student. On 25 April 2013, the State filed three amended bills of particulars. The State contended that the alleged offenses occurred during the month of July 2011 at J.B.'s residence, at defendant's apartment, in defendant's car, and in the orchestra pit and recording room at Reynolds. As for the acts that constituted the offenses, the State listed numerous acts, including: hugging, kissing, cuddling, and various other types of inappropriate touching by defendant.

At trial, several witnesses testified on behalf of defendant including several students, a teacher, defendant's wife, and defendant himself. In short, the witnesses testified that defendant was a "father figure" to the students and would often hug students in a nonsexual way. In addition, several witnesses testified that defendant would not have had the opportunity to commit any inappropriate acts with J.B. during the SEP. Although defendant admitted that some of his behavior might have been "inappropriate," he denied any misconduct.

On 6 May 2013, the jury found defendant guilty on all three counts. The trial court sentenced defendant to consecutive sentences of six to eight months imprisonment but suspended the sentences for thirty-six months of supervised probation. Defendant appealed.

Arguments

[1] First, defendant argues that the trial court erred by not instructing the jury according to the amended bills of particulars filed by the State. Specifically, defendant contends that the trial court erred in failing to instruct the jury on the actus reus of each charge. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"The function of a bill of particulars is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry." *State v. Young*, 312 N.C. 669, 676, 325 S.E.2d 181, 186 (1985). Here, the amended bills of particulars set out numerous acts that constituted the basis for the offenses, including: hugging and kissing at Reynolds; "cuddling" with J.B. at Reynolds; hugging, holding hands, and groping J.B.'s crotch in defendant's car; hugging and kissing J.B. at J.B.'s home; and "cuddling" with J.B. in his bedroom. At trial, defendant requested the trial court instruct the jury on the *actus reus* for each count. However, the trial court held that it was not required to do so for indecent liberty charges. Defendant contends that the trial court's failure to instruct as to the acts set out in the amended bills of particulars constituted error.

However, defendant's argument is without merit. It is well-established that

> the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts. The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child for the purpose of arousing or gratifying sexual desire. Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial. It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather, the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990) (internal quotation marks omitted).

Here, the trial court properly instructed the jury that it could find defendant guilty if it concluded that defendant willfully took "*any* immoral, improper, or indecent liberties" with J.B. The actual act by defendant committed for the purpose of arousing himself or gratifying his sexual desire was "immaterial." *Id.* Furthermore, J.B.'s testimony included numerous acts, any one of which could have served as the basis for the offenses, and the amended bills of particulars reflected his testimony. Accordingly, the trial court did not err in not instructing the jury as to the *actus reus* for each count of indecent liberties with a student.

[2] Next, defendant argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence that J.B. was a "student" during the summer. Specifically, defendant contends that J.B. was not "enrolled" at East Forsyth at the time of the incidents because a person is "enrolled" only during the academic school year. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455.

At trial, the court instructed the jury that a "student," for purposes of N.C. Gen. Stat. 14-202.4(A), means "a person enrolled in kindergarten, or in grade one through 12 in any school." Defendant contends that a person is only "enrolled" during the academic year; thus, since the offenses occurred during the summer, J.B. was not enrolled, nor was he a student, at East Forsyth. In support of his argument, defendant claims that each school completes an "Initial Enrollment" count at the beginning of each school year, and students do not become enrolled at a school until that initial count.

However, at trial, Patricia Gainey, the principal of East Forsyth, testified that students remain enrolled at her school until a parent withdraws them. Although students are required to register for fall classes during the spring, students remain in the school's database until a parent "signs them out." J.B.'s mother testified at trial that J.B. had registered for his fall classes in April or May 2011, the spring before the incidents occurred. Since J.B.'s mother did not withdraw him from East Forsyth until the end of the 2011 school year (June 2012), he remained enrolled at East Forsyth during the summer of 2011 even though he was not taking classes at that time. In other words, he remained in East Forsyth's

database, and, thus, remained enrolled, until June 2012. Therefore, during the summer, although the academic year was over, he was an enrolled student at East Forsyth. Accordingly, the trial court did not err in instructing the jury that a "student" includes anyone enrolled in a school and in denying defendant's motion to dismiss because the State presented substantial evidence that J.B. was a student at the time of the offenses.

Conclusion

Based on the foregoing reasons, we conclude that defendant's trial was free from error.

NO ERROR.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA
v.
ALEXANDER SCOTT TALBOT

No. COA13-1077

Filed 3 June 2014

1. Jury—deliberations—playing surveillance video twice—not an expression of opinion by trial court

The trial court did not err in a common law robbery case by replaying a surveillance video twice during jury deliberations. Merely playing a moving picture (video) of an event which did not contain any audio, so that the jurors would have an ample opportunity to review this evidence without having to ask to see the tape again later, did not constitute error nor did such an action by the trial court express any opinion. Jurors are presumed to follow jury instructions and curative instructions, including the one given in this case that jurors should not think the judge had any opinion.

2. Evidence—video—photographs—jury instruction

The trial court did not err in a common law robbery case by failing to instruct the jury in accordance with N.C.P.I.-Criminal 104.50. While the trial court did not clarify which portion of the instruction as given applied to the video or to the other photos, it hardly seemed likely that the jury failed to understand the distinction.

3. Damages and Remedies—restitution—sufficiency of evidence

The trial court erred in a common law robbery case by ordering restitution without sufficient evidence. The sentence of restitution was vacated and the case was remanded for a new sentencing hearing on this sole issue.

Appeal by Defendant from judgment entered 3 May 2013 by Judge Alma L. Hinton in Wilson County Superior Court. Heard in the Court of Appeals 5 February 2014.

Attorney General Roy Cooper, by Assistant Attorney General Deborah M. Greene, for the State.

Bowen and Berry, PLLC, by Sue Genrich Berry, for the defendant.

McCULLOUGH, Judge.

Alexander Scott Talbot, ("Defendant") was indicted on 30 December 2012 for the offense of Common Law Robbery. He was tried in Wilson County Superior Court, Judge Alma L. Hinton, presiding and on 3 May 2013 convicted of Larceny from a Person at which time he was sentenced to a minimum of eight (8) months and maximum of nineteen (19) months in the custody of the North Carolina Department of Corrections. Defendant was also ordered to pay $44.00 in restitution. On 9 May 2013, Defendant filed Notice of Appeal. After a careful review of the proceedings below we find No Error in the trial conducted in Superior Court, but vacate the sentence of restitution and remand for re-sentencing on that issue.

I. Background

On 7 September 2012, Defendant's father who is the owner and operator of a business called 8 Ball Cycle Work in the Wilson area, requested that Defendant watch his shop while he ran some errands. On that date, Defendant, his girlfriend, Cassandra Setzer ("Setzer") and Jamy Reid ("Reid"), a friend of Defendant who on occasion lived with Defendant, left his apartment traveling to the father's business. Along the way the trio stopped at Valvoline to pay for some repairs made to Defendant's Jeep before reaching his father's business. Defendant began to have concerns about the repairs as he heard noises coming from his Jeep, so all three proceeded to an auto parts store to buy parts. Before returning to 8 Ball Cycle, they made a stop at McDonald's. While at McDonald's Reid announced he was going to go make some money. Reid then left. After

receiving a call from his father about the length of time it was taking for Defendant to arrive at his business, Defendant informed Setzer that he was going to go find Reid.

Churchwell's Jewelers, a near-by custom jewelry business was open as it was now past 10:00 a.m., its opening time, and jewelry had been placed in glass-top counter displays. The owners, Angie and Anderson Bass were present in their upstairs office over-looking the showroom while two employees, Cora Wooten and Ashley Townsand, were on the main floor. Ms. Wooten moved to the display case when Reid entered the store while Mr. Townsand, who was in the repair area, stood up and watched Reid. After Reid asked to see some rings, Ms. Wooten removed a display of rings from inside a glass case in order to show them to Reid. Shortly thereafter, Defendant entered the store. At this juncture, one of the owners, Mr. Bass, came downstairs to the showroom and Defendant asked Mr. Bass what time the restaurant located next door opened for business. When Mr. Bass replied that the restaurant opened at 5:00 p.m. Defendant began to exit the store and opened the door. At that moment Reid grabbed the ring display and ran out the open door behind Defendant. Reid ran in one direction and Defendant walked in another, until Townsand caught up with Defendant and requested he return to the store.

Reid ran back to McDonald's, got in the back seat of the Jeep, and told Setzer to drive. While doing so, she called Defendant, and learned he was being held for acting as a decoy. Once the police arrived, a look-out for the Jeep was issued and shortly thereafter Reid and Setzer were taken into custody. A consent search resulted in officers discovering the stolen jewelry hidden inside an antifreeze container in the rear of the Jeep.

II. Discussion

On appeal the Defendant raises three issues, (1) Did the trial court err in re-playing the surveillance video twice during jury deliberations; (2) Did the trial court err by failing to instruct the jury in accordance with N.C.P.I.-Criminal 104.50; and (3) Did the Court err in ordering restitution without sufficient evidence?

1. Did the Trial Court Err by Playing Video Surveillance Tape Twice, Thereby Expressing an Opinion in Contravention of N.C.G.S. § 15A-1222?

[1] Following the trial and closing arguments, the trial court instructed the jury that they should not think the judge had any opinion stating:

> [the trial court had] implied any of the evidence should be believed or disbelieved, that a fact has been proven or not or what your findings ought to be. Instead you alone are to find the facts and render a verdict reflecting the truth.

Defendant now argues, that despite the preceding instruction, by re-playing the jewelry store surveillance tape of this incident, the trial court overly emphasized Defendant's role thus implicitly commenting on Defendant's guilt. We do not believe this argument has merit.

Shortly after the jury began considering Defendant's case, the jury requested to review certain exhibits that had been admitted during the trial. These exhibits included certain photographs, a copy of Defendant's statement, a copy of Setzer's statement and a receipt. The trial court agreed to allow the jurors to review these exhibits in the courtroom without objection. Before the exhibits could be given to the jury, the foreperson asked if the jury could also review the jewelry store video surveillance film. The prosecutor announced that the equipment could be set up to re-play the tape. The foreperson requested that the tape be played from the point where Defendant entered the store. Following the first playing of the video, the trial judge instructed the prosecutor to play the tape a second time. This action was taken without a request from either counsel. The jury then resumed its deliberations finding Defendant guilty as previously stated.

As a preliminary matter, it should be noted that the court was well within its discretion in permitting the inspection of evidence including the re-playing of the video. In N.C. Gen. Stat. § 15A-1233(a) it is provided that:

> [i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in [her] discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In [her] discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2013).

The decision by the trial court to either grant or deny a jury's request to review evidence previously admitted lies within the court's discretion,

State v. Johnson, 346 N.C. 119, 124, 484 S.E.2d 372, 375 (1997) and it is presumed that the court does so in accordance with this statute. *State v. Weddington*, 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991). When the examination takes place in open court as in the case at bar, there is no necessity for obtaining the consent of the parties. *State v. Lee*, 128 N.C. App. 506, 509, 495 S.E.2d 373, 375, *cert. denied* 348 N.C. 76, 505 S.E.2d 883 (1998). Thus, in the case now before us we fail to see how merely playing a moving picture (video) of an event which evidently did not contain any audio, so that the jurors would have an ample opportunity to review this evidence without having to ask to see the tape again later, constitutes error nor do we see how the trial court by such an action expresses any opinion whatsoever. Jurors are presumed to follow jury instructions and curative instructions, including the one given in this case as set forth above, *State v. Little*, 56 N.C. App. 765, 770, 290 S.E.2d 393, 396 (1982). We do not believe the record demonstrates the court rendering any opinion about Defendant's guilt rather the record demonstrates the court properly instructed the jury wherein the court stated it was expressing no opinion. The record also demonstrates that the trial judge complied with the proper statutory method of allowing jurors to review evidence which they had previously examined. Appellant's arguments to the contrary are overruled.

2. Did the Trial Court Commit Prejudicial Error by Failing to Properly Instruct Pursuant to N.C.P.I.-Criminal 104.50?

[2] During the charge conference, Defendant's counsel requested that the court issue N.C.P.I.-Criminal 104.50 which states "A photograph was introduced into evidence in this case for the purpose of illustrating and explaining the testimony of a witness. This photograph may not be considered by you for any other purpose." The State requested the court instruct that the video could be viewed as substantive evidence. The trial judge informed counsel that N.C.P.I.-Criminal 104.50A includes both. This instruction provides, in part, "A [photograph] [video] was introduced into evidence in this case. This [photograph] [video] may be considered by you as evidence of facts it illustrates or shows." The trial court instructed the jury in accordance with the latter pattern instruction, without any additional objection.

When a party, requests an instruction which is supported by the evidence, it is recognized that a failure to give that instruction or an instruction in substantial conformity thereto is error. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). When defendant requests an instruction which was not given, the lack of objection does not waive the error and the issue is deemed preserved. *State v. Ross*, 322 N.C. 261,

265-66, 367 S.E.2d 889, 891-92 (1988). In the case *sub judice* some photographs were for illustrative purposes, those being the photos of the jewelry shop and its goods while the video was undoubtedly admitted as substantive evidence depicting actual events that transpired. While the trial judge did not clarify which portion of the instruction as given applied to the video or to the other photos it hardly seems likely that the jury failed to understand the distinction and it is difficult to see how the muddled instruction prejudiced Defendant. Accordingly, this argument is likewise overruled.

3. Restitution

[3] Although we are constrained by the Supreme Court's ruling in *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010) to review restitution awards on appeal regardless of whether a defendant has objected to the restitution amount at trial, we note that this issue is frequently before this Court due to easily correctable errors. As this Court noted in *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011), "the quantum of evidence needed to support a restitution award is not high." In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards.

Here, the trial judge entered an order directing that Defendant repay Churchwell's Jewelers the sum of $44.00. There is no evidentiary support for this amount in the record and both parties concede the trial court erred in ordering restitution. An order of restitution must be supported by evidence, *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) and neither a prosecutor's unsworn statement nor a restitution worksheet is adequate to support an order of restitution, *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010). Here Appellant argues that Defendant is entitled to a new sentencing hearing on the issue of restitution and the State agrees. Therefore the sentence of restitution is vacated and the case remanded for a new sentencing hearing on this sole issue.

III. Conclusion

In summary, we find no error in Defendant's conviction and sentence save for the issue of restitution. The order of restitution is vacated and the case is remanded for re-sentencing on the issue of restitution only.

No Error, Restitution Order Vacated and Remanded.

Judges HUNTER, Robert C. and GEER concur.

TEMPLETON PROPS. LP v. TOWN OF BOONE

[234 N.C. App. 303 (2014)]

TEMPLETON PROPERTIES LP, PETITIONER
v.
TOWN OF BOONE, RESPONDENT

No. COA13-1274

Filed 3 June 2014

1. Zoning—harmony with surrounding area—issue of law and fact—standard of review

The issue of whether the superior court erred in a zoning case by concluding as a matter of law that the Boone Board of Adjustment considered the wrong "area" when assessing a proposed clinic's harmony with the adjacent community was reviewed as a mixed question of fact and law, applying both de novo review and the whole record test.

2. Zoning—special use permit—harmonious with area—definition of area—fact specific

Where a zoning ordinance provided the Boone Board of Adjustment with the ability to deny a special use permit if the application would not be in harmony with the area in which it was located, a fact-specific inquiry was necessarily required to define "area." The superior court improperly acted as a finder of fact on review and imposed its view of what the bounded "area" should be, rather than reviewing whether the Board's findings of fact concerning the area were supported by competent evidence and not arbitrary and capricious.

3. Zoning—special use permit—prima facie case—rebuttal

Although petitioner argued that a Boone zoning ordinance allowed construction of its medical clinic under a special use permit, a prima facie case that a petitioner was entitled to a special use permit could be rebutted by competent, material, and substantial evidence that the use contemplated was not in fact in harmony with the area in which it was to be located.

4. Zoning—special use permit—harmony with area—evidence sufficient to support findings

There was competent evidence in a special use zoning case supporting the Board of Adjustment's finding that a medical clinic would not be in harmony with its surrounding area and the superior court erred by overturning the Board's decision to deny the special use permit.

Appeal by respondent from order entered 7 August 2013 by Judge Shannon R. Joseph in Watauga County Superior Court. Heard in the Court of Appeals 20 March 2014.

The Brough Law Firm, by Michael B. Brough; and di Santi Watson Capua & Wilson, by Anthony S. di Santi and Chelsea B. Garrett, for Petitioner-appellee.

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

HUNTER, JR., Robert N., Judge.

The Town of Boone ("Boone") appeals the superior court's 7 August 2013 order reversing a decision of the Town of Boone's Board of Adjustment ("Board") that denied Templeton Properties L.P.'s ("Templeton") application for a zoning permit. We reverse the superior court's order.

I. Facts & Procedural History

This is the third time this Court has reviewed this case. *See Templeton Properties, L.P. v. Town of Boone*, ___ N.C. App. ___, ___, 724 S.E.2d 604, 605 (2012) ("*Templeton II*"); *Templeton Properties LP v. Town of Boone*, 198 N.C. App. 406, 681 S.E.2d 566, 2009 WL 2180620 (2009) (unpublished) ("*Templeton I*").

The dispute centers around Templeton's 2.9 acre lot ("the Parcel") in Boone at 315 State Farm Road. The Parcel is zoned for single-family residential use ("R-1"), but has historically been used as a church under a special use permit. T*empleton I*, 2009 WL 2180620 at *1. The church is 2,250 square feet and is located between State Farm Road and VFW Drive in Boone, which provide routes of access to the Parcel. *Id.* The surrounding neighborhood is "composed of mostly single-family residences," except for a non-residential VFW hall located near the Parcel. *Id.* Under section 165 of Boone's then-existing unified development ordinance ("UDO"), medical clinics over 10,000 square feet were allowed in R-1 zoning with a valid special use permit. Applications for special use permits may be denied by the Board upon showing of at least one of four reasons set forth in UDO § 69(c), namely that the development

> (1) Will materially endanger the public health or safety, or
>
> (2) Will substantially injure the value of adjoining or abutting property, or

> (3) Will not be in harmony with the area in which it is to be located, or
>
> (4) Will not be in general conformity with the comprehensive plan, thoroughfare plan, or other plan officially adopted by the council.

On 28 September 2006, Templeton submitted an application to Boone to obtain a special use permit to place a 13,050 square foot medical clinic on the Parcel. *Id.* The Board denied the application as incomplete. *Id.* Templeton modified its application and resubmitted it on 2 March 2007 to address the Board's concerns, including decreasing the clinic's size to 10,010 square feet, the current proposed size of the clinic. *Id.*

On 1 May 2007 the Board rejected Templeton's application. *Templeton II*, ___ N.C. App. at ___, 724 S.E.2d at 606. The Watauga County Superior Court granted a writ of certiorari and then entered an order on 7 July 2008 reversing the Board's denial of Templeton's application for the special use permit. *Id.* Boone appealed to this Court and we remanded to the Board to issue reviewable findings of fact in *Templeton I*. *Id.* at ___, 724 S.E.2d at 606–07.

On 2 September 2010, the Board met to make findings of fact relating to the special use permit after the remand. *Id.* After taking testimony from residents and Templeton's counsel, the Board made findings of fact and approved them via a written decision on 29 September 2010. *Id.* On 27 October 2010, Templeton appealed the Board's decision to the superior court by petition for writ of certiorari, which was granted the same day. *Id.* On 21 February 2011, the superior court affirmed the Board's decision. *Id.* Templeton then appealed the superior court's decision to this Court, resulting in *Templeton II*. *Id.* This Court remanded in *Templeton II* and required the Board to "make reviewable findings of fact . . . based only upon the testimony and evidence presented at the hearings held on 5 April and 1 May 2007" due to defects in additional testimony taken by the Board after the first remand. *Id.* at ___, 724 S.E.2d at 614. We adopt the remaining statements of fact and procedural history in *Templeton I* and *Templeton II*.

On remand, the Board again denied Templeton's application for a special use permit on 4 October 2012 via an identical order as we considered in *Templeton II*. The Board made twenty-one findings of fact relating to the proposed clinic's lack of harmony within the order:

> 3. Templeton's proposed clinic would be 10,010 square feet in size and would have 67 parking spaces distributed among four different parking lots.

4. The clinic and its parking lots would have 23 light poles. These light poles would produce a glow at night visible from neighborhood residents' homes and yards. Further, some people in the surrounding neighborhood live on properties that are at a higher elevation than the Lot, and those people would look down on the well-lit clinic. The shields that Templeton proposed for the poles' light bulbs would not prevent light from bleeding into the neighborhood.

5. Templeton plans for employees and patients to access the clinic from State Farm Road, and Templeton plans to add a left-turn lane from State Farm Road into the clinic.

6. The clinic would have a large dumpster pad, though Templeton did not specify how many dumpsters would be on this pad.

7. Templeton had not found a tenant for the clinic and did not know what kind of medical procedures would be performed there or what types of medical wastes might be produced. Templeton did acknowledge, however, that some wastes produced at the clinic could be hazardous.

8. The only development currently on the Lot is a 2,250 square-foot church. The church has few lights, and it generally has traffic only on weekends.

9. The area surrounding the Lot is predominantly zoned R-1 Single Family Residential. The surrounding area has been almost uniformly zoned R-1 Single Family Residential since the Town first adopted zoning for the area in 1979.

10. The area surrounding the Lot is a residential neighborhood, one of [the] oldest in Boone. It is more consistently residential, with fewer non-residential developments, than other residential neighborhoods in Town. The Lot's surrounding area also has more preserved trees and vegetation than other areas in Boone.

11. Next door to the Lot is a VFW hall. Although the VFW hall is non-residential, it is grandfathered because it was built before Boone adopted zoning in 1979.

12. Except for the VFW hall, properties in the Lot's surrounding area are almost all single-family homes.

13 During the hearing, Templeton offered the results of a survey that it had conducted of development along a stretch of State Farm Road. Some properties in this survey were non-residential.

14. However, Templeton's survey was not limited to the area where the clinic would be located. Instead, Templeton's survey extended almost a mile away from the Lot, into other areas of Town. The survey also focused on properties fronting State Farm Road, which caused it to exclude many properties that, although not fronting on the road, were still part of the area where the clinic would be located.

15. Templeton's survey did not accurately reflect the character of the area in which the clinic would be located.

16. The Lot's surrounding area is separated from less residential parts of Boone, including those less residential parts covered in Templeton's survey, by distance, topography, and the curves in State Farm Road. As a result, the Lot's surrounding area is a distinct and separate residential neighborhood.

17. Templeton's appraiser, in describing the Lot's surrounding area, also concluded that the only developments in the surrounding area were the VFW hall and single-family homes.

18. The Lot's surrounding area has no medical buildings, offices, or commercial developments.

19. The clinic would introduce a busy commercial operation into an area that is overwhelmingly residential in character.

20. At 10,010 square feet, the clinic would be much larger than the single family homes that predominate in the surrounding area.

21. The clinic would produce far more traffic than other properties in the Lot's surrounding area and would produce a level of traffic out-of-character for that area.

22. No properties in the Lot's surrounding area produce as much light as the clinic would produce. The clinic's

> lighting would not be in keeping with the type and level of lighting currently found in the surrounding area.
>
> 23. Templeton's proposed clinic would not be in harmony with the area in which it would be located.

On 6 November 2012, Templeton appealed the denial of its application to the Watauga County Superior Court. On 7 November 2012, the superior court issued an *ex parte* writ of certiorari. On 7 August 2013, the superior court entered an order reversing the Board's denial of Templeton's application. In its third conclusion of law, the superior court found

> 3. The Board's determination that Petitioner's proposed use is not in harmony with the area rests on an overly-restrictive application of the term "area," which amounts to a misinterpretation of the applicable standard. In this case, the relevant "area" within the meaning of the ordinance is not limited to the residences that lie north of the subject site and that do not front State Farm Road but includes similarly situated properties along State Farm Road that are in reasonable proximity to the subject site. The undisputed evidence in the record is that most of those properties are used for office, institutional, and commercial — not residential — purposes. Therefore, the Board's conclusion that the proposed use is not in harmony with the area in which it is to be located is not supported by the evidence.
>
> Also, the Board's findings on lack of harmony generally and impermissibly cite impacts that are inherent in the nature of the proposed use. As matter of law, a board of adjustment cannot deny an application for lack of harmony on the basis that a use deemed conditionally permissible by the local legislative body would produce impacts common to all such uses — for to allow such a decision would be to empower the board to substitute its judgment for that of the elected governing body. All of the Board's findings in this case are of that nature, and as a matter of law do not support the Board's conclusion that the proposed use would not be in harmony with the area in which it is to be located.

The superior court's order also found that Finding of Fact 10 was not supported by competent evidence.

In its fourth conclusion of law, the superior court found the Board's determination that Templeton's proposed use would not be in conformity with the town's comprehensive plan was based on "general policy statements in the comprehensive plan" and was not a sufficient basis to deny Templeton's application. The superior court also found the Board erred in finding that the proposed use would materially endanger public safety, as "there was not competent, material and substantial evidence to support such a conclusion." Boone filed notice of appeal on 26 August 2013 and a second notice of appeal on 5 September 2013 to correct the filing number listed on the initial notice of appeal.

II. Jurisdiction & Standard of Review

Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2013) (stating a right of appeal lies with this Court from the final judgment of a superior court "entered upon review of a decision of an administrative agency").

[1] Boone first argues that the superior court erred by improperly acting as a fact-finder in its determination of the "area" considered by the Board's harmony analysis. "[T]his Court examines the trial court's order for error[s] of law by determining whether the superior court: (1) exercised the proper scope of review, and (2) correctly applied this scope of review." *Turik v. Town of Surf City*, 182 N.C. App. 427, 429, 642 S.E.2d 251, 253 (2007) (second alteration in original) (internal quotation marks omitted) (quoting *Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001)).

Here, the superior court erred when it concluded as a matter of law that the Board considered the wrong "area" when assessing the clinic's harmony with the adjacent community. This issue is more properly construed as a mixed question of fact and law. *See Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (finding a trial court mislabeled a mixed question of fact and law as a finding of fact); *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 202 N.C. App. 631, 636, 689 S.E.2d 880, 883 (2010), *rev'd on other grounds*, 365 N.C. 152, 712 S.E.2d 868 (2011).

In *Morris*, this Court held (i) that interpretation of a term in a zoning ordinance was a question of law and (ii) that determining whether the specific actions of a petitioner fit within that interpretation was a question of fact reviewable under the whole record test. *Morris*, 202 N.C. App. at 636, 689 S.E.2d at 883. This Court relied on *Whiteco Outdoor Adver. v. Johnston Cnty. Bd. of Adjust.*, 132 N.C. App. 465, 513 S.E.2d 70 (1999), which prescribed *de novo* review of a petitioner's alleged error

of law, but also provided deference to a board of adjustment's interpretation of its own ordinance under that *de novo* review. *Id.* at 470, 513 S.E.2d at 74. The Supreme Court rejected this Court's application of a deferential *de novo* standard, stating that "[u]nder de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Morris*, 365 N.C. at 156, 712 S.E.2d at 871. The Supreme Court did not reverse this Court's finding that interpreting "work" was properly considered a mixed question of law and fact. *Id.*

Thus, we review the superior court's determination that the Board erred in its definition of "area" in two parts: (i) whether the Board's interpretation of the ordinance's use of "area" prescribed was an error of law under *de novo* review and (ii) whether the specific findings of fact used to define the area were supported under the whole record test.

Under *de novo* review, we examine the case with new eyes. "[*D*]*e novo* means fresh or anew; for a second time, and an appeal *de novo* is an appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." *Parker v. Glosson*, 182 N.C. App. 229, 231, 641 S.E.2d 735, 737 (2007) (quotation marks and citations omitted).

"When utilizing the whole record test, . . . the reviewing court must examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (quotation marks and citation omitted). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cnty. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

III. Analysis

A. Defining Area in the Ordinance

[2] As discussed *supra* in Section II, the definition of "area" in the ordinance is a mixed question of law and fact subject to *de novo* review. "[O]ne of the functions of a Board of Adjustment is to interpret local zoning ordinances." *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659 (1992). "[R]eviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations. This proposition emphasizes

the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards." *Morris*, 365 N.C. at 156, 712 S.E.2d at 871 (quotation marks and citation omitted).

In *Morris*, the Supreme Court compared a board of adjustment's interpretation of the term "work" to the actual ordinance:

> [W]e find the BOA's interpretation of the term "work" unpersuasive. The ordinance provides that:
>
> "If the work described in any compliance or sign permit has not begun within six months from the date of issuance thereof, the permit shall expire. Upon beginning a project, work must be diligently continued until completion with some progress being apparent every three months. If such continuance or work is not shown, the permit will expire."
>
> City of Bessemer City, N.C., Ordinance § 155.207.
>
> Bessemer City's zoning administrator testified at the BOA hearing that he interpreted the term "work" to mean "actually something moving on the ground . . . . [c]onstruction." In his view, Fairway failed to commence "work" within the time period prescribed in the sign permit because he did not observe construction-like activities occurring on the property. He therefore concluded the sign was relocated without a valid sign permit.
>
> In contrast, Fairway argues the term "work" encompasses the broader range of activities necessary to complete the sign relocation. Fairway contends its negotiations with DOT and Dixon, as well as its acquisition of a county building permit, constitute "work" under the ordinance. We agree with Fairway that the term "work" has a broader meaning than mere visible evidence of construction.

Id. at 156–57, 712 S.E.2d at 871.

We consider the phrase "area" here and the Board's interpretation of it. The ordinance provides the Board with the ability to deny a special use permit if the application "[w]ill not be in harmony with the area in which it is located." A fact-specific inquiry is necessarily required to define "area" in this context, as each individual application for a special use permit will have different surrounding areas the Board will need to consider when determining whether the property would be harmonious

with its surroundings. This scenario is much like our Supreme Court's interpretation of the phrase a "reasonable time":

> If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them that the question ever becomes one of law.

Claus-Shear Co. v. E. Lee Hard Ware House, 140 N.C. 552, 555, 53 S.E. 433, 435 (1906). Conversely, if the Board made a determination of what "area" generally meant within the ordinance and there was no disagreement about the area in question,[1] a trial court's *de novo* analysis of the Board's conclusion of law, that being an interpretation of "area" within the ordinance, would be appropriate.

Here, the Board used the term "area" as it related to specific findings of fact, which was the proper application under UDO § 69(d). Finding of fact #13 considered Templeton's offered survey, which included non-residential developments further down State Farm Road. Finding of fact #14 noted that Templeton's evidence "extended almost a mile away" from the Parcel and that Templeton's survey excluded several properties fronting State Farm Road that the Board considered part of the "area." Finding of fact #16 stated that "distance, topography, and the curves in State Farm Road" separated the Parcel from the commercial properties cited by Templeton as being part of the "area." Finding of fact #17 noted that Templeton's appraiser concluded "that the only developments in the surrounding area were the VFW hall and single-family homes." These findings, amongst others, are a proper contextual usage of "area" as laid forth in the ordinance and are inherently fact specific.

Beyond reviewing the Board's actions, this Court reviews whether the superior court correctly performed its several tasks in its reviewing capacity:

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1. For example, if the Board made a finding that "area" categorically included all adjacent properties within the R-1 zoning area.

> [T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:
>
> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

"When the petitioner correctly contends that the agency's decision was either unsupported by the evidence or arbitrary and capricious, the appropriate standard of review for the initial reviewing court is 'whole record' review. If, however, petitioner properly alleges that the agency's decision was based on error of law, *de novo* review is required." *Tucker*, 148 N.C. App. at 55, 557 S.E.2d at 634. As such, the superior court conducts a *de novo* review under the first three tasks and a "whole record" review for the final two tasks.

Here, the superior court improperly acted as a finder of fact on review and imposed its own view of what the bounded "area" should be, rather than reviewing whether the Board's findings of fact concerning the area were supported by competent evidence and not arbitrary and capricious. The superior court held that the fact-specific definition of "area" as used by the Board should have included "similarly situated" properties that are "in reasonable proximity to the subject site." "In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the town board." *Coastal Ready-Mix Concrete Co., Inc.*, 299 N.C. at 626, 265 S.E.2d at 383. If findings of fact about the "area" affected here were supported by evidence, they must stand even if conflicting evidence may have allowed the superior court to reach a different result under *de novo* review. *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997).

By improperly acting as a trier of fact, the superior court erred and we reverse its order.

B. Rebuttal of a Presumed Legislative Finding

[3] Templeton also contends that because Boone's R-1 zoning allowed construction of its clinic under a special use permit, Boone's legislative determination that clinics are entitled to receive special use permits should have been enforced. Templeton cites a number of cases in support of this proposition. *See Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980) ("Where an applicant for a conditional use permit produces competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it." (citation and quotation marks omitted)); *Blair Investments, LLC v. Roanoke Rapids City Council*, ___ N.C. App. ___, ___, 752 S.E.2d 524, 527 (2013); *Habitat for Humanity of Moore Cnty., Inc. v. Bd. of Comm'rs of Pinebluff*, 187 N.C. App. 764, 768, 653 S.E.2d 886, 888 (2007); *MCC Outdoor, LLC v. Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 814, 610 S.E.2d 794, 797 (2005); *Clark v. City of Asheboro*, 136 N.C. App. 114, 122, 524 S.E.2d 46, 52 (1999); *Vulcan Materials Co. v. Guilford Cnty. Bd. of Cnty. Comm'rs*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994) ("The inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan.").

Of the preceding cases, Templeton argues that *Woodhouse* uses a "legislative finding" rule and that *Vulcan* is a "less-restrictive" formulation of the *Woodhouse* test. We do not see conflict between the two cases, which both allow the presumption of granting the special use permit to be rebutted by the party opposing its issuance. *See Blair*, ___ N.C. App. at ___, 752 S.E.2d at 528–29 (citing *Woodhouse* and holding that after a petitioner "makes a prima facie showing of entitlement to a special use permit, the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit" so long as denial is "based upon findings which are supported by competent, material, and substantial evidence appearing in the record" (citation and quotation marks omitted)). Thus, while showing that entitlement to a conditional or special use permit creates a prima facie case that a petitioner is entitled to a special use permit, the prima facie case may be rebutted by "competent, material, and substantial evidence [showing the] use contemplated is not in fact in harmony with the area in which it is to be located." *Vulcan*, 115 N.C. App. at 324, 444 S.E.2d at 643 (citations and quotation marks omitted).

Accordingly, we must consult the record to determine whether "competent, material, and substantial" evidence existed to support the Board's harmony analysis. *Id.*

C. Findings of Fact Supporting Board's Decision to Deny the Special Use Permit

[4] As noted *supra* in Section II, we now review whether the Board's findings of fact were supported by competent evidence under the whole record test. At the outset, we note that

> [A] city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears "about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.

Blair, ___ N.C. App. at ___, 752 S.E.2d at 529 (quotation marks and citation omitted). Were the Board's findings concerning the area's characteristics solely based on the testimony of individuals affected by development of the Parcel, denial of the permit on those grounds might be impermissible. However, several findings of fact concern the nature of the Parcel and the surrounding area which buttress its decision:

- Finding of fact #3 notes that there would be sixty-seven parking spaces at the clinic.
- Finding of fact #4 describes the twenty-three light poles on the clinic's grounds as well as issues with the shielding on the lights affecting the surrounding residents.
- Finding of fact #5 describes Templeton's proposed left-turn lane to allow access from State Farm Road.
- Finding of fact #6 describes the clinic's proposed "two large dumpster pads," and that Templeton could not estimate how many containers would be placed on the pads.
- Finding of fact #7 noted the uncertainty of the type of clinic that would locate at the facility.

- Finding of fact #8 noted the size, limited weekend use, and lack of lighting by the current church structure on the Parcel.
- Finding of fact #9 noted the historical tendency to zone the surrounding area as R-1.
- Finding of fact #11 noted that the VFW Hall adjacent to the Parcel was grandfathered into existence because it was built before Boone adopted zoning.
- Finding of fact #12 noted that the surrounding area was primarily comprised of single family homes.
- Findings of fact #13, #14, and #15 found that Templeton's survey was not limited to an area that accurately reflected the character of the area near the Parcel, extended close to a mile away from the Parcel, and excluded several properties not fronting State Farm Road.
- Finding of fact #16 finds that the Parcel is separated from the other non-residential parcels cited by Templeton by topography, distance, and road features.
- Finding of fact #17 notes that Templeton's appraiser described the Parcel's surrounding area as the VFW hall and single family homes.
- Findings of fact #18 and #19 note the lack of medical buildings, offices, or other commercial developments in the surrounding area and found that introducing the medical clinic would introduce a "busy commercial operation" into an "overwhelmingly residential" area.
- Findings of fact #20, #21, and #22 note that the clinic would be "much larger" than the surrounding structures, would produce additional traffic, and would create more artificial light than other surrounding structures in the area.

These findings were based on testimony, photographs of the area, drawings, topographic surveys, and other data compiled by the Board prior to its 4 May 2007 denial of Templeton's application. The foregoing was ample evidence to support a finding that the proposed clinic was not harmonious with its surrounding area. Further, the superior court cited only finding of fact #10 as not being supported by evidence in its order. We disagree and hold that the six residents' testimony of the area regarding its contents constituted competent evidence supporting finding of

fact #10.[2] Accordingly, there was competent evidence supporting the Board's finding that the medical clinic would not be in harmony with its surrounding area pursuant to UDO § 69(c)(3) and the superior court erred in overturning the Board's decision to deny the special use permit.

Because we hold that the Board's denial of Templeton's special use permit was supported by competent evidence and proper under its harmony analysis, we do not address Boone's remaining arguments concerning conformance with the comprehensive plan or to provide for the public's safety.

IV. Conclusion

For the reasons stated above, the decision of the superior court is

REVERSED.

Judges STROUD and DILLON concur.

2. The testimony included statements from Ben Shoemake who said the Parcel was surrounded by homes and that the commercial development cited by Templeton was further away from the neighborhood that he described as "much smaller." Les Monkemeyer testified that the neighborhood has trees over a century old in the surrounding area. Marc Kadyk, a thirty-year resident of the neighborhood, testified that the area is heavily wooded. Thirty-four year neighborhood resident and Town Mayor Loretta Clawson testified that the area was overwhelmingly used as homes. Thomas and Joan McLaughlin also testified that the neighborhood was residential in nature, that the area was heavily wooded, and that the commercial portion of State Farm Road to the southeast cited by Templeton was dissimilar because it did not have the same amount of vegetation.

THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH. v. CLEVELAND CNTY. BD. OF EDUC.

[234 N.C. App. 318 (2014)]

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT COMMUNITY CHARTER SCHOOL AND LINCOLN CHARTER SCHOOL, PLAINTIFFS
v.
CLEVELAND COUNTY BOARD OF EDUCATION, D/B/A CLEVELAND COUNTY SCHOOLS, DEFENDANT

No. COA13-893

Filed 3 June 2014

1. Schools and Education—charter school funding—funding—restricted funds

An order involving the sharing of money between the Cleveland County Schools (CSS) and charter schools was remanded for appropriate findings of fact and a determination of whether the funds at issues were "restricted" under the 2010 clarifying amendment to N.C.G.S. § 115C-426 (such amendments apply to all cases pending before the courts when the amendment is adopted, regardless of when the underlying claim arose). Money from the local current expense fund is shared with the charter schools, but not money from restricted funds.

2. Attorney Fees—action against school board—not an agency

The trial court erred in an action against a school board by awarding plaintiff attorney fees under N.C.G.S. § 6-19.1, which allows attorney fees to a party prevailing over a state agency in a civil action. Defendant was not an agency for purposes of that statute.

Appeal by defendant from Judgment entered on or about 13 February 2013 and Order and Judgment entered 2 April 2013 by Judge Jesse B. Caldwell III, in Superior Court, Cleveland County. Heard in the Court of Appeals 23 January 2014.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot and Matthew F. Tilley, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Allison B. Schafer and Christine T. Scheef for N.C. School Boards Association, for amicus curiae.

STROUD, Judge.

The Cleveland County Board of Education, d/b/a Cleveland County Schools ("CCS" or "defendant"), appeals from the judgment entered by the trial court on or about 13 February 2013, wherein it concluded that certain funds that CCS had placed in Fund 8 should have been placed into the local current expense fund and distributed on a pro rata basis to the plaintiff charter schools. CCS also appeals from an order awarding plaintiffs attorneys' fees. We remand to allow the trial court to apply the correct legal standard. We reverse the trial court's order awarding attorneys' fees.

I. Background

On 9 January 2012, Thomas Jefferson Classical Academy Charter School, Piedmont Community Charter School, and Lincoln Charter School ("plaintiffs") filed a complaint in superior court, Cleveland County, alleging that CCS had failed to pay them the proper per-pupil amount required by statute. Plaintiffs specifically contended that CCS wrongfully moved approximately $4.9 million from the local current expense fund, which must be shared with the charter schools, to a "special revenue fund," which is not shared. Plaintiffs alleged that they were owed approximately $102,480. Plaintiffs sought a declaratory judgment that CCS must allocate the funds as plaintiffs contended the statute required, recovery in the amount of $102,480, and attorneys' fees under N.C. Gen. Stat. § 6-19.1. CCS answered, denying that their transfer of the funds to the special revenue fund violated any of the applicable statutes and that plaintiffs were owed anything.

The case was tried by the superior court sitting without a jury. The parties each presented evidence to support their claims. Plaintiffs primarily relied on the testimony of David Lee, financial director for CCS. Mr. Lee prepared an audit report of CCS' finances, which used various state budget codes for different revenue sources. Many of the funding sources that CCS had placed in the special revenue fund were classified by Mr. Lee as "unrestricted." Defendant presented a number of witnesses who administered various programs within the CCS system who testified about their funding sources and the use of those funds. After two days of testimony, the trial court took the matter under advisement.

The trial court entered its judgment on 21 February 2013, wherein it found that defendant had misappropriated approximately $2,781,281 that should have been placed in the current expense fund rather than the

special revenue fund. It found that Mr. Lee had admitted that $2,109,377 of the funds, called "Column A," were "unrestricted." It further found, based on Mr. Lee's testimony and that of the other CCS administrators, that $671,904 of the funds, listed under "Column B" and "Column C" were "(a) part of 'moneys made available to CCS for its 'current operating expenses, (b) used by CCS to operate its general K-12 programs and activities, and (c) not restricted to purposes outside CCS's general educational programs." It concluded that defendant owed plaintiffs $57,836 collectively and entered judgment against CCS in that amount. Defendant filed written notice of appeal from the 21 February 2013 judgment on 18 March 2013.

Plaintiffs then filed a petition for attorneys' fees under N.C. Gen. Stat. § 6-19.1(a). The trial court, by order and judgment entered 2 April 2013, granted plaintiffs' petition and awarded them $47,195.90 in attorneys' fees. Defendant filed written notice of appeal from the 2 April 2013 judgment and order on 30 April 2013.

II. "Restricted" Funds

[1] Defendant argues that the trial court erred in finding that various revenue sources were not "restricted" and concluding that these funds were therefore subject to a per-pupil distribution to the plaintiff charter schools. Recently the Legislature has amended the statute the Judge applied below clarifying the definition of "restricted" funds, so we remand for the trial court to apply this definition to the facts here.

A. Standard of Review

> When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. . . . Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment.

Jackson v. Culbreth, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citations, quotation marks, and brackets omitted).

B. Charter School Funding and the Uniform Budget Statute

The allocation of funds between local school administrative units and charter schools is governed by N.C. Gen. Stat. § 115C-238.29H (2009). That statute requires the local school administrative unit to

"transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C. Gen. Stat. § 115C-238.29H(b). This Court has interpreted the phrase "local current expense appropriation" to be "synonymous with the phrase 'local current expense fund' in the School Budget and Fiscal Control Act, N.C.G.S. § 115C–426(e)." *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002), *disc. rev. denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). We have further held that charter schools "are entitled to an amount equal to the per pupil amount of all money contained in the local current expense fund." *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 188 N.C. App. 454, 460, 655 S.E.2d 850, 854 (*Sugar Creek I*), *disc. rev. denied*, ___ N.C. ___, 667 S.E.2d 460 (2008). It is immaterial that the school board has earmarked particular funds for a specific purpose if the funds have been deposited in the local current expense fund. *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 676 (*Sugar Creek II*) (holding, *inter alia*, that the trial court did not err in concluding that funds designated for students affected by Hurricane Katrina were subject to per-pupil distribution to charter schools because they were placed in the current local expense fund, as opposed to a separate fund), *disc. rev. denied*, 363 N.C. 663, 687 S.E.2d 296 (2009).

The local current expense fund is defined by N.C. Gen. Stat. § 115C-426(e) (2009):

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or

> accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(c) also permits the creation of "other funds . . . to account for trust funds, federal grants restricted as to use, and special programs." Thus, we have held that "the provisions of Chapter 115C . . . do not require that all monies provided to the local administrative unit be placed into the 'local current expense fund' (Fund Two)." *Thomas Jefferson Classical Academy v. Rutherford County Bd. of Educ.*, 215 N.C. App. 530, 543, 715 S.E.2d 625, 633 (2011) (*Thomas Jefferson I*), *disc. rev. denied and app. dismissed*, ___ N.C. ___, 724 S.E.2d 531 (2012). "Restricted funds" kept in a fund separate from the local current expense fund are exempt from per-pupil distribution to the charter schools. *Id.* at ___, 715 S.E.2d at 630 ("[I]f funds are placed in the 'local current expense fund' and not held in a 'special fund,' they must be considered as being part of the 'local current expense fund' used to determine the *pro rata* share due to the charter schools."). The local school board has the authority to place such restricted funds in a separate fund. *Id.* at ___, 715 S.E.2d at 634 ("*Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund."); *Sugar Creek I*, 188 N.C. App. at 460-61, 655 S.E.2d at 855. However, we have never defined what "restricted funds" are or who has the authority to make that determination.

Thus, there are two fundamental questions we must address here: (1) does the local school board have discretionary authority to allocate funds into the local current expense fund or a separate fund as it sees fit?; and if not, (2) did defendant here properly classify the funds at issue as restricted?

N.C. Gen. Stat. § 115C-426(e) states that the local current expense fund

> *shall* be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

"It is well established that the word 'shall' is generally imperative or mandatory." *Chandler ex rel. Harris v. Atlantic Scrap & Processing*, ___ N.C. App. ___, ___, 720 S.E.2d 745, 750 (2011) (citation and quotation marks omitted), *aff'd and remanded*, ___ N.C. ___, 749 S.E.2d 278 (2013). Consistent with this Court's decisions in *Sugar Creek I*, *Sugar Creek II*, and *Thomas Jefferson I*, as well as the plain language of N.C. Gen. Stat. § 115C-426(e), we conclude that the local school administrative unit may deposit any "restricted" funds into a fund separate from the current expense fund. *See Thomas Jefferson I*, 215 N.C. App. at 544, 715 S.E.2d at 634; *Sugar Creek I*, 188 N.C. App. at 460, 655 S.E.2d at 855. By contrast, any funds covered by N.C. Gen. Stat. § 115C-426(e) must be deposited into the local current expense fund. We further conclude that the determination of which funds may be placed in a separate fund is not solely in the discretion of the local school board, given the mandatory language found in the budget statute. *See Chandler*, ___ N.C. App. at ___, 720 S.E.2d at 750 (holding that the Industrial Commission has no discretion in determining an interest award when the relevant statute employed the word "shall").

C. Defining "restricted" funds

"Restricted" is not a term found in any of the relevant statutes. Rather, it is a gloss this Court has put on the statutory definitions found in N.C. Gen. Stat. § 115C-426(c). It was the Court's shorthand for those monies that can be placed in a separate fund, i.e. those from "trust funds, federal grants restricted as to use, and special programs" which must be accounted for separately. N.C. Gen. Stat. § 115C-426(c).

The guidance from the Department of Public Instruction that we reviewed in *Thomas Jefferson I* indicated that Fund 8 was a new, separate fund "to separately maintain funds that are restricted in purpose and not intended for the general K–12 population in the LEA." *Thomas Jefferson I*, 215 N.C. App. at 537, 715 S.E.2d at 630. Such funds included:

> (a) State funds that are provided for a targeted non–K–12 constituency such as More–at–Four funds;
>
> (b) Funds targeted for a specific, limited purpose, such as a trust fund for a specific school within the LEA;
>
> (c) Federal or other funds not intended for the general K–12 instructional population, or a sub-group within that population, such as funds for a pilot program;

> (d) Indirect cost, such as those associated with a federal grant that represent reimbursement for cost previously incurred by the LEA.

Id.

After the extensive litigation over the definition of "restricted" and "unrestricted" funds, the Legislature passed an amendment to N.C. Gen. Stat. § 115C-426 in 2010 and again in 2013. N.C. Sess. Laws 2010-31, § 7.17(a); N.C. Sess. Laws 2013-355, § 2(a). The statute now clarifies that:

> other funds may be used to account for reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the ad valorem method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, and funds received for prekindergarten programs. In addition, the appropriation or use of fund balance or interest income by a local school administrative unit shall not be construed as a local current expense appropriation included as a part of the local current expense fund.

N.C. Gen. Stat. § 115C-426 (c) (2013).

> In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into the way in which the legislature intended the law to apply from its original enactment.

Ray v. North Carolina Dept. of Transp., 366 N.C. 1, 8-9, 727 S.E.2d 675, 681 (2012) (citation and quotation marks omitted).

The 2010 amendment to § 115C-426 is fully consistent with the 2009 definition of "restricted" funds used by the Department of Public Instruction that we approved of in *Thomas Jefferson I* and with this Court's gloss on that statute. *See Thomas Jefferson I*, 215 N.C. App. at 537, 715 S.E.2d at 630. In addition to being consistent with the prior case law, the amendment simply provided a more complete description of the funds which may be excluded from the local current expense fund. "To determine whether the amendment clarifies the prior law

or alters it requires a careful comparison of the original and amended statutes. If the statute initially fails expressly to address a particular point but addresses it after the amendment, the amendment is more likely to be clarifying than altering." *Ray*, 366 N.C. at 10, 727 S.E.2d at 682. Therefore, we conclude that the 2010 amendments were clarifying amendments rather than substantive changes. *See id.* at 11, 727 S.E.2d at 683 (concluding that an amendment was a clarifying one "[b]ecause the legislature left essentially all our pre-amendment cases intact"). "[S]uch amendments apply to all cases pending before the courts when the amendment is adopted, regardless of whether the underlying claim arose before or after the effective date of the amendment." *Id.* at 9, 727 S.E.2d at 681.

It is not clear what definition of "restricted" the trial court applied, but it is clear that the definition used was not that laid out by the 2010 amendments. In some instances it followed the budget code assigned by Mr. Lee, but not in others. It considered some reimbursements "restricted," but others "unrestricted." Even some pre-K programs were considered "unrestricted."

The clarifying amendments provide the proper standard with which to determine whether funds are "restricted." "Restricted" funds, i.e., monies that may be properly placed in a fund separate from the local current expense fund, are those that fall into one of the categories mentioned in N.C. Gen. Stat. § 115C-426(c) as amended. It is clear that the trial court did not apply this standard. We therefore remand to allow the trial court to make appropriate findings of fact and to determine whether the funds at issues are "restricted" under the correct standard of law. *See Powe v. Centerpoint Human Services*, 215 N.C. App. 395, 396, 715 S.E.2d 296, 298 (2011) (remanding for the fact finder to apply the correct legal standard).

On remand, the trial court should make findings about whether the funds at issue here are "reimbursements, including indirect costs, fees for actual costs, tuition, sales tax revenues distributed using the ad valorem method pursuant to G.S. 105-472(b)(2), sales tax refunds, gifts and grants restricted as to use, trust funds, federal appropriations made directly to local school administrative units, [or] funds received for prekindergarten programs." N.C. Gen. Stat. § 115C-426(c) (2013). If the funds fall into any of these categories, they may be properly considered "restricted," placed into a separate fund, and not shared on a *pro rata* basis with the charter schools. *See Thomas Jefferson I*, 215 N.C. App. at 544, 715 S.E.2d at 633.

III. Attorneys' Fees

[2] Defendant next argues that the trial court erred in awarding plaintiff attorneys' fees under N.C. Gen. Stat. § 6-19.1 because a local school board is not a state agency. We agree.

N.C. Gen. Stat. § 6-19.1 (2011) allows the trial court to award attorney's fees to a party prevailing over a state agency in a civil action. This Court has held that the definition of "agency" for the purposes of § 6-19.1 is the same as the definition of an "agency" under the Administrative Procedures Act (APA). *Izydore v. City of Durham (Durham Bd. of Adjustment)*, ___ N.C. App. ___, ___, 746 S.E.2d 324, 326, *disc. rev. denied*, ___ N.C. ___, 749 S.E.2d 851 (2013). The APA defines an "agency" as

> an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

N.C. Gen. Stat. § 150B-2(1a) (2011) (emphasis added). Accordingly, we have held that local governmental units, like municipalities and counties, are not subject to the attorney's fees provisions of N.C. Gen. Stat. § 6-19.1. *Izydore*, ___ N.C. App. at ___, 746 S.E.2d at 326 (holding that "local governmental units—such as respondents—are not 'agencies' for purposes of § 6–19.1."). Local school boards and local school administrative units are local governmental units, and, as such, are not "agencies" for the purpose of the APA. *See* N.C. Gen. Stat. § 115C-5(5)-(6) (defining "local school board" as "a city board of education, county board of education, or a city-county board of education" and a "local school administrative unit" as "a subdivision of the public school system which is governed by a local board of education. It may be a city school administrative unit, a county school administrative unit, or a city-county school administrative unit."); *Coomer v. Lee County Bd. of Educ.*, ___ N.C. App. ___, ___, 723 S.E.2d 802, 803 (observing that "local boards of education are generally excluded from the requirements of the APA."), *disc. rev dismissed*, 366 N.C. 238, 731 S.E.2d 427, *disc. rev. denied*, 366 N.C. 238, 731 S.E.2d 428 (2012).

Plaintiffs contend that the local school boards are subject to § 6-19.1 because we have held that they "are deemed agents of the State for purposes of providing public education." *Kiddie Korner Day Schools*,

Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 140, 285 S.E.2d 110, 114 (1981), *app. dismissed and disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 150 (1982). Yet, our Supreme Court has noted that "[a]n agent of the State and a state agency are fundamentally different . . . ." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997); *see also Green v. Kearney*, 203 N.C. App. 260, 272, 690 S.E.2d 755, 764 (2010) (noting the distinction between a state agent and a state agency). In that same opinion, the Supreme Court quoted a prior opinion for the proposition that "[i]n no sense may we consider the [Local] Board of Education in the same category as the State Board of Education . . . ." *Meyer*, 347 N.C. at 106, 489 S.E.2d at 885 (citation and quotation marks omitted). Thus, local school boards are not state agencies for purposes of the APA and N.C. Gen. Stat. § 6-19.1 simply because they may be considered agents of the State in certain circumstances.

We hold that the trial court erred in awarding plaintiff attorney's fees under N.C. Gen. Stat. § 6-19.1 because defendant is not an agency for purposes of that statute. Therefore, we reverse the trial court's order allowing plaintiff's petition for attorneys' fees.

IV. Conclusion

For the foregoing reasons, we remand for the trial court to enter a revised judgment with appropriate findings of fact and conclusions of law applying the correct standard as laid out in the 2010 amendments. We reverse the trial court's order awarding plaintiffs attorney's fees.

REVERSED in part; REMANDED.

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

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JUNE 2014)

BRAMHALL v. HURBAN No. 13-1069	Gaston (10CVS911)	DISMISSED in part; AFFIRMED in part.
BURROUGHS v. LASER RECHARGE OF CAROLINAS, INC. No. 12-1238	N.C. Industrial Commission (584372)	Reversed and Remanded
DEP'T OF TRANSP. v. SCHAD No. 13-1302	Stanly (11CVS809) (11CVS845)	Dismissed
HOPKINS v. HOPKINS No. 13-1229	Forsyth (12CVD8177)	Reversed and Remanded
HUNT v. DURFEE No. 13-1443	Iredell (11CVD1911)	Affirmed
IN RE D.C.M. No. 13-1393	Alleghany (12JT18)	Affirmed
IN RE H.M.B. No. 13-1474	Johnston (11JT166-169)	Affirmed
IN RE O.B. No. 14-88	McDowell (12JA42-45)	AFFIRMED in part, DISMISSED in part.
IN RE W.S. No. 13-1452	Chatham (12JT35)	Affirmed
JACKSON v. TOWN OF LAKE WACCAMAW No. 13-1296	Columbus (11CVS1360)	Affirmed
JOHNSON v. McNAIRY & ASSOCS. No. 13-1138	Guilford (13CVS6142)	Affirmed
KNOWLES v. BENNETT No. 13-1340	Union (08CVD3735)	Affirmed
SIDDLE v. SIDDLE No. 13-1064	Currituck (11CVD45)	Affirmed
SIMPSON v. SIMPSON No. 13-864	Forsyth (95CVD6117)	Dismissed

SKOFF v. US AIRWAYS, INC. No. 13-994	N.C. Industrial Commission (X67234)	Affirmed
STATE v. ANDERSON No. 13-1281	Union (10CRS51012)	No Error
STATE v. BENTON No. 13-1204	Guilford (12CRS74220)	REVERSED in part; VACATED in part.
STATE v. CATALDO No. 13-1343	Rockingham (11CRS50300-01) (11CRS50518)	No error
STATE v. DANIELS No. 13-1197	Pitt (12CRS156)	NO ERROR; REMAND FOR CORRECTION OF A CLERICAL ERROR.
STATE v. DAVIS No. 13-952	Mecklenburg (09CRS240640)	No Error
STATE v. HARRIS No. 13-1217	Durham (06CRS40556)	Affirmed
STATE v. MARTIN No. 13-956	Halifax (12CRS1797) (12CRS51587)	No Error in part; Vacated and Remanded in part.
STATE v. MARTINEZ No. 13-1288	Wake (10CRS4710)	No Error
STATE v. McNEIL No. 13-1285	Brunswick (12CRS50539)	Affirmed
STATE v. MEZA-RODRIGUEZ No. 13-1190	Wake (11CRS216911)	No Error
STATE v. TORRES-ROBLES No. 13-1023	Wake (11CRS207991-95)	No Error
STATE v. VALENTINE No. 13-1370	Guilford (11CRS95540)	Affirmed
STATE v. WILLIAMS No. 13-1250	Wake (10CRS3417)	No Error

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