236 N.C. App.—No. 3 Pages 508-659

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 21, 2016

MAILING ADDRESS: The Judicial Department
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OF

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 7 OCTOBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Authority of board to issue fines—not limited to licensees—limitation not read into statute—The trial court erred by concluding that the Board of Barber Examiners did not have the statutory authority to impose fines on persons or entities not licensed by the Board. A plain reading of N.C.G.S. § 86A-27(a) revealed no indication that imposition of civil penalties was limited solely to licensees and the Court of Appeals would not read limiting language into the statute where it did not exist. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

Judicial review—exceptions to Board's decision—sufficient—The trial court did not err in a case involving judicial review of an administrative action by denying respondent's motion to dismiss the petition for judicial review. Although petitioner did not except to specific findings or conclusions by the Board of Barber Examiners,

petitioner clearly stated exceptions to the Board's final decision. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

Judicial review—scope—issues decided by Board—The trial court exceeded the permissible scope of review when it ordered petitioner to remove a barber pole and stop advertising barber services unless licensed by the Board of Barber Examiners. The only issues before the trial court for review were those issues decided by the Board – the assessment of civil penalties, attorney's fees, and costs. N.C.G.S. § 86A-20.1 provided an avenue for respondent to seek an injunction, which respondent did not pursue. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

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Appealability—notice of appeal—interlocutory order and judgment—affected final judgment—The Court of Appeals had jurisdiction to hear an appeal from an equitable distribution (ED) judgment, a discovery order, and a sanctions judgment. Appellant timely filed notice of appeal from the ED judgment. Moreover, appellant timely objected to the discovery order and sanctions judgment; (2) the order and judgment were interlocutory and not immediately appealable; and (3) the order and judgment involved the merits and necessarily affected the ED judgment. **Green v. Green, 526.**

Preservation of issues—failure to argue constitutional issue at trial—unrecorded bench conferences—appellate review not frustrated—The trial court did not commit prejudicial error in an assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon case when it conducted multiple off-the-record bench conferences. The record did not reflect that defendant raised his constitutional argument before the trial court. Further, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction was without merit. **State v. Foster, 607.**

Preservation of issues—mortgage debt discharged in bankruptcy—not raised at trial—Plaintiffs failed to preserve for appellate review their argument that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court and plaintiffs failed to support their argument with citation to record evidence. **Basmas v. Wells Fargo Bank Nat'l Ass'n, 508.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Authority to order respondent pay costs—oral rendering of judgment—conflict with written order—order remanded—The trial court did not lack the authority in a child custody case to order respondent to pay the costs of supervised visitation and that argument had already been rejected by the Court of appeals in respondent's previous appeal. However, the trial court's written judgment directly contradicted the trial court's statements from the bench regarding visitation. The portion of the trial court's order regarding visitation was vacated and remanded for entry of an amended order which accurately reflected the trial court's oral disposition. **In re J.C., 558.**

Permanency planning order—changed legal custody—immediately appealable—The Court of Appeals granted respondent's petition for certiorari in an appeal

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

from the trial court's permanency planning order in a child custody case ceasing reunification efforts. Because the order changed legal custody of the juveniles, the order was immediately appealable pursuant to N.C.G.S. § 7B-1001(a)(4). **In re J.C., 558.**

Permanency planning order—findings supported by evidence—findings supported conclusion—The trial court's findings of fact in a child custody permanency planning order were supported by competent evidence and supported the trial court's decision to cease reunification efforts with respondent. **In re J.C., 558.**

Subject matter jurisdiction—findings not necessary—circumstances must exist—The trial court did err in a child custody case by failing to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction. Although making specific findings of fact related to a trial court's jurisdiction under N.C.G.S. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. In this case, the evidence from the permanency planning hearing demonstrated that neither the parents nor the children continued to live in Kentucky. **In re J.C., 558.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—inapplicable—not an adjudication on the merits—Collateral estoppel was inapplicable where the Bankruptcy Court did not rule on the merits of D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action, and the Leonard order was not an adjudication on the merits. Further, respondents waived their right to advance the argument that Wachovia was required to execute Restated Loan Documents for the Confirmed Plan to be valid and enforceable against respondents in the foreclosure action because the record showed that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. Findings of fact #2, #5, and #9 were supported by competent evidence. **In re Foreclosure of L.L. Murphrey Co., 544.**

CONSTITUTIONAL LAW

Board of Barber Examiners—authority over non-licensees—reasonably necessary to purpose—The ability of the Board of Barber Examiners to impose civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering. While there are other statutory means to accomplish the Board's purpose, such as seeking an injunction or criminal prosecution, those means are not exclusive. **Kindsgrab v. N.C. Bd. of Barber Exam'rs, 564.**

CONSUMER PROTECTION

North Carolina Debt Collection Act—manufactured home—individual alleged by debt collector to be liable for debt—The trial court erred by concluding that defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act in an action seeking to recover a manufactured home and its contents based upon the fact that required payments against the underlying debt had not been made. The trial court's order was reversed and the case was remanded to the superior court for further proceedings. **Green Tree Servicing LLC v. Locklear, 514.**

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.

HRISTOS BASMAS AND MARIA BASMAS, PLAINTIFFS
v.
WELLS FARGO BANK NATIONAL ASSOCIATION, CARRINGTON MORTGAGE SERVICES, LLC AND NATIONWIDE TRUSTEE SERVICES, INC., AS SUBSTITUTE TRUSTEE, DEFENDANTS

No. COA13-464

Filed 7 October 2014

1. Res Judicata and Collateral Estoppel—foreclosure action—new or changed circumstances

A trial court's order vacating defendant's first foreclosure action did not bar a subsequent foreclosure action under the doctrine of res judicata. The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered and the trial court in the subsequent action found two separate instances of new or changed circumstances.

2. Appeal and Error—preservation of issues—mortgage debt discharged in bankruptcy—not raised at trial

Plaintiffs failed to preserve for appellate review their argument that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court and plaintiffs failed to support their argument with citation to record evidence.

Appeal by plaintiffs from order entered 5 December 2012 by Judge Hugh B. Lewis in Iredell County Superior Court. Heard in the Court of Appeals 11 August 2014.

Elliott Law Firm, PC, by Michael K. Elliott for plaintiff-appellants.

RCO Legal, P.S., by Susan B. Shaw, for defendant-appellee.

STEELMAN, Judge.

The effect of plaintiffs' discharge in bankruptcy on foreclosure proceedings was not preserved for appellate review. The trial court's order allowing foreclosure is affirmed.

I. Factual and Procedural Background

On 29 September 2006 Hristos and Maria Basmas (plaintiffs) borrowed $304,056.00 from New Century Mortgage Corporation for the purpose of purchasing residential property located in Iredell County, North Carolina. The loan was secured by a deed of trust on plaintiffs' property, which was recorded in the Iredell County Registry of Deeds. On 19 December 2006, the loan was sold to Wells Fargo (defendant). In conjunction with the sale of the loan, the original Note was "indorsed in blank by New Century" and transferred to Wells Fargo, with Deutsche Bank being the custodian of the original Note for Wells Fargo.

In 2009 plaintiffs became delinquent in their mortgage payments; they failed to make the payment due on 1 March 2009, and have made no payments towards their debt since that time. On 9 September 2010 the substitute trustee filed a petition in Iredell County case No. 10 SP 1503, seeking to foreclose on the note and deed of trust. On 6 September 2011 the Iredell County Clerk of Court entered an order allowing defendant to proceed with foreclosure. Plaintiffs appealed to the Superior Court of Iredell County, and on 2 November 2011 Judge Theodore S. Royster, Jr., entered an order stating in relevant part that:

> 1. On or about September 29, 2006, a Promissory Note ('the Note') was executed in favor of New Century Mortgage Corporation in the principal sum of $304,056 which Note was secured by a Deed of Trust on real estate located in Iredell County, North Carolina, and recorded in . . . the Iredell County Registry.
>
> 2. The Respondents did not produce an original Indorsement of the Note, nor a copy of the Indorsed Note.
>
> 3. The Respondent claims to be the holder of the Note.
>
> 4. Since the Respondent failed to produce sufficient competent evidence of Indorsement of the Note, . . . at the time of this hearing the Respondent does not qualify as the 'holder' under the North Carolina Uniform Commercial Code, and is thus not the 'holder' of the Promissory Note as the term is used in N.C.G.S. § 45-21-16 for foreclosures under power of sale.

Judge Royster concluded that "[t]he Respondent has failed to prove that it is the owner and holder of a valid indebtedness of [plaintiffs] as required pursuant to N.C.G.S. 45-21.16(d) and therefore cannot foreclose

on the subject property under the current case (10-SP-1503)." The court ordered that the "Order of Sale entered by the Iredell Clerk of Court on September 6, 2011 is hereby vacated" and that the substitute trustee "shall not proceed under the current case (10-SP-1503) with any foreclosure of the real estate described in that certain Deed of Trust recorded in Book 1789, Page 2079 in the Iredell County Public Registry."

On 14 March 2012 defendant filed a new petition, in Iredell County case No. 12 SP 292, seeking to foreclose on the note and deed of trust. On 10 July 2012 plaintiffs filed a complaint in the instant case, seeking a permanent injunction barring foreclosure, a declaratory judgment that foreclosure was barred by the doctrine of *res judicata* on the basis of Judge Royster's order, and alleging claims for abuse of process, unfair and deceptive trade practices, and misrepresentation. A hearing was conducted on 5 November 2012 before the trial court and on 5 December 2012 the court denied plaintiffs' claim for declaratory judgment in an order that stated in relevant part:

> [This matter] came on for hearing . . . on Plaintiffs' motion for declaratory judgment that the doctrine of *res judicata* bars the Defendants from pursuing foreclosure in . . . Iredell County, N.C., 12-SP-0292 . . . or any other subsequent foreclosure proceeding. Having considered the briefs, supporting affidavits, and case law submitted by the parties . . . the Court hereby finds and concludes as follows:
>
> 1. Since November 2011, no payment has been made by the Plaintiffs under that certain adjustable rate promissory note . . . secured by the deed of trust . . . that is the subject of the current foreclosure [proceeding] and the loan . . . is, accordingly, in default at this time;
>
> 2. Subsequent to the entry by Judge Theodore S. Royster, Jr. on November 2, 2011 of the order vacating the . . . order of foreclosure entered by the Iredell County Clerk of Court in [10-SP-1503] . . . Defendant Wells Fargo obtained physical possession of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), which Note was presented to the Court at the November 5th hearing;
>
> . . .

> 4. New facts have occurred since Judge Royster's November 2, 2011 order in the initial foreclosure [proceeding], by way of subsequent default and Defendants' presentation of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), creating a change in circumstances that would preclude any *res judicata* effect of said order upon the current foreclosure [proceeding] and/or any other subsequent foreclosure proceeding;
>
> 5. Issues as to the *res judicata* effect, if any, upon past due moneys owed by the Plaintiffs upon the Note shall remain pending as the Court, by the entry of this Order, is not determining such issues at this point in time and such issues are hereby reserved for a later date, if so necessary.

The order denied plaintiffs' claim for declaratory judgment and ruled that plaintiffs' "other prayers for relief are hereby deemed to be moot[.]"

Plaintiffs appeal.

II. Standard of Review

"Our standard of review of a declaratory judgment is the same as in other cases. N.C. Gen. Stat. § 1-258[.]" *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 596, 632 S.E.2d 563, 571 (2006). " 'The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal.' " *Cross v. Capital Transaction Grp., Inc.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (quoting *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 7, 657 S.E.2d 673, 678, *affirmed in part, review improvidently granted in part on other grounds*, 362 N.C. 675, 669 S.E.2d 320 (2008)). Findings of fact not challenged on appeal are binding on this Court. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). " 'However, the trial court's conclusions of law are reviewable *de novo*.' " *Cross*, 191 N.C. App. at 117, 661 S.E.2d at 780 (quoting *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)).

III. Doctrine of *Res Judicata*

[1] Plaintiffs' primary argument is that Judge Royster's entry of an order vacating defendant's first foreclosure action barred the subsequent

foreclosure action under the doctrine of *res judicata*. " 'Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.' The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. 'When a court of competent jurisdiction has reached a decision on facts in issue, neither of the parties are allowed to call that decision into question and have it tried again.' " *Nicholson v. Jackson Cty. School Bd.*, 170 N.C. App. 650, 654-55, 614 S.E.2d 319, 322 (2005) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993), and *Green v. Dixon*, 137 N.C. App. 305, 308, 528 S.E.2d 51, 53 (2000) (other citations omitted).

However, "[i]t is well settled that the estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties when in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." *Flynt v. Flynt*, 237 N.C. 754, 757, 75 S.E.2d 901, 903 (1953) (citation omitted). In this case, the trial court found two separate instances of new or changed circumstances: plaintiffs' default on their loan after entry of Judge Royster's order, and defendant's production of documentation of its status as holder of the note.

IV. Effect of Discharge in Bankruptcy

[2] Plaintiffs argue that the trial court erred by finding that their default on the loan after entry of Judge Royster's order constituted new facts or circumstances that rendered the doctrine of *res judicata* inapplicable. Plaintiffs assert that their mortgage debt was discharged in bankruptcy, eliminating the possibility of any further default. We do not reach the merits of this issue, because plaintiffs failed to preserve for appellate review the effect of a discharge in bankruptcy on the foreclosure action.

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that "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" and must "obtain a ruling upon the party's request, objection, or motion." The effect of the bankruptcy proceeding in which plaintiffs were involved was not raised in plaintiffs' complaint, their memorandum of law, or at the hearing before the trial court.

Moreover, plaintiffs' argument is premised in part on their assertion that there was "no reaffirmation agreement entered" during the bankruptcy case. Plaintiffs fail to support this contention by citation to sworn testimony, affidavit, documentary evidence, or any other record evidence. It "'is axiomatic that the arguments of counsel are not evidence.'" *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (quoting *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996)).

Plaintiffs failed to preserve for appellate review any issues pertaining to the effect of their bankruptcy proceeding on the foreclosure action, and have not supported their argument with citation to record evidence. Accordingly, we do not reach the merits of this argument.

As discussed above, the trial court found and concluded in relevant part that:

> New facts have occurred since Judge Royster's November 2, 2011 order in the initial foreclosure [special proceeding], by way of subsequent default and Defendants' presentation of the original Note (with an original blank indorsement by New Century Mortgage Corporation, the original Lender, affixed thereon), creating a change in circumstances that would preclude any *res judicata* effect of said order upon the current foreclosure [special proceeding] and/or any other subsequent foreclosure proceeding.

Plaintiffs' appellate challenge is restricted to the trial court's finding that their continued default subsequent to entry of Judge Royster's order constituted new facts. Plaintiffs do not challenge the trial court's finding that defendant's production of proper documentation of its status as holder of the note separately established that "[n]ew facts have occurred . . . creating a change in circumstances" that precluded application of *res judicata* to defendant's second foreclosure proceeding. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). Given that plaintiffs failed to preserve this challenge to the trial court's order, the order must be affirmed.

V. Public Policy Considerations

Plaintiffs also argue that we should reverse the trial court's order based upon various public policy concerns. "Weighing . . . public policy considerations is the province of our General Assembly, not this Court." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008). This argument lacks merit.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED.

Judges ERVIN and McCULLOUGH concur.

GREEN TREE SERVICING LLC, PLAINTIFF
v.
JIMMY LOCKLEAR AND TRUDY LOCKLEAR, DEFENDANTS

No. COA13-1287

Filed 7 October 2014

Consumer Protection—North Carolina Debt Collection Act—manufactured home—individual alleged by debt collector to be liable for debt

The trial court erred by concluding that defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act in an action seeking to recover a manufactured home and its contents based upon the fact that required payments against the underlying debt had not been made. The trial court's order was reversed and the case was remanded to the superior court for further proceedings.

Appeal by defendants from orders entered 23 April 2013 and 5 August 2013 by Judge Thomas H. Lock in Robeson County Superior Court. Heard in the Court of Appeals 4 March 2014.

Jordan Price Wall Gray Jones & Carlton, by Paul T. Flick and Lori P. Jones, for Plaintiff.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for Defendants.

ERVIN, Judge.

Defendants Jimmie and Trudy Locklear appeal from orders dismissing the counterclaims that they had attempted to assert against Plaintiff and denying their motion seeking to have the order dismissing

their counterclaims set aside.[1] On appeal, Defendants contend that they have standing to pursue their claims under the North Carolina Debt Collection Act on the grounds that they occupy the status of "consumers" as that term is used in the relevant statutory provisions. After careful consideration of Defendants' challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be reversed and that this case should be remanded to the Robeson County Superior Court for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts[2]

On 28 February 1998, Marvin and Mertice Locklear executed a Manufactured Home Retail Installment Contract and Security Agreement under which they purchased a manufactured home from Ted Parker Home Sales, Inc. According to the provisions of the contract between the parties, Ted Parker was authorized to repossess the manufactured home in the event that any act constituting a default as defined in the agreement occurred, including any failure to make the required monthly payments in a timely manner. Subsequently, Ted Parker assigned its rights under the contract to a pool serviced by Plaintiff.

By November 2004, Marvin and Mertice Locklear had both died, with Mertice Locklear having survived Marvin Locklear by approximately five years. Defendant Jimmie Locklear received a partial interest in the manufactured home that Marvin and Mertice Locklear had purchased from Ted Parker by virtue of the residuary clause contained in Mertice Locklear's will. Although Mertice Locklear's will was admitted to probate, the estate administration process was never completed. On 31 October 2012, Defendant Jimmie Locklear qualified as the collector of Mertice Locklear's estate.

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1. Although the notice of appeal that Defendants filed made reference to both of the orders mentioned in the text of this opinion, Defendants have not, as Plaintiff correctly notes, made any argument challenging the denial of their motion for a new trial. As such, the validity of the trial court's order denying Defendant's motion for a new trial is not properly before us.

2. The facts set forth in the text of this opinion are derived from an examination of the allegations set out in Defendants' amended counterclaim as compared to the allegations contained in their original pleading. *See Hughes v. Anchor Enters., Inc.*, 245 N.C. 131, 135, 95 S.E.2d 577, 581 (1956) (holding that, "[w]hile the excerpt from the original complaint was competent as evidence, as a pleading it was superseded by the amended complaint").

Defendants took possession of the manufactured home used to secure the original debt in 2004 and used it as their principal residence. Although Plaintiff was aware that Defendants had begun to occupy the manufactured home, it did not provide Defendants with an opportunity to assume the underlying debt or take any other action to make Defendants liable on the obligation created under the original contract between Marvin and Mertice Locklear and Ted Parker and knew that Defendants, as compared to Mertice Locklear's estate, were not personally obligated to make the payments required under the original contract. As a result, the monthly statements that Plaintiff sent to the residence were addressed to "Mertice Locklear C/O Jim and Trudy Locklear."

On or about 12 September 2011, Plaintiff sent Defendants a document discussing a deferral of the monthly payments required under the original agreement that included language to the effect that the document had been transmitted to Defendants as part of "an attempt to collect a debt." After entering into a deferral agreement with Plaintiff, Defendants made the required payments prior to the payment applicable to January 2012 in a timely manner.

On or about 12 June 2012, an agent of Plaintiff called Defendant Jimmie Locklear on his cell phone during work hours despite the fact that Plaintiff had previously been advised not to attempt to contact Defendant Jimmie Locklear while he was at work. Instead of answering this phone call, Defendant Jimmie Locklear immediately terminated the call in compliance with his employer's strict prohibition against engaging in cell phone conversations during work hours. As a result, Plaintiff's agent called Defendant Jimmie Locklear again and left him a message to the effect that Defendant Jimmie Locklear had "just hung up on your account manager," that "[i]t's probably not going to go well" for Defendant Jimmie Locklear, and that Defendant Jimmie Locklear should expect to receive a legal notice in the mail. Although Defendant Trudy Locklear called Plaintiff's agent and informed him that she would be willing to make two payments of $1,000 each by a certain date in order to bring the payments required under the original purchase contract current, Plaintiff's agent responded by telling Defendant Trudy Locklear that Defendants would need to make the required payments before the date that Defendant Trudy Locklear had mentioned and suggested that she pawn her jewelry and lawnmower in order to make the required payment. As a result, Defendant Trudy Locklear borrowed money from an unknown source or sources and used the money that she borrowed on this occasion to send a payment to Plaintiff on 15 June 2012.

Subsequently, Defendant Trudy Locklear called Plaintiff to confirm that the payment that she had made had been received and was told that Defendants had been granted a deferral for June and July, so that their next payment was not due until 5 August 2012. In spite of this understanding, Plaintiff sent a letter to Defendants on or about 18 June 2012 indicating that Plaintiff had begun to take the steps necessary to obtain possession of the collateral, with this letter containing the statement that the "communication [was] from a debt collector" and represented an "attempt to collect a debt."

On 20 July 2012, another of Plaintiff's agents told Defendant Trudy Locklear that the oral agreement that she had made with Plaintiff in June 2012 had not been entered into Plaintiff's recordkeeping system, that there would be no deferral of the June and July payments, and that the overdue payments were due immediately. Although Defendant Trudy Locklear offered to pay $1,000 for the months of September and October, her offer was rejected. Instead, Plaintiff's agent asked Defendant Trudy Locklear where her husband's money was going. In response to Defendant Trudy Locklear's assertion that Defendants had other financial obligations in addition to those associated with the manufactured home that Marvin and Mertice Locklear had purchased from Ted Parker, Plaintiff's agent suggested that Defendants defer payments on their van in order to ensure that Plaintiff received payment.

On 24 July 2012, Defendant Trudy Locklear spoke with another of Plaintiff's agents, who asked her, in response to Defendant Trudy Locklear's inquiry concerning the amount of time that would be available before Defendants had to vacate the manufactured home, "What are you going to do, live in your van?" After making that statement, Plaintiff's agent hung up on Defendant Trudy Locklear. Subsequently, another of Plaintiff's agents called Defendant Trudy Locklear and stated that Defendants would not be forced to vacate the manufactured home in the event that the required monthly payment was automatically drafted from their bank account. In response to Defendant Trudy Locklear's comment that Defendants' account did not contain sufficient funds to support the making of the required payments, Plaintiff's agent stated that Plaintiff would refund the resulting overdraft fee as long as a draft was scheduled. Although Defendant Trudy Locklear agreed to enter into the proposed arrangement based upon her belief that Defendants would be forced to vacate the manufactured home in the event that she acted otherwise, Defendants later closed the account in question before any draft was actually made against that account.

On or about 30 August 2012, Defendants notified Plaintiff that they were represented by counsel. On 12 September 2012, Plaintiff contacted counsel for Defendants and agreed to stop contacting Defendants by telephone. Even so, Plaintiff's agents contacted Defendant Jimmie Locklear on or about 26 November 2012 using a work number that he had requested that Plaintiff refrain from using. In the course of the ensuing conversation, Plaintiff's agent indicated that Plaintiff was attempting to collect a debt. The same agent contacted Defendant Trudy Locklear on the same date for the same purpose.

B. Procedural Facts

On 7 November 2012, Plaintiff filed a complaint against Defendants seeking to recover the manufactured home and certain of its contents based upon the fact that required payments against the underlying debt had not been made. On 4 December 2012, Defendants filed a responsive pleading in which they responded to the material allegations contained in Plaintiff's complaint, moved to dismiss Plaintiff's complaint, and asserted a number of counterclaims against Plaintiff, including claims based upon alleged violations of the North Carolina Debt Collection Act and the equivalent provisions of federal law.

On 22 January 2013, the trial court entered an order denying Defendants' dismissal motion. On 29 January 2013, Plaintiff filed a motion to dismiss Defendants' counterclaims. On 4 March 2013, Defendants filed a response to Plaintiff's dismissal motion. On 18 March 2013, Defendants filed an amended counterclaim that sought relief from Plaintiff on the same essential basis set forth in their original responsive pleading. On 22 April 2013, Plaintiff filed a motion seeking the entry of a final judgment in its favor with respect to the repossession claim asserted in its complaint. On 23 April 2013, the trial court entered an order dismissing Defendants' counterclaims.

On 2 May 2013, Defendants filed a motion seeking the entry of an order setting aside the order dismissing their counterclaims. On 20 May 2013, the trial court entered a final judgment awarding Plaintiff possession of the manufactured home. Defendants' motion to set aside the order dismissing their counterclaims was denied by the trial court on 5 August 2013. Defendants noted an appeal to this Court from the trial court's orders dismissing their counterclaims and denying their motion to set aside the order dismissing their counterclaims.[3]

3. As a result of their failure to advance any argument challenging the dismissal of the claims that they had asserted against Plaintiff under the federal Fair Debt Collection Practices Act, Defendants have abandoned any claims that they originally asserted under federal law.

II. Legal Analysis

In their brief, Defendants argue that the trial court erred by granting Plaintiff's motion to dismiss their counterclaims, a decision that was predicated on the theory that Defendants were not "consumers" for purposes of the North Carolina Debt Collection Act. In support of this contention, Defendants argue that the plain language of the statute necessitates a conclusion that individuals, like themselves, who are alleged by a debt collector to be liable for a debt and have a sufficient connection to the underlying obligation have "consumer" status for purposes of the North Carolina Debt Collection Act. We find Defendant's argument to be persuasive.

A. Standard of Review

We have previously discussed the standard of review utilized in the course of reviewing orders addressing standing-related issues in *Slaughter v. Swicegood*, 162 N.C. App. 457, 463-64, 591 S.E.2d 577, 582 (2004), in which we stated that:

> [t]he North Carolina Rules of Civil Procedure require that "every claim shall be prosecuted in the name of the real party in interest." [N.C. Gen. Stat.] § 1A-1, Rule 17(a) (2003). "A real party in interest is 'a party who is benefited or injured by the judgment in the case' and who by substantive law has the legal right to enforce the claim in question." *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 802 (1984) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E.2d 206, 209 (1977)). A party has standing to initiate a lawsuit if he is a "real party in interest." *See Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citing *Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997)). A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003). An appellate court should review a trial court's order denying a motion for failure to state a claim "to determine 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under

> some legal theory.' " *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000) (quoting *Shell Island Homeowners Ass'n Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)).

We will now utilize this standard of review in determining whether the trial court properly dismissed Defendants' counterclaims.

B. Defendants' Standing

According to the North Carolina Debt Collection Act, entities operating as "debt collectors" are prohibited from engaging in certain activities in the course of their work, such as using obscene, profane or abusive language, N.C. Gen. Stat. § 75-52(1); calling an individual at his or her place of employment in violation of an explicit instruction to the contrary, N.C. Gen. Stat. § 75-52(4); failing to disclose that the purpose of a particular communication is to collect a debt, N.C. Gen. Stat. § 75-54(2); erroneously describing the creditor's rights or intentions, N.C. Gen. Stat. § 75-54(4); falsely representing that the debtor may be required to pay attorneys' fees, N.C. Gen. Stat. § 75-54(6); and communicating with any consumer by means other than the transmission of an account statement after having been notified that the consumer is represented by counsel, N.C. Gen. Stat. § 75-55(3). However, "before a claim for unfair debt collection can be substantiated, three threshold determinations must be satisfied. First, the obligation owed must be a 'debt'; second, the one owing the obligation must be a 'consumer'; and third, the one trying to collect the obligation must be a 'debt collector.' " *Reid v. Ayers*, 138 N.C. App. 261, 263, 531 S.E.2d 231, 233 (2000) (citing N.C. Gen. Stat. § 75-50(1)-(3)). According to the relevant statutory provisions, a "consumer" is "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes," N.C. Gen. Stat. § 75-50(1), with a "debt" being "any obligation owed or due or alleged to be owed or due from a consumer." N.C. Gen. Stat. § 75-50(2). An individual or entity is "a debt collector" if he, she, or it "engag[es], directly or indirectly, in debt collection from a consumer." N.C. Gen. Stat. § 75-50(3). As a result, the ultimate issue raised by Defendants' challenge to the dismissal of their counterclaims is the meaning of the term "consumer" as used in N.C. Gen. Stat. § 75-50(1).

"Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed

differently." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81-82, 347 S.E.2d 824, 828 (1986) (citations omitted). According to its plain language, N.C. Gen. Stat. § 75-50(1) treats individuals who have incurred both actual and alleged debts as "consumers." When this reference to an "alleged debt" is considered in conjunction with the fact that N.C. Gen. Stat. § 75-50(2) includes both "obligation[s] owed or due or alleged to be owed or due from a consumer" within the statutory definition of a "debt," it is clear that the General Assembly contemplated that the protections available under the North Carolina Debt Collection Act would be available to both those who actually owed the debt that the debt collector was seeking to collect and those whom the debt collector claimed to owe the debt even if the debtor denied the existence of the underlying obligation. Any other interpretation of the relevant statutory language would have the absurd result of making the relevant statutory protections unavailable to those who had a viable defense to the underlying claim that the debt collector was seeking to enforce. As a result of the fact that Defendants sufficiently alleged that Plaintiff sought to collect the amount owed under the original contract between Marvin and Mertice Locklear and asserted that Defendants were liable for that obligation, we believe that Defendants sufficiently alleged that they were "consumers" for purposes of N.C. Gen. Stat. § 75-50(1).

In seeking to persuade us that Defendants do not fall within the category of "consumers" as defined in N.C. Gen. Stat. § 75-50(1), Plaintiffs argues that our decision in *Holloway v. Wachovia Bank & Trust Co.*, N.A., 109 N.C. App. 403, 428 S.E.2d 453 (1993), *aff'd in part, rev'd in part*, 339 N.C. 338, 452 S.E.2d 233 (1994), is controlling and required the trial court to dismiss Defendants' counterclaims. In *Holloway*, one of the plaintiffs obtained a loan, on which she later defaulted, for the purpose of purchasing a car. *Holloway*, 109 N.C. App. at 406, 428 S.E.2d at 455. According to the plaintiffs' complaint, an agent for the defendant pointed a firearm at the debtor and various members of her family during the repossession process. *Id.* at 406-07, 428 S.E.2d at 455. On appeal, this Court affirmed the trial court's decision to dismiss the claims that had been asserted based upon the pointing of a gun at members of the debtor's family on the grounds that, "[a]s this definition indicates, the legislative intent of the statute is to protect the consumer, not bystanders or those who happen to accompany the consumer at the time of an alleged [N.C. Gen. Stat.] Chapter 75, Article 2 violation." *Id.* at 413, 428 S.E.2d at 459. We do not, however, believe that our decision in *Holloway* has any bearing on the proper outcome of this case given our conclusion that Defendants were not mere bystanders. Instead of simply standing around while Plaintiff engaged in efforts to collect a debt from a third

party, Defendants were the direct targets of Plaintiff's activities. As a result, the trial court's decision to dismiss Defendant's counterclaims cannot be upheld on the basis of the logic set out in *Holloway*.

In addition, Plaintiff argues that, given the fact that we cited the decision of the United States District Court for the Middle District of North Carolina in *Fisher v. Eastern Air Lines, Inc.*, 517 F. Supp. 672 (M.D.N.C. 1981), in the course of discussing the definition of a "consumer" in *Holloway*, we are obligated to utilize the rationale employed in *Fisher* in deciding the validity of Defendants' challenge to the trial court's order in this case. In *Fisher*, the plaintiff sought relief for alleged violations of the North Carolina Debt Collection Act arising from the defendant's efforts to collect a debt from the plaintiff that was, in fact, owed by an individual with a name that was similar to the plaintiff's name. *Fisher*, 517 F. Supp. at 673. In holding that the plaintiff was not a "consumer" as defined in N.C. Gen. Stat. § 75-50(1), the court stated that, in order for an individual to be a "consumer," "he must have had at least some connection with the underlying debt or alleged debt" and that the statutory reference to an "alleged debt" did not encompass "an instance in which a debt collector mistakenly identified the person who owed it money or allegedly owed it money" given the necessity that the "debt" or "alleged debt" be "incurred." *Id.* As a result, the *Fisher* court held that the relevant statutory language "does not evidence an intent by the legislature to provide protection for persons mistakenly thought to have been the one who incurred an obligation." *Id.*

We are simply unable to read *Fisher* as narrowly as Plaintiff does. As we read its decision, the *Fisher* court simply held that there must be some connection between the debt or alleged debt and the individual from whom recovery is sought. In light of that fact, a simple case of mistaken identity does not involve the sort of connection between the "consumer" and the "alleged debt" contemplated by the relevant statutory language. In this case, however, Defendants are in possession of the manufactured home that secured the original debt evidenced by the contract between Marvin and Mertice Locklear, on the one hand, and Ted Parker, on the other. As a result, even if we are bound by the logic utilized by the *Fisher* court, a subject about which we express no opinion, such a determination does not necessitate a decision to affirm the trial court's order.

After carefully reviewing the record, we believe that the facts present in this case closely resemble those underlying the decision of the United States District Court for the Eastern District of North Carolina in *Redmond v. Green Tree Servicing, LLC*, 941 F. Supp. 2d 694 (E.D.N.C.

2013), in which the debtor incurred a debt pursuant to a real estate financing agreement. *Redmond*, 941 F. Supp. 2d at 695. After the original debtor died, the property used to secure the debt was left to his wife, who rented the property to the plaintiffs. *Id.* Although the creditor knew that the plaintiffs possessed the property used to secure the original debt, it never entered into an agreement with the plaintiffs under which the plaintiffs were made liable for the underlying debt and never requested the plaintiffs to assume responsibility for paying the underlying debt. However, the defendant did attempt to collect the debt from the plaintiffs on numerous occasions. *Id.* at 695-96.

Although the defendant in *Redmond*, like Plaintiff here, argued that the plaintiffs were not "consumers" as that term is defined in N.C. Gen. Stat. § 75-50(1) on the grounds that they "did not actually incur the" debt, *id.* at 697, the court rejected that argument, reasoning that "the plain language of the statute references both *alleged* debts and *alleged* debtors" and stating that "[t]his language would be rendered superfluous if the court imposed on plaintiffs an additional requirement that they demonstrate they themselves actually incurred the debt." *Id.* at 698. In response to the defendant's argument, in reliance upon *Fisher*, "that giving weight and meaning to the statute's use of 'alleged' would render the statute's use of 'incurred' superfluous," the *Redmond* court noted that "the plaintiff [in *Fisher*] did not have standing because the debt collector had attempted to collect from him on the basis of mistaken identity," while, in this case, "there [was] a strong connection between the plaintiffs and the underlying debt" and "the defendant actively worked to perpetuate the plaintiffs' impression that they were legally bound by the debt." *Id.* As a result, given the existence of "a strong connection between the plaintiffs and the underlying debt" and the fact that the debt collector "actively worked to perpetuate the plaintiffs' impression that they were legally bound by the debt," *id.*, the *Redmond* court allowed the plaintiff's claim to proceed. We find the approach utilized in *Redmond* persuasive.

In its brief, Plaintiff argues that *Redmond* is inapplicable to the present case because no one misled Defendants into believing that they owed a debt and because, on the contrary, everyone understood that the underlying debt was owed by Mertice Locklear's estate. However, the debt collector in *Redmond*, like Plaintiff, made repeated contacts with Defendants in an attempt to collect the debt. *Id.* at 695. In addition, the defendant before the Court in *Redmond*, like Plaintiff here, threatened to lock the plaintiffs out of the home or have them evicted in the event that the plaintiffs did not make payments against the underlying

obligation. *Id.* at 696. In addition, Plaintiff's agents identified themselves to Defendant Jimmie Locklear as "your" account manager, allowed Defendants to defer making monthly payments, and engaged in other actions that were tantamount to treating Defendants as if they were liable on the underlying debt. As a result, we are persuaded by the similarity between the actions taken by the debt collector at issue in *Redmond* and the actions taken by Plaintiff in this instance and conclude that Plaintiff acted in such a manner as "to perpetuate the plaintiffs' impression that they were legally bound by the debt," *id.* at 698, despite the fact that Defendants never officially assumed the original obligation undertaken by Marvin and Mertice Locklear.

In addition, the record reflects the existence of a strong connection between Defendants and the underlying debt. The only connection between the *Redmond* plaintiffs and the underlying debt was the fact that the plaintiffs were living on the property used to secure the underlying debt. *Id.* at 695. Similarly, in this case, Defendants resided in the property that secured the underlying debt. In addition, Defendant Jimmie Locklear had an expectancy interest in the manufactured home by virtue of the residuary clause contained in Mertice Locklear's will. Although "mobile homes are considered personal property," *Patterson v. City of Gastonia*, __ N.C. App. __, __, 725 S.E.2d 82, 93, *disc. review denied*, 366 N.C. 406, 759 S.E.2d 82 (2012), and although "personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate," N.C. Gen. Stat. § 28A-15-1(a), N.C. Gen. Stat. § 28A-15-2(a) provides that, "[s]ubsequent to the death of the decedent and prior to the appointment and qualification of the personal representative or collector, the title and the right of possession of personal property of the decedent is vested in the decedent's heirs"; that, "upon the appointment and qualification of the personal representative or collector, the heirs shall be divested of such title and right of possession which shall be vested in the personal representative or collector relating back to the time of the decedent's death for purposes of administering the estate of the decedent"; and that, "if in the opinion of the personal representative, the personal representative's possession, custody and control of any item of personal property is not necessary for purposes of administration, such possession, custody and control may be left with or surrendered to the heir or devisee presumptively entitled thereto." As a result of the fact that Defendant Jimmie Locklear was in possession of the manufactured home both before and after his appointment as collector of Mertice Locklear's estate in 2012 and the fact that, in the absence of a

determination that the manufactured home needs to be sold in order to pay the debts of the estate, the property will pass to him under Mertice Locklear's will, Defendants clearly have a sufficiently "strong connection" to the property to afford them standing to maintain their claims under the North Carolina Debt Collection Act. As a result, based upon our reading of the relevant statutory language and the logic of *Redmond*, 941 F. Supp. 2d at 698 (holding that the Act "extend[s] to claims by individuals against whom a debt collector has made purposeful, targeted, and directed attempts to collect a debt alleged to be owed by the plaintiffs"), which we find to be persuasive, we hold that Defendants have alleged sufficient facts to establish their standing to maintain the claims that they have asserted against Plaintiff under the North Carolina Debt Collection Act.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by concluding that Defendants lacked standing to maintain a claim based upon alleged violations of the North Carolina Debt Collection Act. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Robeson County Superior Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges McGEE and STEELMAN concur.

GREEN v. GREEN

[236 N.C. App. 526 (2014)]

MICHAEL L. GREEN, PLAINTIFF
v.
JANA M. GREEN, DEFENDANT

No. COA14-150

Filed 7 October 2014

Appeal and Error—appealability—notice of appeal—interlocutory order and judgment—affected final judgment

The Court of Appeals had jurisdiction to hear an appeal from an equitable distribution (ED) judgment, a discovery order, and a sanctions judgment. Appellant timely filed notice of appeal from the ED judgment. Moreover, appellant timely objected to the discovery order and sanctions judgment; (2) the order and judgment were interlocutory and not immediately appealable; and (3) the order and judgment involved the merits and necessarily affected the ED judgment.

Appeal by defendant from judgment entered 12 July 2013 by Judge John J. Covolo in District Court, Nash County. Heard in the Court of Appeals 12 August 2014.

Teresa DeLoatch Bryant, for plaintiff-appellee.

Judith K. Guibert, for defendant-appellant.

STROUD, Judge.

Defendant Estate of Jana M. Green[1] appeals from a judgment on equitable distribution entered by the District Court, Nash County on 12 July 2013. On appeal, defendant argues, *inter alia*, that the trial court erred by imposing sanctions against her which decreed that she had "forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court." The record indicates that the order which set a deadline of 4 December 2012 for the filing of defendant's equitable distribution affidavit was entered *after* 4 December 2012, on 10 December 2012, so that

1. Defendant died during the pendency of this appeal, on 7 February 2014, and by order of this Court her estate was substituted as a party to this appeal. We will nevertheless refer to the appellant as "defendant" in this opinion.

she had no notice of the deadline until after it had passed. Due to the lack of notice and other serious procedural and legal errors, we reverse the order of 10 December 2012, the 19 December 2012 judgment, and the 12 July 2013 judgment thereafter entered.

I. Background

Plaintiff and defendant were married in 1990 and separated from one another on or about 15 October 2009. On 1 December 2009, plaintiff filed a complaint for divorce from bed and board and equitable distribution. On 28 December 2009, attorney Larry A. Manning obtained an extension of time for defendant to answer, extending the time to 30 January 2009. Through defendant's counsel Mr. Manning, defendant filed her answer and counterclaims for divorce from bed and board, post-separation support, equitable distribution, and attorney's fees on 2 February 2010. On 5 August 2010, plaintiff filed a request for production of documents regarding defendant's counterclaim for post-separation support, which had been served upon defendant, through her counsel; on the same date, plaintiff also filed a reply to defendant's counterclaims, which was also served upon defendant's counsel. At this point, the record falls silent for nearly two years.

The next document which appears in the supplement to the record is a hand-written letter, dated 3 February 2012, from defendant to the Nash County Clerk of Court, which states as follows: "Please send any documents or order in this case to [defendant's name and an address in Indiana.] Mr. Larry Manning has refused to notify or forward any court dates, motions, orders in this case so I can have a chance to protect my right." The record does not contain a motion for withdrawal by Mr. Manning, any order releasing him as the attorney of record for defendant, nor any indication of why he disappeared from the case.[2]

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2. "An attorney at law is a sworn officer of the court with an obligation to the public, as well as his clients, for the office of attorney at law is indispensable to the administration of justice. The attorney's obligation crystallizes into one of noblesse oblige. As between the attorney and his client the relationship may ordinarily be dissolved in good faith at any time, but before an attorney of record may be released from litigation he must satisfy the court that he is justified in withdrawing. The first requirement for his withdrawal is proof of timely notice to his client." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 306 (1965) (citations and quotation marks omitted). Rule 16 of North Carolina's General Rules of Practice for the Superior and District Courts, entitled "Withdrawal of Appearance[,]" provides that "No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." North Carolina's General Rules of Practice for the Superior and District Courts, rule 16.

On 17 October 2012, the trial court entered the "Seventh District Judge Designation on Equitable Distribution of Property[;]" ("Judge Designation") (original in all caps), this document stated that "the parties hereby request designation of John J. Covolo as the judge to determine the equitable distribution claim." Although the "Judge Designation" document has blanks for the signatures of attorneys for both plaintiff and defendant to agree to Judge Covolo, the document was signed only by R. D. Kornegay, attorney for plaintiff; defendant's attorney's signature line is blank. The "Judge Designation" document also has a second section which states that "[t]he parties are unable to agree upon designation of a Judge to determine the equitable distribution issues. [(sic)] hereby applies to the Court for designation of a Judge." Plaintiff's attorney signed the second section of the "Judge Designation" document as well, so it is unclear whether the parties had agreed on the designation or if they did not agree. In any event, the Chief Judge of District Court in Nash County, William C. Farris, signed the "Judge Designation" document, designating Judge Covolo to determine the equitable distribution claim.

On 22 October 2012, nearly three years after plaintiff filed his equitable distribution complaint, he filed his equitable distribution affidavit ("ED Affidavit").[3] There is no certificate of service indicating that plaintiff's ED Affidavit was served upon defendant or any counsel for defendant.[4] On the same date, plaintiff filed a notice of hearing upon the equitable distribution claim, setting the hearing for 6 November 2012, and this notice of hearing was served upon defendant by mail to her at the address she provided in Indiana.[5] The record contains no indication

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3. North Carolina General Statute § 50-21(a) requires that "[w]ithin 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property." N.C. Gen. Stat. § 50-21(a) (2009). Furthermore, in District Court in Nash County, North Carolina Rule 4 of the "Rules for Trial and Settlement Procedures in Equitable Distribution and Other Family Financial Cases[,]" ("Local Rules") (original in all caps), the ED Affidavit "required by G.S. 50-21(a) shall be prepared using the form of affidavit attached to the Rules. Unless extended for good cause by the court, statutory time limits on the exchange of properly prepared affidavits are to be strictly observed. There shall be a presumption that sanctions are to be imposed upon willful noncompliance." Local Rules, rule 4.

4. According to the Cc: line of the letter from plaintiff's counsel to the Nash County Assistant Clerk of Court, requesting that the ED Affidavit be filed, he sent both plaintiff and defendant a copy of the ED Affidavit on or about 17 October 2012.

5. The notice also stated that "[t]he issuing party is ready for hearing upon the issues to be calendared, but the parties have not agreed upon the court date." (Emphasis in original.)

that plaintiff had complied with any of the requirements of North Carolina General Statute § 50-21(d), including a scheduling and discovery conference[6], possible mediation[7], and a final pretrial conference.[8]

Thereafter, the trial court entered an "ORDER OF CONTINUANCE" which continued "this matter" to 4 December 2012 ("Continuance Order"). We cannot discern exactly what was continued to when by the Continuance Order, nor could counsel at the oral argument of this case explain the meaning of the Continuance Order. Normally hearings are continued to a date in the future instead of the past, but here though the Continuance Order was filed on 6 November 2012, the trial court signed the order on 6 December 2012. To be clear, the trial court did not even abbreviate the date but wrote out "6th . . . December[.]" We assume that the clock for the Clerk of Court's office was working properly, so perhaps the trial judge inadvertently wrote the wrong month when signing the Continuance Order. But there were court dates set for both 6 November 2012 -- plaintiff's notice of hearing for the equitable distribution claim -- and 4 December 2012 -- Continuance Order for "this matter[.]" Furthermore, though the Continuance Order provides numerous reasons for the trial court to check for why the matter is being continued, none are checked on this Continuance Order. Lastly, in the consent portion of the Continuance Order, only plaintiff's attorney has signed. There is no indication in the record that the Continuance Order was served upon defendant or any counsel for defendant.

On 10 December 2012, the trial court entered an order ("ED Affidavit Order") which states that it was based upon the hearing held on 6 November 2012, "upon the Plaintiff's request for the Court to structure a time frame within which any and all matters pertaining to equitable distribution or any remaining issues raised in the pleading would be disposed of . . . ." [9] Defendant was not present or represented. The ED Affidavit Order stated as follows:

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6. "Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference." N.C. Gen. Stat. § 50-21(d) (2009).

7. Mediation is required by Rule 7 of the Local Rules prior to scheduling an equitable distribution case for trial, unless the case has been exempted from mediation. *See* Local Rules, rule 7. Mediation is to "be completed within 90 days of the scheduling conference or 210 days of the filing of the complaint, whichever occurs first." Local Rules, rule 10(c).

8. Rule 10(d) of the Local Rules requires that "[a] final pre-trial conference shall be held within 60 days of the completion of mediation." Local Rules, rule 10(d).

9. We note that the Local Rules, particularly Rule 10, provide detailed "timelines" for equitable distribution cases. See Local Rules, rule 10(c). Under Rule 11, "[f]or good cause

[I]t appearing that the Plaintiff has in fact filed his equitable distribution affidavit in timely fashion but the Defendant, for whatever reason has failed or refused to do so; and it appears as if the Defendant has not appeared in court but has had some alleged reason not to be in court each occasion the case has been set for trial; and on the occasion first mentioned hereinabove, the Defendant forwarded a correspondence dated November 5, 2012, which she did not copy Plaintiff's attorney with (with the exception of the copy of a purported medical document at the bottom thereof) which was either in the file or provided to the presiding judge by the Clerk when the calendar was called; and Plaintiff's attorney indicated to the Court that they thought it was frivolous, unreasonable, and inequitable for the Defendant to be able to continually avoid a hearing in this case for reasons that cannot be substantiated when they have otherwise complied with the law and needed for the Court to take action to structure time limits within which things could happen; and the Court reviewed the medical document at the bottom of the Plaintiff's November 5 correspondence but could not decipher or understand the handwriting therein and did not find the letter or the attachment to be reasonable under the circumstances; and, based upon the pleadings in the file and the motion of Plaintiff's counsel, the Court does ORDER,

ADJUDGE, AND DECREE as follows:

1. That the Defendant shall have until December 4, 2012 in which to file her equitable distribution affidavit, which is already well passed [(sic)] the time allowed by law, and should she not have her affidavit filed by that time her right to do so shall be forfeited and she and the Court will be bound by the information set forth in the Plaintiff's Equitable Distribution Affidavit and thereafter she will not be allowed any additional time within which to file said document.

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the Presiding Judge may modify the [rule 10] timelines[,]" but the record contains no indication of any order modifying the rules. *See* Local Rules, rule 11. Perhaps the 10 December 2012 order could be considered as an order modifying the requirements of the rules except that it does not mention any statute or local rule nor does it mention any "good cause" for modification. *Id.*

> 2. That if either party desires any further discovery, it shall be completed on or before December 4.
>
> 3. That at the December 4 calendar, the Court shall determine a final date for trial in this matter.
>
> 4. For such other and further relief as the Court seems just and proper in the nature of this cause.

The record contains no indication that the ED Affidavit Order was served on defendant or any counsel for defendant.

The letter regarding a medical excuse referred to in the ED Affidavit Order was a letter from defendant, dated 5 November 2012, in which she stated that her surgeon, Dr. Benjamin Chiu, of Kokomo, Indiana, had forbidden her from traveling to the hearing on 6 November 2012. At the bottom of defendant's letter was a handwritten note, which we have no difficulty deciphering, on a prescription form for Howard Regional Health System, of Kokomo, Indiana, stating that "Pt. to be excused from travel/work until follow up visit in 1-2 weeks[.]" Defendant also stated in the letter that she had told plaintiff's attorney the dates she could attend court, and he set the 6 November 2012 date against her wishes.

Defendant's medical condition was a recurring theme throughout the case. Defendant's counterclaim alleged that she suffered "from a number of medical conditions" which made "her unable to support herself." Plaintiff replied that defendant "malingers" and would "say or do anything that she can to not work an honest day's work." But the record contains no substantive evidence regarding defendant's medical condition. In addition, despite the trial court's statement in the ED Affidavit Order that "the Defendant has not appeared in court but has had some alleged reason not to be in court each occasion the case has been set for trial[,]" our record contains no indication whatsoever that this case had ever been set for any sort of hearing before 6 November 2012.

On 4 December 2012, the matter came on for hearing again, and a judgment was filed on 19 December 2012 as a result of this hearing ("Sanctions Order"). The Sanctions Order stated as follows:

> [I]t appearing that the matter was before the Court based upon the Plaintiff's request (all of which was relayed to the Court at its last session when Judge Covolo was presiding) asking that the Defendant forfeit her right to file any further equitable distribution documents for her failure to have her equitable distribution affidavit filed with the Court the date first referenced hereinabove, and for

the Court to set this case before the undersigned Judge Presiding, who is the designated judge, for the final equitable distribution hearing on January 8, 2013; and it appearing that the Plaintiff was in court with his attorney of record, Robert D. Kornegay, Jr., and that the Defendant was not in court, although attorney Katherine Fisher informed the Court that she had been contacted by the Defendant, and had a telephone conference scheduled with her the following day (December 5) at 3:00 p.m.; and, based upon the pleadings in the file, the statement of counsel, and the proceedings, the Court does make the following FINDINGS OF FACT:

1. That all parties have had due and adequate notice of the proceedings and that the parties and the subject party are properly before the Court.

2. That the last order of the Court gave to the Defendant the right and opportunity to file her equitable distribution affidavit by the date first referenced hereinabove, but that no pleadings of any other or further type have been filed with or received by the Court. That the Defendant has had plenty [of] adequate time under all the circumstances to file her pleadings and for her lack or inability of having done so, the Court does find that it is not unreasonable that the Defendant has therefore forfeited any further right to file her equitable distribution affidavit and the identification, valuation, and classification of all said assets and debts as provided by the Plaintiff in his equitable distribution affidavit shall hereinafter be those values that shall be considered and heard by the Court.

3. That there has been discovery pending since August of 2010, whereby the Plaintiff filed discovery on the Defendant and she has not made any valid attempt to provide the information required therein by law.

4. That this matter has been pending for a long period of time and it is right, fair, and reasonable that the parties should be able to move forward with their lives and conclude the issues raised in the litigation and therefore the case will be set for trial on the issue of equitable distribution of property at the undersigned Judge's next session of court for January 8, 2013.

NOW, THEREFORE, based upon the foregoing Findings the Court makes the following CONCLUSIONS OF LAW:

1. That all parties have had due and adequate notice of these proceedings and that the parties and the subject matter are properly before the Court.

2. That the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court.

NOW, THEREFORE, based upon the foregoing Findings and Conclusions the Court does hereby ORDER, ADJUDGE AND DECREE:

1. That the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to same and that the identification, valuation, and classification of assets and debts as set forth in the Plaintiff's said affidavit shall be those that shall be considered by the Court.

2. That this case is hereby set for hearing on equitable distribution of property at the Undersigned's next session of court for January 8, 2013.

3. That this matter shall be retained for further consideration by the court.

The record contains no indication that the Sanctions Order was served upon defendant or any counsel for defendant.

The 8 January 2013 court date was continued, by consent of both plaintiff and defendant, to the March or April 2013 term of court with Judge Covolo. An order for peremptory setting for 5 March 2013 was filed on 17 January 2013, and this was served upon defendant. On 23 January 2013, plaintiff's counsel also filed a notice of hearing on equitable distribution for 5 March 2013, and this was served upon defendant.

The equitable distribution trial was held on 5 March 2013. Plaintiff was present with his attorney and defendant was present, *pro se*. The 12 July 2013 judgment ("ED Judgment") stated,

> the Defendant has forfeited her right to file her equitable distribution affidavit or any other documents or matters pertaining to the same by virtue of a Judgment dated December 14, 2012, of record in this matter, and that as a result thereof the Plaintiff's equitable distribution affidavit, and his documentation in support thereof, in addition to the testimony of the parties, and any documentation offered by the Defendant, was the sole source of the Court's identification, valuation, and classification of marital property; and, based upon the pleadings in the file, the testimony of the parties and their documentary evidence, and the statement of counsel, the Court does make the following FINDINGS OF FACT[.]

Ultimately, the trial court made findings of fact consistent with plaintiff's ED Affidavit and evidence and awarded an unequal distribution of property in favor of plaintiff. Defendant filed a *pro se* "NOTICE OF APPEAL" appealing "the ruling and judgment of the Nash County District Court entered on July 12, 2013[.]"

II. Jurisdiction

[1] Defendant asserts on appeal that the ED Judgment of 12 July 2013 is a final, appealable order, and she also challenges the "December 10, 2012 discovery order and the December 19, 2012 sanctions Judgment" which were interlocutory orders and not immediately appealable; this is true, but defendant also failed to give notice of appeal identifying the ED Affidavit Order and the Sanctions Order, so we must first consider whether this Court has jurisdiction to consider her appeal as to these decisions.

> We note that while Rule 3(d) of the Rules of Appellate Procedure provides that the notice of appeal shall designate the judgment or order from which appeal is taken, N.C. Gen. Stat. § 1–278 (2013) provides: Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1–278 is proper under the following circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must

> have involved the merits and necessarily affected the judgment. All three conditions must be met.

Tinajero v. Balfour Beatty Infrastructure, ___ N.C. App. ___, ___, 758 S.E.2d 169, 175 (2014) (citation and quotation marks omitted).

We find that all three conditions for defendant's appeal as to the ED Affidavit Order and the Sanctions Order have been met. *See id.* As to the timeliness of defendant's objection, based upon the record before us, we cannot determine when, if ever, the ED Affidavit Order and the Sanctions Order were served upon defendant. Clearly defendant became aware of the ED Affidavit Order and the Sanctions Order at some point in time, but there is no certificate of service[10] on either document. Under North Carolina General Statute § 1A-1, Rule 58, the ED Affidavit Order and the Sanctions Order should have been served upon defendant within three days of their entry:

> Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5.

N.C. Gen. Stat. § 1A-1, Rule 58 (2009). Under North Carolina Rule of Appellate Procedure Rule 3, defendant would have had 30 days to appeal from the ED Affidavit Order or Sanctions Order if she had been served with them "within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C.R. App. P. 3(c). Since we do not know when or if defendant was ever "served" with the ED Affidavit Order or the Sanctions Order, we cannot discern how she would have made any more timely objection to the ED Affidavit Order and the Sanctions Order than she has by her appeal of the ED Judgment resulting from them.

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10. North Carolina General Statute § 1A-1, Rule 5(b) requires that "[a] certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served." N.C. Gen. Stat. § 1A-1, Rule 5(b) (2009).

Next, both the ED Affidavit Order and Sanctions Order were interlocutory, as they did not make a final determination of all claims and issues. *See Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." (citation and quotation marks omitted)).

Finally, both the ED Affidavit Order and Sanctions Order "involved the merits and necessarily affected the judgment." *Tinajero*, ___ N.C. App. at ___, 758 S.E.2d at 175. As a result of the ED Affidavit Order and Sanctions Order defendant could not challenge plaintiff's evidence as to the identification, classification, and valuation of the martial property and debts; these are the central issues in any equitable distribution claim. Thus, we have jurisdiction to consider defendant's appeal as to the ED Affidavit Order and Sanctions Order. *See Tinajero* ___ N.C. App. at ___, 758 S.E.2d at 175.

III. Imposition of Sanctions Without Notice

Defendant first argues that "the trial court erred in imposing sanctions against defendant which prohibited her from filing an equitable distribution affidavit and prevented her from presenting her case." (Original in all caps.) The sanctions were imposed in the trial court's Sanctions Order, which found that defendant had failed to comply with the ED Affidavit Order. Defendant contends that the ED Affidavit Order, which set a 4 December 2012 deadline for filing her ED Affidavit, had not yet been entered when the deadline had passed. We need not engage in any analysis to determine that defendant's argument is factually correct -- 10 December 2012 is after 4 December 2012. Even if defendant had been present in court on 6 November 2012, when it seems that the trial court addressed this issue, an order is not entered until it is signed and filed, and the ED Affidavit was signed on 24 November 2012 and filed on 10 December 2012. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2011) ("Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.")

Plaintiff does not even attempt to argue in his brief that defendant had notice of the 4 December 2012 deadline, but in his approximately two page argument which is devoid of citation of any authority, claims that defendant had "a full and fair opportunity to present her case at trial[,]" (original in all caps), because at trial the trial court did permit her to testify and asked her "broad and open-ended questions[.]" Plaintiff also contends that the 10 December 2012 order actually gave

defendant an *extension* of time to file her ED Affidavit, an argument which is directly contradicted by the order itself. Plaintiff argues that defendant "began representing herself" on 3 February 2012 — this fact is not supported by the record -- and that she "was served on 17 October 2012 with the Plaintiff's Equitable Distribution Inventory Affidavit[.]" Actually, the only indication in the record of the service of plaintiff's ED Affidavit is the Cc: line at the bottom of plaintiff's counsel's transmittal letter to the Assistant Clerk of Court, asking that plaintiff's ED Affidavit be filed; there is no certificate of service on defendant. But even if we assume that plaintiff is correct, and plaintiff mailed his ED Affidavit to defendant on 17 October 2012, plaintiff argues that defendant's ED Affidavit would have been due on 19 November 2012.[11] Plaintiff claims that since the ED Affidavit Order deadline was 4 December 2012, the ED Affidavit Order actually gave defendant 15 *extra* days to file her ED Affidavit, beyond the time allowed by North Carolina General Statute § 50-21. Plaintiff's argument is inexplicable, given the finding in the ED Affidavit Order, based upon the stated hearing date of 6 November 2012, that "Defendant, for whatever reason *has* failed or refused to" file her ED Affidavit in a "timely fashion[.]" (Emphasis added.) In addition, the ED Affidavit Order decreed that "the Defendant shall have until December 4, 2012 in which to file her equitable distribution affidavit, *which is already well passed [(sic)] the time allowed by law*[.]" (Emphasis added.) That is, on 6 November 2012, despite the fact that according to plaintiff, defendant's ED Affidavit *was not due until 19 November 201*2, the trial court found that defendant has "for whatever reason . . . failed or refused to" file her ED Affidavit in a "timely fashion" and that the time for filing of her ED Affidavit was "already well passed" (sic). Plaintiff's argument is, to use the words of the trial court's ED Affidavit Order describing defendant's failure to appear in court on 6 November 2012, "frivolous [and] unreasonable[.]"

We realize that many things may have happened in this case which are not revealed by the record, despite the fact that counsel for plaintiff and defendant participated in the settlement of the record on appeal and would presumably have included all documents necessary for us to review the issues presented. In fact, several of the documents which do show various important dates were added as supplements to the record. We agree that this equitable distribution case took entirely too long, far beyond the time guidelines set by both North Carolina General Statute

11. Plaintiff's brief actually argues that "Defendant's EDIA was due on or before 19 November 2014[;]" we assume plaintiff means 2012, as that was the year when the 10 December 2012 order was entered.

§ 50-21 and by the Local Rules. *See* N.C. Gen. Stat. § 50-21; Local Rules, rule 10. Yet we feel compelled to note that *plaintiff* filed the initial equitable distribution claim, and thus he had the obligation under North Carolina General Statute § 50-21(a) to file his ED Affidavit within 90 days. *See* N.C. Gen. Stat. § 50-21(a). Instead, plaintiff filed his ED Affidavit approximately two years and 10 months after he filed his complaint. This is not, as the ED Affidavit Order described it, "timely[.]" The trial court also found in its Sanctions Order that defendant failed to respond to the "REQUEST FOR PRODUCTION OF DOCUMENTS" served upon her in August of 2012; this is true, but essentially irrelevant to the equitable distribution claim, as this request for production included only three requests, the first of which was directed to defendant's counterclaim for post-separation support. While it is true that defendant also failed to take actions that she should and could have taken to comply with the time requirements of equitable distribution and have the case resolved sooner, both parties were complicit in the delay. Also, the record before this Court does not reveal that defendant ever failed to respond to any sort of discovery request relevant to the equitable distribution claim and does not reveal that she ever failed to appear at any court date other than the 6 November 2012 and 4 December 2012 dates previously discussed.

As we have established that defendant had no notice of the 4 December 2012 deadline before it had passed, we must now consider whether she had sufficient notice that she may face sanctions, in the form of barring her from presentation of evidence as to the identification, valuation, and classification of the property to be distributed and a decree that the trial court would determine the "identification, valuation, and classification of assets and debts" according to plaintiff's ED Affidavit. Although neither the trial court's ED Affidavit Order or Sanctions Order cite any statutory basis for imposition of sanctions against defendant, nor did plaintiff file any motion seeking relief based upon any statute or rule, it appears that the sanctions were based upon North Carolina General Statute § 50-21(e):

> (e) Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
>
> (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or

> unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
>
> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.
>
> Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted.

N.C. Gen. Stat. § 50-21(e).

This Court has determined in *Megremis v. Megremis* that the adequacy of notice of potential sanctions under North Carolina General Statute § 50-21 is a question of law which we review *de novo*:

> Notice and opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution. Whether a party has adequate notice is a question of law. In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of such charges. Moreover, a party has a due process right to notice both (1) of the fact that sanctions may be imposed, and (2) the alleged grounds for the imposition of sanctions.

179 N.C. App. 174, 178-79, 633 S.E.2d 117, 122 (2006) (citations, quotation marks, and brackets omitted); *see also Suntrust Bank v. Bryant/Sutphin Prop., LLC*, ___ N.C. App. ___, ___, 732 S.E.2d 594, 598 (2012) ("For questions of law, we apply *de novo* review." (citation and quotation marks omitted)).

As also noted in *Megremis*, North Carolina General Statute § 50-21(e) does not set forth any specific requirements for notice, so we have looked to similar statutory provisions for guidance:

> N.C.G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. Under N.C. Gen. Stat. § 1A-1, Rule 11, a motion requesting sanctions must be served within the period prescribed by N.C. Gen. Stat. § 1A-1, Rule 6(d), not later than five days before the hearing on the Rule 11 motion. N.C.G.S. § 50-21(e) includes conduct sanctioned under N.C. Gen. Stat. § 1A-1, Rule 37, as well as a separate, more general, sanctions provision specific to an equitable distribution proceeding. Under Rule 37, a trial court may impose sanctions, including attorney's fees, upon a party for discovery violations. Our Court has held that a party sanctioned under Rule 37 had ample notice of sanctions where the moving party's written discovery motion clearly indicated the party was seeking sanctions under Rule 37. Moreover, at a hearing on the discovery motion, the sanctioned party was given the opportunity to explain to the trial court any justification for the party's delinquency in responding to discovery.

Megremis, 179 N.C. App. at 179, 732 S.E.2d at 121 (citations omitted).

As in *Megremis*, "plaintiff filed no written motion seeking sanctions." Id. at 179, 732 S.E.2d at 121. Here, the sanctions issue was initially addressed at the hearing on 6 November 2012. The notice of hearing for 6 November 2012 stated that the hearing was set for plaintiff to "make application for relief in the form of equitable distribution of property and for attorney's fees, costs and such other relief as provided in Chapter 50 of the North Carolina General Statutes and as prayed for in the pleadings." No motion to compel or motion for sanctions was filed. No scheduling or pretrial conferences were ever held, although both are required by North Carolina General Statute § 50-21(d) and by the Local Rules. *See* N.C. Gen. Stat. § 50-21(d); Local Rules, rule 10. Instead, plaintiff asked the trial court at the 6 November 2012 hearing, where defendant was not present, "to structure a time frame within which any and all matters pertaining to equitable distribution or any remaining issues raised in the pleading would be disposed of[,]" and the trial court did this by setting forth the 4 December 2012 deadline previously discussed at length.

We can safely say that the complete absence of notice of potential sanctions under North Carolina General Statute § 50-21(e) is not adequate notice. *See* N.C. Gen. Stat. § 50-21(e). We also disagree with plaintiff that the Sanctions Order "did not adversely affect [defendant] during

the hearing." Plaintiff does not dispute that the trial court's ED Judgment makes findings of fact and conclusions of law as to "the identification, valuation, and classification of assets and debts" strictly in accord with plaintiff's ED Affidavit, as the Sanctions Order decreed.

As we must reverse the ED Judgment, we will not address each of defendant's arguments about the failure of the trial court to properly classify, value, and distribute the property. But because these issues will arise again on remand, for guidance to the trial court, we will note that North Carolina § 50-20(c) creates a presumption of an equal distribution, and the trial court must make findings of fact as to the factors under North Carolina General Statute § 50-20(c) to support an unequal distribution. N.C. Gen. Stat. § 50-20(c) (2009). In its ED Judgment, the trial court based its unequal distribution on

> reasons that include but are not limited to the following:
>
> a. The Defendant's failure to work and contribute to the marital estate.
>
> b. The debt that the Defendant incurred during the marriage and the fact that Plaintiff had to pay off what he did both during the marriage and after the separation.
>
> c. The Defendant was not a stay at home mother but spent a large part of her time up and down the road and with her family and friends in Indiana, that although it appears to the Court that she was capable and able bodied, did not work substantially or materially and contribute towards the marital estate or the needs of the family.
>
> d. The fraud perpetrated on the Plaintiff to believe that the child born during their relationship was his and the fact that he was primarily responsible for that child's support to and through the age of 19.
>
> e. The fact that the Plaintiff ended up paying the educational loans for the Defendant's son by another relationship without any help or contribution from the Defendant.
>
> f. The Defendant took out a false and frivolous domestic violence action against the Plaintiff in order to better her position in court when she could not sustain the burden of proof with regards thereto.
>
> g. The fact that the Plaintiff basically raised and supported her three children from a prior marriage from the

> date they became married until the date they aged out or moved out of their home.

Most if not all of these factors except possibly (b) appear to fall under the "catch-all" provision of North Carolina General Statute § 50-20(c)(12): "Any other factor which the court finds to be just and proper[,]" but only factors which address the *economic* aspects of the marriage are relevant to the distribution.[12] *See Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985) ("Thus, under 50-20(c)(12), the only other considerations which are just and proper within the theory of equitable distribution as expressed by 50-20(c)(1)-(11) are those which are relevant to the marital economy. Therefore, we hold that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered." (quotation marks omitted)). Many of the trial court's findings of fact and conclusions of law address factors which are simply irrelevant to equitable distribution because they are not economic factors as defined by *Smith*. *See id.*

One particularly egregious example of the trial court's consideration of irrelevant evidence is the paternity of the parties' now-adult child. Plaintiff alleged in his complaint that "one child was born of the marriage who is past the age of majority[;]" defendant's answer admitted this fact. Since this fact was judicially admitted by both parties, it would appear that paternity of the child was not a disputed issue. *See Hinton v. Hinton*, 70 N.C. App. 665, 672, 321 S.E.2d 161, 165 (1984) ("It has long been established that where there is an admission in the final pleadings defining the issues and on which the case goes to trial, such admission is a judicial admission which conclusively establishes the fact for the purposes of that case and eliminates it entirely from the issues to be tried."). Furthermore, support of a child of the marriage, minor or adult, is not a proper distributional factor under North Carolina General Statute § 50-20(c). *See* N.C. Gen. Stat. § 50-20(c); *see also Godley v. Godley*, 110 N.C. App. 99, 117, 429 S.E.2d 382, 393 (1993) ("Defendant further argues that the trial court's finding that plaintiff has voluntarily taken in their 22 year old son, David, was irrelevant to the equitable distribution proceeding. We agree and hold that this factor was improperly considered as a distributional factor. The trial judge also improperly considered the fact that the minor child, Catherine, was still residing at the marital

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12. In fact, the findings as to distributional factors which were disapproved by the Supreme Court in *Smith v. Smith*, bear some resemblance to those in this case, as the trial court there found that defendant generally failed in many ways in her duties as a wife and mother. 314 N.C. 80, 331 S.E.2d 682 (1985).

residence at the time of trial. North Carolina General Statutes § 50-20(f) provides that the court shall provide for equitable distribution without regard to alimony or child support."). Yet in this equitable distribution case, to which the adult son is not a party, plaintiff sought to bastardize his child.

At trial, plaintiff took the position that his son is not his biological child. Defendant had become pregnant prior to the marriage, and plaintiff was aware of the possibility that he may not be the child's father, as defendant "told the Plaintiff that she was 99.5% sure that the child was his[.]" Plaintiff testified that he had a DNA test performed on his son, on the pretense of doing a drug test, and attempted to present as evidence the results of this DNA test to prove that he was not the biological father of said son. The trial court quite properly sustained defendant's objection to the admission of this DNA evidence. Despite the exclusion of the evidence, the trial court then made finding of fact number 6 "[t]hat in the recent past the Plaintiff had DNA samples tested and established to the best of scientific means under current circumstances that the child was and is not his biological child." Based upon finding of fact number 6, the trial court concluded that this factor was one which supported the unequal distribution: "[t]he fraud perpetrated on the Plaintiff to believe that the child born during their relationship was his and the fact that he was primarily responsible for that child's support to and through the age of 19." Many of the other factors upon which the order relies are also irrelevant as they do not relate to the marital economy.[13] As the judgment must be reversed, we will not address any of the other findings of fact or conclusions of law challenged by defendant.

For the foregoing reasons, we reverse the ED Affidavit Order, the Sanctions Order, and the ED Judgment. We are particularly troubled by the need to vacate the ED Judgment, and thus prolong this case which has already been pending for over four and one-half years, especially since defendant has died during this case. In addition, an equitable distribution claim is one of the very few types of cases which has a statutory scheme which sets forth a timeline for each stage of the case. *See* N.C. Gen. Stat. § 50-21. We are concerned by the complete absence of any

13. Factor (b) supporting the unequal distribution was "[t]he debt that the Defendant incurred during the marriage and the fact that Plaintiff had to pay off what he did both during the marriage and after the separation." Factor (b) seems to address the economy of the marriage, but was perhaps misplaced; the trial court may classify debts as marital or separate and may determine what credit should be given for payment of debts after the date of separation, but should not both give credit for payment of debts and give an unequal distribution on this basis, as this gives double credit for the debt payment.

mention of the timeline and scheduling requirements of North Carolina General Statue § 50-21 and the Local Rules; such statutory provisions and rules are intended to prevent exactly the sort of delay and waste of judicial resources which this case demonstrates. On remand, we direct the Chief District Court Judge to set a date for a scheduling conference, as directed by Rule 10(b) of the Local Rules, with proper notice of this scheduling conference to plaintiff and defendant, so that the trial court may set forth a new schedule for this case on remand in accord with North Carolina General Statute § 50-21 and the Local Rules, to the extent possible from this point forward.

IV. Conclusion

For the foregoing reasons, we reverse the ED Affidavit Order, the Sanctions Order, and the ED Judgment; and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges McGEE and BRYANT concur.

IN THE MATTER OF THE FORECLOSURE OF A NORTH CAROLINA DEED OF TRUST EXECUTED BY L.L. MURPHREY CO., F/K/A/ L.L. MURPHREY HOG CO., LOIS M. BARROW, LARRY BARROW, CONNIE M. STOCKS, DONALD STOCKS AND DORIS MURPHREY DATED APRIL 23, 1996 AND RECORDED APRIL 24, 1996 IN BOOK 489 AT PAGE 620, AS MODIFIED BY THOSE CERTAIN MODIFICATION AND EXTENSION AGREEMENTS DATED AUGUST 30, 1996, RECORDED OCTOBER 7, 1996 IN BOOK 493 AT PAGE 20, DATED APRIL 4, 1997, RECORDED APRIL 25, 1997 IN BOOK 497, PAGE 94, DATED MAY 26, 1998, RECORDED JUNE 29, 1998 IN BOOK 507, PAGE 24 AND DATED AUGUST 21, 1998, RECORDED OCTOBER 2, 1998, ALL IN THE OFFICE OF THE GREENE COUNTY REGISTER OF DEEDS, BY KLUTTZ, REAMER, HAYES, RANDOLPH, ADKINS & CARTER, L.L.P., SUBSTITUTE TRUSTEE

No. COA14-166

Filed 7 October 2014

1. Collateral Estoppel and Res Judicata—collateral estoppel—inapplicable—not an adjudication on the merits

Collateral estoppel was inapplicable where the Bankruptcy Court did not rule on the merits of D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action, and the Leonard order was not an adjudication on the merits. Further, respondents waived their right to advance the argument that Wachovia was required to execute Restated Loan Documents for the Confirmed Plan to be

valid and enforceable against respondents in the foreclosure action because the record showed that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. Findings of fact #2, #5, and #9 were supported by competent evidence.

2. Mortgages and Deeds of Trust—foreclosure—valid debt —default—notice

The trial court did not err by authorizing D.A.N. Joint Venture Properties of North Carolina, LLM (DAN) to foreclose on the subject properties. DAN presented competent evidence of: (i) a valid debt of which the party seeking to foreclose was the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled as required under N.C.G.S. § 45-21.16(d).

3. Statutes of Limitation and Repose—foreclosure—ten years after final payment

D.A.N. Joint Venture Properties of North Carolina, LLM's foreclosure action was not barred by the statute of limitations set forth in N.C.G.S. § 1-47(2) and (3). The statute of limitations does not run until ten years after a final payment is made on an obligation, and L.L. Murphrey Hog Co. made payments pursuant to the terms of the Confirmed Plan through 2011.

Appeal by respondents from order entered 31 October 2013 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 27 August 2014.

Driscoll Sheedy, P.A., by Susan E. Driscoll, for appellee.

WHITE & ALLEN, P.A., by John P. Marshall and Ashley C. Fillippeli, for appellants.

ELMORE, Judge.

Lois M. Barrow, Larry Barrow, and Doris Murphrey (respondents) appeal from the Order Denying Motion to Dismiss and Authorizing Foreclosure entered by Judge Paul L. Jones on 31 October 2013. After careful consideration, we affirm.

I. Background

In the instant case, the particular real estate security interest being foreclosed was a North Carolina Deed of Trust entered into on

23 April 1996 by Doris Murphrey, Lois M. Barrow, Larry Barrow, Connie M. Stocks, Donald Stocks, and L.L. Murphrey Hog Co. (LLM), a North Carolina corporation, in favor of Wachovia Bank, N.A., predecessor in interest to D.A.N. Joint Venture Properties of North Carolina, LLM (DAN). The deed of trust was recorded in the Greene County Register of Deeds and the Lenoir County Register of Deeds and amended over time by certain modification and extension agreements. To secure the deed of trust, respondents pledged certain items of real property as collateral. Wachovia also received a security interest in LLM's fixtures and items of personal property. The deed of trust secures an indebtedness evidenced by five promissory notes (the Wachovia notes) executed by LLM, the borrower, in favor of Wachovia between July 1993 and March 1999.

LLM previously filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on 8 June 2000. At that time, LLM was in default to Wachovia for $12,790,522.36 pursuant to the Wachovia notes. In LLM's Chapter 11 case, the Bankruptcy Court entered an order confirming LLM's fourth amended plan of reorganization ("Confirmed Plan" or "the Plan"). Pursuant to class III of the Confirmed Plan, Wachovia's claims were divided into Note A and Note B. Note A is an amortizing note in the amount of $8,000,000; Note B is a cash flow note in the amount of $3,500,000. Both Notes remained secured by the collateral pledged to secure the Wachovia notes. Respondents, LLM's principals, guaranteed Note A and Note B, which both listed a maturity date of 30 September 2011. Upon maturation, the Plan provided that Note A and Note B would be recapitalized and that the obligations of the guarantors would be limited to the amount of recapitalized debt.

The Confirmed Plan also specified:

> **R. Execution and Delivery of Revised Loan Documents**
>
> The Debtor and Wachovia will enter into amended and restated Loan Documents (the "Wachovia Restated Loan Documents") consistent with the provisions of this Plan of Reorganization. The Debtor shall execute and deliver such agreements, instruments and documents as may be reasonably requested by Wachovia. The Wachovia Restated Loan Documents shall contain reasonably and customary warranties, covenants and other terms as the Debtor and Wachovia may agree upon. The following shall constitute events of default:
>
> (i) Nonpayment as required under [the] terms of Note A or Note B,

(ii) Material misrepresentation,

(iii) Material breach of warranties of covenants,

(iv) Subsequent voluntary or involuntary bankruptcy proceedings, or

(v) Reopening of current bankruptcy proceedings.

S. Implementation Date

The Implementation Date for Note A and Note B shall be October 1, 2001, provided that the following Conditions Precedent have been met:

(i) Cash shall be available to the Debtor in an amount sufficient to permit payment in full of all Administrative Claims,

(ii) Eleven days shall have expired since the Confirmation Date and no stay of the Confirmation Order shall be in effect, and

(iii) The Wachovia and MLLC Restated Loan Documents [referred to above as the "Wachovia Restated Loan Documents"] required by the Plan of Reorganization shall have been executed and delivered.

Wachovia did not execute the Restated Loan Documents referenced in the Confirmed Plan. Nonetheless, LLM made payments pursuant to the terms of the Confirmed Plan from 1 October 2001 through 2011. Post-confirmation, Wachovia sold the Wachovia notes to CadleRock Joint Venture, L.P., who later sold or assigned the Wachovia notes to DAN in 2008. DAN filed the necessary notices of assignment, amendments, and continuation statements with the Greene County Register of Deeds, the Lenoir County Register of Deeds, and the North Carolina Secretary of State.

Upon maturity of Note A and Note B, LLM and DAN could not agree to the amount of the recapitalized debt. Seeking a determination, LLM reopened the Chapter 11 case and filed an adversary proceeding in Bankruptcy Court. Judge J. Rich Leonard, United States Bankruptcy Judge for the Eastern District of North Carolina, ruled that LLM's total indebtedness due and owing to DAN was $6,186,362.00. Neither party appealed this judgment.

Thereafter, LLM filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on 21 May 2012. After LLM's Chapter 7 filing,

DAN filed a proof of claim in the amount of $6,056,645.26. DAN attached a copy of LLM's fourth amended plan of reorganization, copies of the requisite security agreements, and copies of the assignments it filed with the Greene and Lenoir County Register of Deeds. In January and February 2013, LLM's bankruptcy trustee filed motions requesting approval to conduct a proposed public sale of LLM's real and personal property free and clear of liens. The trustee submitted a draft of a proposed complaint that he anticipated filing in an adversary proceeding against DAN. The complaint alleged that the Wachovia notes and the deed of trust were avoidable pursuant to 11 U.S.C. § 5444(a)(3) (2013).

The real property that was the subject of the proposed public sale included five tracts of land in Greene County and one tract of land in Lenoir County. As DAN asserted liens on all but one of the tracts of real property, it filed an objection to the trustee's motion to sell free and clear of liens. DAN asserted that pursuant to 11 U.S.C. § 363(f)(4), its interest was not subject to a factual or legal dispute because LLM: (1) did not file any objection to DAN's proof of claim, and (2) because LLM's indebtedness was reaffirmed in the bankruptcy court adversary proceeding. *See L.L. Murphrey Co. v. D.A.N. Joint Venture III, L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011) (calculating the recapitalized debt under the Confirmed Plan to be $6,168,362.00).

On 6 June 2013, Judge Leonard entered an order ("the Leonard order") in the Chapter 7 case. The Leonard order reviewed the terms of the Confirmed Plan, particularly the portions that purported to require Wachovia to execute Restated Loan Documents to reaffirm the loan. Judge Leonard determined the terms of the Confirmed Plan were "unambiguous and impose[d] an obligation on the parties, the debtor and Wachovia, to execute amended and restated agreements, instruments and other loan documents consistent with the treatment provided therein." Judge Leonard further concluded, "[i]n addition to being explicitly required, the execution and delivery of the amended and restated loan documents was a condition precedent for setting the implementation date for Note A and Note B as October 1, 2001."

Further, Judge Leonard held that in the absence of the Restated Loan Documents, the description of Note A and Note B and the recitation of the terms were insufficient to constitute negotiable instruments. Accordingly, Judge Leonard found that the trustee established the existence of a "bona fide dispute" regarding the validity of DAN's liens. Judge Leonard authorized the trustee to sell the real property free and clear of the liens asserted by DAN. Notably, the Leonard order did not terminate DAN's rights to foreclose on the deed of trust—it merely recognized the

existence of a bona fide dispute between the parties and authorized the trustee to proceed with the sale of the requisite property.

DAN filed a Notice of Hearing for Foreclosure of Deed of Trust on 4 September 2013. Based on the Leonard order, LLM filed a motion to dismiss DAN's foreclosure action on 2 October 2013. On 31 October 2013, the matter came on for hearing before Judge Paul L. Jones in Greene County Superior Court. Judge Jones entered an order denying LLM's motion to dismiss. He also authorized the Substitute Trustee for DAN to proceed with the foreclosure of the subject property pursuant to the power of sale granted to him under the deed of trust. Judge Jones entered the following findings of fact:

> 2. The Deed of Trust secures an indebtedness evidenced by certain promissory notes executed by [LLM] in favor of Wachovia Bank, which were modified over time and through the Fourth Amended Plan (Confirmed Plan) filed in [LLM's] Chapter 11 Bankruptcy Case[.]
>
> 3. The Deed of Trust states that it operates as security for "any renewals, modifications or extensions" of the Notes identified in the Confirmed Plan, as well as "all present and future obligations of Grantor[s] to [DAN]." (Deed of Trust, p.3.)
>
> 5. Under the terms of the Confirmed Plan, the Notes were divided into two tranches: Note A and Note B were to "remain secured by that collateral pledged to Wachovia by [Borrower] prior to the Petition Date". [sic] Although the Confirmed Plan required entry by Borrower and Wachovia into "amended and restated Loan Documents", [sic] it did not specify what documents were required. Instead, the Confirmed Plan required that Borrower "execute and deliver such agreements, instruments and documents as may be reasonably requested by Wachovia." There was no requirement that the Barrow Family, Donald Stocks or Connie Murphrey execute any new documents.
>
> . . .
>
> 8. Through the Adversary Proceeding, it was determined that the amount of the Recapitalized Debt was $6,186,362.00. (May 10, 2012 Order, Adv. Proc. No.: 11-00139-8-JRL, p.6.) Instead of paying the

> Recapitalized Debt in full or entering into new loan documents for the amount of the Recapitalized Debt, Borrower filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code, Case No.: 12-03837-8-JRL. (Chapter 7 Case).
>
> 9. D.A.N. Joint Venture Properties of N.C., LLC is the current holder of the Notes and the Deed of Trust.

Respondents now appeal.

II. Analysis

A. Judge Leonard's order

[1] Initially, we note that defendant challenges finding of fact #2, #5, and #9 above as being unsupported by competent evidence. The forgoing analysis addresses each of these challenged findings in substance and illustrates how each is, in fact, supported by competent evidence.

Much of respondents' argument is premised on the belief that the Leonard order constituted a final judgment purportedly affecting the merits of the foreclosure action. We find it necessary to dispel this argument at the outset of this appeal. In their brief, respondents advance the following argument:

> The issue of whether the language of the Confirmed Plan, in the absence of Restated Loan Documents, is sufficient to constitute negotiable instrument **has already been litigated and determined by the Leonard Order**. The Leonard Order specifically provides that the Confirmed Plan is "unambiguous and imposes an obligation on the parties, the debtor and Wachovia, to execute [Restated Loan Documents] consistent with the treatment provided therein." In addition, the Leonard Order holds specifically that "in addition to being explicitly required, the execution and delivery of the [Restated Loan Documents] was a condition precedent for setting the implementation date of Note A and Note B as October 1, 2001." Finally the Leonard Order provides that "these provisions appear mandatory and are not self-executing" and that "in the absence of [Restated Loan Documents], the description of Note A and Note B as well as the recitation of its terms, obligations and the treatment provided to Wachovia are insufficient to constitute negotiable instruments." DAN

> does not and cannot meet the Holder requirement of N.C. Gen. Stat. §45-21.16(d).
>
> North Carolina must give full faith and credit to final judgments of Federal Courts. . . . **An Order of a Bankruptcy Court avoiding a mortgage lien is a Final Order**. . . . Issue preclusion prevents [DAN] from re-litigating the issue concerning holder status.

Respondents are misguided. "In order for collateral estoppel to apply in this case, the issues to be concluded must be the same as those in the prior Bankruptcy Court action[.]" *In re Foreclosure Under That Deed of Trust Executed by Azalea Garden Bd. & Care, Inc.*, 140 N.C. App. 45, 56, 535 S.E.2d 388, 396 (2000). The Bankruptcy Court did not rule on the merits of DAN's foreclosure action, and the Leonard order was not an adjudication on the merits. For example, the issue of whether DAN was the holder of a valid debt was not litigated and determined in the bankruptcy proceeding. Therefore, collateral estoppel is inapplicable. Respondents' counsel was aware that Judge Leonard's order did not constitute an adjudication on the merits of the foreclosure. During the foreclosure hearing counsel stated, "Judge Leonard's decision is not an adjudication . . . but it's really darn convincing and persuasive argument as to how it is he was going to rule." In respondents' reply brief, they clarify that their position is not that the Leonard order constitutes a final order avoiding a mortgage lien; instead, they aver that it is an order establishing: (1) that the reorganization plan mandated new loan documents, and (2) that the failure to execute new loan documents meant that the payment obligations under the Confirmed Plan were insufficient to constitute negotiable instruments.

Regardless, as applied to the foreclosure action before us on appeal, the Leonard order lacks controlling authority. It is merely a determination that a "bona fide dispute" exists between LLM and DAN regarding the validity of DAN's liens. Under 11 U.S.C. §363(f), a trustee has the right to sell property free and clear of liens if there is a bona fide dispute as to the validity of the lien. Despite respondents' arguments to the contrary, Wachovia was not required to execute Restated Loan Documents for the Confirmed Plan to be valid and enforceable against respondents in the foreclosure action. As the trial court found in Finding #5, the Confirmed Plan simply provides: "The debtor shall execute and deliver such agreements, instruments and documents as **may be reasonably requested** by Wachovia." Thus, the Confirmed Plan allowed Wachovia to determine what, if any, new loan documents Wachovia required.

Restated Loan Documents were neither required nor a condition precedent for the Confirmed Plan to bind the parties.

Further, respondents have waived their right to advance the above argument because the record shows that they made timely payments pursuant to the terms of the Confirmed Plan for approximately ten years. *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (holding doctrine of waiver provides that "[a] person may waive almost any right he has, unless forbidden by law or public policy.)

B. Foreclosure by Power of Sale

[2] Next, we must consider whether the trial court erred in authorizing DAN to foreclose on the subject properties. In a foreclosure by power of sale, the trial court shall enter an order permitting foreclosure upon finding: (i) a valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled. N.C. Gen. Stat. § 45-21.16(d) (2013). Here, respondents essentially challenge the first and third elements of N.C. Gen. Stat. § 45-21.16(d) on the basis that DAN failed to produce competent evidence of a valid debt, failed to show that it was the current note holder, and was unable to show that it had a right to foreclose under the deed of trust. These issues are "question[s] of law controlled by the UCC [Uniform Commercial Code], as adopted in Chapter 25 of the North Carolina General Statutes." *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175-76 (2013). We conclude that the trial court did not err.

The following documents set out the rights of the parties in this case: (1) the five Wachovia promissory notes executed between 1993-1999 by LLM in favor of Wachovia; (2) the deed of trust securing the notes executed by respondents and amended over time; (3) LLM's fourth amended plan of reorganization filed 4 May 2001; (4) the Confirmed Plan effective 13 July 2001; and (5) the order determining LLM's indebtedness entered in the adversary proceeding. *L.L. Murphrey Co. v. D.A.N. Joint Venture III, L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011) (calculating the recapitalized debt under the Confirmed Plan to be $6,168,362.00).

For the reasons set forth above, we decline to address respondents' arguments that are premised entirely on the contention that the Confirmed Plan is not enforceable against them. However, we will address the following three specific arguments advanced by respondents: First, respondents aver that DAN is not the holder of a valid debt because the Confirmed Plan fails to qualify as a negotiable instrument. Second, respondents argue that the Confirmed Plan does not contain a

sufficient description of the debt it proposes to secure. Third, respondents argue that the Confirmed Plan was not intended to operate as an extension or modification of the deed of trust.

First, we note that DAN need not prove that it is the holder of a negotiable instrument in order to satisfy element one of N.C. Gen. Stat. § 45-21.16(d). When determining whether a party is the holder of a valid debt, we must find (i) sufficient competent evidence of a valid debt, and (ii) sufficient competent evidence that the party seeking to foreclose is the current holder of the notes that evidence that debt. *In re Adams*, 204 N.C. App. 318, 322, 693 S.E.2d 705, 709 (2010). Prong two, whether DAN is the holder of a valid debt, need not be addressed. Respondents' argument that DAN is not the "holder" of a valid debt is based on the premise that the Confirmed Plan is a nullity. Accordingly, we must only find competent evidence of a valid debt. In *Azalea*, this Court held that a "valid debt" can be evidenced by several documents (including a confirmed bankruptcy plan), each modifying the terms of the other. *Azalea*, 140 N.C. App. at 53, 535 S.E.2d at 394 (2000) (finding that "the compromise and settlement agreement and *plan of reorganization* that were negotiated, amended and ratified by the parties in this case modified the original documents[.]") (emphasis added). Here, the Wachovia notes were modified by the plan of reorganization, which was negotiated, amended, and ratified by the parties through the Confirmed Plan. The Confirmed Plan set forth the maturity date of the loans, interest rate, and events triggering default. LLM (at respondents' direction) made payments under the terms of the Confirmed Plan for approximately ten years. Upon review, we hold that the Confirmed Plan evidences a valid debt of which DAN is the holder.

In addition, the valid debt and DAN's holder status is further evidenced in the order entered by Judge Leonard. *See L.L. Murphrey Co. v. D.A.N. Joint Venture III, L.P.*, Adv. No. 11-00139, 2011 WL 6301214 (Bankr. E.D.N.C. Dec. 16, 2011). Judge Leonard calculated LLM's recapitalized debt under the Confirmed Plan at $6,168,362.00 and found that DAN became the holder of this indebtedness in 2008. LLM did not appeal this order and it is therefore binding on this Court.

Second, the deed of trust and the Confirmed Plan both adequately describe the indebtedness each secures. In North Carolina, a deed of trust must identify the obligation secured so that all subsequent purchasers or lenders are afforded sufficient notice as to the nature of the obligations secured by the deed of trust. *In re Hall*, 210 N.C. App. 409, 413, 708 S.E.2d 174, 177 (2011) (holding "[t]o be a valid lien on real property, North Carolina law requires a deed of trust to specifically identify

the obligation it secures.") Here, the deed of trust provides a detailed description of the obligations secured, as follows:

> (a) Note, dated July 9, 1993, in the original principal amount of $1,000,000, executed by Larry Barrow and Lois M. Barrow and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof, is hereinafter referred to as the "Barrow Note").
>
> (b) Note, dated July 9, 1993, in the original principal amount of $1,000,000, executed by Donald Stocks and Connie M. Stocks and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof is hereinafter referred to as the "Stocks Note").
>
> (c) Note, dated July 9, 1993 in the original principal amount of $1,131,478.94, executed by the Maker and payable to the Beneficiary (which, together with any and all renewals, modifications and extensions thereof, is hereinafter referred to as the "1993 Company Note").

The deed of trust also details the modification of the Wachovia notes over time, including the decrease in principal balance and extension of maturity dates. Further, the deed of trust contains a catchall phrase—stating it operates as security for "any renewals, modifications or extension" of the Wachovia notes and "all present and future obligations of [LLM and respondents] to [DAN]."

The Confirmed Plan specifically describes the obligations it secures as including:

> A. Note #1: Note #1 is a promissory note dated July 9, 1993 in the original principal amount of $1,131,478.94. By its terms, this obligation accrued interest at the annual rate of 7.15%. It was to be repaid by monthly principal and interest payments in the amount of $17,160.40. This note matured July 10, 1999.
>
> B. Note #17: Note #17 is a promissory note dated April 23, 1996 in the original principal amount of $3,500,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus .75%. It was to be repaid by monthly principal payments in the amount of $58,334.00 plus accrued interest. This note matures on May 1, 2001.

C. Note #18: Note #18 is a Declining Revolver Note dated April 23, 1996 in the original principal amount of $5,420,000.00. By its terms, this obligation accrued interest at the annual rate of 9%. It was to be repaid by quarterly principal payments in the amount of $250,000.00 plus accrued interest. This note matured March 15, 2000.

D. Note #19: Note #19 is a Grain Line of Credit Note dated April 23, 1996 in the original principal amount of $2,750,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus 1%. It was to be repaid by monthly interest payments with principal due and payable at maturity. This note matured February 25, 1999.

E. Note #22: Note #22 is a future advances note dated March 16, 1999 in the original principal amount of $175,000.00. By its terms, this obligation accrued interest at the annual rate of prime plus 1.5%. It was to be repaid by monthly interest payments with principal due and payable at maturity. This note matured April 15, 1999.

We conclude that the description of the indebtedness evidenced in the deed of trust and the Confirmed Plan is sufficient under North Carolina law to notify creditors of the nature of the obligations secured by the deed of trust and likewise by the Confirmed Plan. *Hall*, *supra*.

As to respondents' third argument, we note that they advance no specific argument to support their position that the Confirmed Plan was not intended to act as an extension or modification of the deed of trust. Our Supreme Court has held that a deed of trust executed as security for a debt will secure all renewals of the debt unless a different intent appears. *Wachovia Nat'l Bank v. Ireland*, 122 N.C. 571, 29 S.E. 835 (1898) ("The deed contains a covenant that the charge shall be binding for all renewals of the debts specified. This would be so without any agreement, unless a different intent appeared."). "Where a note is given merely in renewal of another note and not in payment thereof, the effect is to extend the time for the payment of the debt without extinguishing or changing the character of the obligation, and, in case of default, the holder may sue upon the original instrument." *Dyer v. Bray*, 208 N.C. 248, 180 S.E. 83 (1935).

> Where a [subsequent] contract involves the same subject matter as the first, but where no recession has occurred, the contracts must be construed together in identifying the intent of the parties and in ascertaining what provisions of the first contract remain enforceable, and in such construction the law pertaining to interpretation of a single contract applies.

In re Fortescue, 75 N.C. App. 127, 130, 330 S.E.2d 219, 221 (1985) (citation omitted) (applying terms of a loan modification agreement to find default of promissory note and foreclosure of deed of trust). "The court's primary purpose in construing a contract is to ascertain the intention of the parties." *Id.* at 130, 330 S.E.2d at 222; *see also In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 659-60, 266 S.E.2d 686, 689 (1980) (concluding "that proper interpretation of the provisions in the Note and the Deed of Trust prescribing the conditions of default requires that the instruments be read together as one contract rather than as two independent agreements.")

The modification of the Wachovia notes through the Confirmed Plan did not eliminate the original debt, as respondents contend. The plan of reorganization specifies: "[Note A and Note B] shall remain secured by that collateral pledged to Wachovia by the Debtor prior to the Petition Date and guaranties will remain in full force and effect for the Notes except as adjusted to reflect the amount of Recapitalized Debt, defined herein" and "[t]he Recapitalized Debt shall remain secured by the same Pre-Petition Collateral." The Confirmed Plan provides: "The guarantors of Wachovia's Notes A and B as provided for under the Plan shall be the same as pre-petition, with the exception [] [of] Connie S. Murphrey[.]" Notably, the Confirmed Plan does not provide for a payoff of the Wachovia notes—it merely reclassifies the preexisting debt. Thus, the Confirmed Plan "set new, specific requirements that the parties in this case intended to follow, in addition to any agreements in the original promissory note and deed of trust, that were not irreconcilable." *Azalea*, 140 N.C. App. at 52, 535 S.E.2d at 393.

The deed of trust also states that it is to operate as security for "any renewals, modifications or extensions" of the Wachovia notes as well as "all present and future obligations of [LLM and the Barrow family] to [DAN]." Based on the language of the Confirmed Plan and deed of trust, we conclude that the parties intended for the deed of trust to operate as security for the Wachovia notes, as modified under the terms of the Confirmed Plan.

C. Statute of Limitations

[3] Respondents argue that DAN's foreclosure action is barred by the applicable statute of limitations set forth in N.C. Gen. Stat. § 1-47(2) and (3) (2013). We disagree and note that the crux of the statute of limitations argument hinges on our having concluded that the Confirmed Plan is unenforceable against respondents.

N.C. Gen. Stat. § 1-47(3) (2013) provides:

> For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

As the statute provides, the statute of limitations does not run until ten years after a final payment is made on an obligation. Respondents do not contest the fact that LLM made payments pursuant to the terms of the Confirmed Plan through 2011. Clearly, DAN is squarely within the requisite time frame in which it can bring its foreclosure action. We overrule respondents' argument.

II. Conclusion

In reviewing the record in its entirety, we hold that DAN presented competent evidence of: (i) a valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled as required under N.C. Gen. Stat. § 45-21.16(d). Accordingly, we affirm the trial court's order.

Affirmed.

Judges CALABRIA and STEPHENS concur.

IN RE J.C.

[236 N.C. App. 558 (2014)]

IN THE MATTER OF J.C., J.C.

No. COA14-268

Filed 7 October 2014

1. Child Abuse, Dependency, and Neglect—permanency planning order—changed legal custody—immediately appealable

The Court of Appeals granted respondent's petition for certiorari in an appeal from the trial court's permanency planning order in a child custody case ceasing reunification efforts. Because the order changed legal custody of the juveniles, the order was immediately appealable pursuant to N.C.G.S. § 7B-1001(a)(4).

2. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—findings not necessary—circumstances must exist

The trial court did err in a child custody case by failing to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction. Although making specific findings of fact related to a trial court's jurisdiction under N.C.G.S. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. In this case, the evidence from the permanency planning hearing demonstrated that neither the parents nor the children continued to live in Kentucky.

3. Child Abuse, Dependency, and Neglect—permanency planning order—findings supported by evidence—findings supported conclusion

The trial court's findings of fact in a child custody permanency planning order were supported by competent evidence and supported the trial court's decision to cease reunification efforts with respondent.

4. Child Abuse, Dependency, and Neglect—authority to order respondent pay costs—oral rendering of judgment—conflict with written order—order remanded

The trial court did not lack the authority in a child custody case to order respondent to pay the costs of supervised visitation and that argument had already been rejected by the Court of appeals in respondent's previous appeal. However, the trial court's written judgment directly contradicted the trial court's statements from the bench regarding visitation. The portion of the trial court's

order regarding visitation was vacated and remanded for entry of an amended order which accurately reflected the trial court's oral disposition.

Appeal by respondent-mother from order entered 12 December 2013 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 9 September 2014.

No brief filed for petitioner-appellee Johnston County Department of Social Services.

No brief filed for guardian ad litem.

Richard Croutharmel, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother ("respondent") appeals from the trial court's permanency planning order which, *inter alia*, ceased reunification efforts with respondent. We affirm in part and vacate and remand in part.

I. Background

On 27 June 2013, the Johnston County Department of Social Services ("DSS") filed petitions alleging that respondent's minor children ("the juveniles") were neglected and dependent, based upon unresolved conflicts between respondent and the juveniles' father, which included false reports of sexual abuse of the juveniles by the juveniles' father that had been fabricated by respondent. After a hearing, the trial court entered an order which adjudicated the juveniles as neglected and dependent. In its subsequent disposition order, the trial court placed the juveniles in the custody of their paternal grandmother and ordered respondent to have supervised visits with the juveniles every other week at a supervised visitation center at her expense. Respondent appealed the adjudication and disposition orders to this Court, which affirmed both orders. *In re J.C.*, *J.C.*, ___ N.C. App. ___, 760 S.E.2d 778 (2014).

On 23 September 2013, respondent filed a motion for review in the trial court seeking, *inter alia*, reconsideration of the visitation plan. On 13 November 2013, the trial court conducted a permanency planning hearing. At the conclusion of the hearing, the trial court orally concluded that it was in the juveniles' best interests to return to their father's custody, changed the permanent plan to reunification with the father, ordered DSS to cease reunification efforts with respondent, and ordered

that visitation with respondent would be supervised by DSS until they could find a suitable replacement supervisor. On 12 December 2013, the trial court entered a written order consistent with its statements from the bench, with the exception that the court ordered respondent's visitation to continue to be supervised at a visitation center at her expense. Respondent appeals.

II. Appellate Jurisdiction

[1] As an initial matter, we note that on 31 March 2014, respondent filed a petition for writ of *certiorari* with this Court in which she asserted that her appeal from the order ceasing reunification efforts was interlocutory pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2013), which limits the circumstances under which a respondent may appeal from an order ceasing reunification efforts which were not present in the instant case. However, "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile" is appealable to this Court. N.C. Gen. Stat. § 7B-1001(a)(4) (2013). In the instant case, the trial court's permanency planning order returned the juveniles to their father's custody. Thus, pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), the trial court's order was appealable as an order changing custody, and respondent's petition for writ of *certiorari* is dismissed as moot. *See In re J.V. & M.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009).

III. Subject Matter Jurisdiction

[2] Respondent first argues that the trial court failed to make sufficient findings in its permanency planning order to establish its subject matter jurisdiction over the instant case. Specifically, respondent contends that because the juveniles and their parents were involved in a previous neglect case in Kentucky, the trial court was required to make specific jurisdictional findings pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. We disagree.

Respondent previously made this same argument in her appeal of the prior neglect and dependency adjudication and disposition order entered in this case. In *J.C.*, we rejected the argument:

> Although this Court has recognized that making specific findings of fact related to a trial court's jurisdiction under N.C. Gen. Stat. § 50A-201(a)(1) would be the better practice, the statute states only that certain circumstances must exist, not that the court specifically make findings to that effect. Therefore, so long as the trial court asserts its jurisdiction and there is evidence to satisfy the statutory

> requirements, the trial court has properly exercised subject matter jurisdiction.

___ N.C. App. at ___, 760 S.E.2d at 780 (internal quotations and citations omitted). In the instant case, respondent acknowledges that the evidence from the permanency planning hearing demonstrates that "neither the parents nor the children continue to live in Kentucky[.]" As in respondent's previous appeal, this is sufficient to establish the trial court's jurisdiction to enter the permanency planning order. *See id.* (Holding that jurisdiction was established when "the evidence shows that the juveniles have continuously resided with a parent in North Carolina since December of 2011"). This argument is overruled.

IV. Cessation of Reunification Efforts

[3] Respondent contends the evidence and the trial court's findings of fact do not support its order changing the permanent plan to reunification with the juveniles' father and ceasing reunification efforts with respondent. We disagree.

A court may order DSS to cease reunification efforts if it makes a written finding of fact that "[s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C. Gen. Stat. § 7B-507(b)(1) (2013). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (internal quotations and citations omitted).

In the instant case, the trial court found that further efforts toward reunification with respondent would be "futile and inconsistent with the juveniles' health, safety and need for a permanent home within a reasonable period of time[.]" The court then further found that respondent failed to provide verification she had completed a psychological evaluation; failed to visit the juveniles; failed to recognize her role in the juveniles' placement; failed to cooperate with DSS's attempts to provide services; and failed to make progress on her case plan since May 2013. Each of these findings is supported by the testimony of the social worker who supervised respondent's case at the time of the permanency

planning hearing. Specifically, the social worker described respondent's history of resisting DSS involvement and lack of progress on her case plan, her conflicting statements about her responsibility in contributing to the juveniles' current situation, and her failure to attend visitation. Although, as respondent contends on appeal, her own testimony contradicted some of the social worker's testimony, it was the trial court's responsibility to weigh the conflicting testimony and make appropriate findings of fact. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Ultimately, the trial court's findings, which were supported by competent evidence, supported the trial court's decision to cease reunification efforts. This argument is overruled.

V. Visitation

[4] Respondent argues that the visitation portion of the trial court's order was erroneous for two reasons. First, respondent contends that the trial court lacked the authority to order her to pay the costs of supervised visitation. However, that argument has already been rejected by this Court in respondent's previous appeal. *See J.C.*, ___ N.C. App. at ___, 760 S.E.2d at 782 ("[I]n the best interests of the juvenile, the trial court has the authority to set conditions for visitation, as the trial court did in this case by requiring respondent to pay the costs of visitation."). In addition, respondent contends that the written visitation order conflicts with the trial court's oral pronouncement regarding visitation and therefore must be vacated. We agree with this contention.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013). Thus, "[a]nnouncement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). "If the written judgment conforms generally with the oral judgment, the judgment is valid." *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007). However, if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive. *See State v. Sellers*, 155 N.C. App. 51, 59, 574 S.E.2d 101, 106-07 (2002).

In the instant case, the trial court heard arguments regarding respondent's ability to pay for supervised visitation and her objections to the imposition of those costs. DSS specifically recommended that respondent continue her visits with the juveniles at a visitation center at respondent's expense. At the conclusion of the hearing, the trial court made two statements which constituted its order regarding visitation:

"I'm going to adopt the recommendations put for[th] by the Department with the exception that DSS will supervise until they can find a replacement[,]" and "I'm adopting every recommendation [by DSS] with the exception of the visitation will be at Social Services every other week." Nonetheless, in its written order, the trial court directly contradicted the order it rendered from the bench, instead adopting DSS's recommendation by ordering that respondent's visitation would continue to be at a visitation center at respondent's expense.

The difference between the trial court's pronouncement in open court and its written order is substantive and the change in the written order cannot be said to generally conform to the court's oral statement. The written judgment directly contradicts the trial court's statements from the bench, and as a result, the portion of the trial court's order regarding visitation must be vacated and remanded for entry of an amended order which accurately reflects the trial court's oral disposition. *See id.* We note that

> [i]t is the duty of the trial judge to ensure that a written order accurately reflects his or her rulings before it is signed, and to modify the order if it is not correct. It is also the duty of counsel preparing the order to ensure that it accurately reflects the trial court's findings and rulings.

State v. Veazey, 191 N.C. App. 181, 196, 662 S.E.2d 683, 692 (2008) (Steelman, J., concurring in the result).

VI. Conclusion

The trial court had subject matter jurisdiction to enter the permanency planning order. The trial court properly found the necessary facts which supported its decision to cease reunification efforts with respondent, and accordingly, that portion of the trial court's order is affirmed. The court was authorized to order respondent to participate in supervised visits at a visitation center at respondent's expense. However, the trial court instead ordered, in open court, that respondent would have supervised visits at DSS. Since the trial court's written order contradicted its oral disposition, the portion of the trial court's order regarding visitation is vacated and remanded for a new order which is consistent with the court's oral pronouncement.

Affirmed in part and vacated and remanded in part.

Judges STEELMAN and McCULLOUGH concur.

HANS KINDSGRAB, PETITIONER-APPELLANT
v.
STATE OF NORTH CAROLINA BOARD OF BARBER EXAMINERS,
RESPONDENT-APPELLANT

No. COA13-1321

Filed 7 October 2014

1. Administrative Law—judicial review—scope—issues decided by Board

The trial court exceeded the permissible scope of review when it ordered petitioner to remove a barber pole and stop advertising barber services unless licensed by the Board of Barber Examiners. The only issues before the trial court for review were those issues decided by the Board – the assessment of civil penalties, attorney's fees, and costs. N.C.G.S. § 86A-20.1 provided an avenue for respondent to seek an injunction, which respondent did not pursue.

2. Administrative Law—judicial review—exceptions to Board's decision—sufficient

The trial court did not err in a case involving judicial review of an administrative action by denying respondent's motion to dismiss the petition for judicial review. Although petitioner did not except to specific findings or conclusions by the Board of Barber Examiners, petitioner clearly stated exceptions to the Board's final decision.

3. Administrative Law—authority of board to issue fines—not limited to licensees—limitation not read into statute

The trial court erred by concluding that the Board of Barber Examiners did not have the statutory authority to impose fines on persons or entities not licensed by the Board. A plain reading of N.C.G.S. § 86A-27(a) revealed no indication that imposition of civil penalties was limited solely to licensees and the Court of Appeals would not read limiting language into the statute where it did not exist.

4. Constitutional Law—Board of Barber Examiners—authority over non-licensees—reasonably necessary to purpose

The ability of the Board of Barber Examiners to impose civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering. While there are other statutory means to accomplish the Board's purpose, such as seeking an injunction or criminal prosecution, those means are not exclusive.

Appeals by petitioner and respondent from orders entered 3 May 2013 and 11 September 2013 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 April 2014.

Harris & Hilton, P.A., by Nelson G. Harris, for petitioner-appellant.

N.C. Board of Barber Examiners, by W. Bain Jones, Jr., and Allen, Pinnix & Nichols, P.A., by M. Jackson Nichols and Catherine E. Lee, for respondent-appellant.

McCULLOUGH, Judge.

Hans Kindsgrab ("petitioner") appeals from the Order On Petition For Judicial Review filed 11 September 2013. The State of North Carolina Board of Barber Examiners ("respondent" or "the Board") appeals from the interlocutory order denying its Motion To Dismiss Petition For Judicial review filed 3 May 2103 and from the Order On Petition For Judicial Review filed 11 September 2013. For the following reasons, we affirm in part and reverse in part.

I. Background

Petitioner is an owner of Maybe Someday, Inc., which owns and operates franchises of "The Barbershop – A Hair Salon for Men" at three locations in the triangle area – Cary, Durham, and Raleigh. At all times relevant to this appeal, each location held a Cosmetic Arts Salon License issued by the North Carolina State Board of Cosmetic Art Examiners.

In 2012, an investigation by barber examiner William Graham revealed that the Cary and Raleigh locations displayed barber polls and advertised barber services without barber permits and without licensed barbers on the premises. As a result, Graham issued "Notice[s] Of Violation[s]" to the Raleigh and Cary locations on 31 July 2012 specifying fraudulent misrepresentation in violation of N.C. Gen. Stat. § 86A-20 and N.C. Admin. Code tit. 21, r. 6O.0107. Following the notices issued by Graham, on 7 September 2012, the Board sent petitioner a Notification of Probable Cause to Fine and ordered petitioner to pay civil penalties, attorney's fees, and costs.

By letter to the Board dated 2 October 2012, petitioner requested an administrative hearing to contest the fraudulent misrepresentation charges. On 3 October 2012, the Board responded to petitioner by letter providing notice that an administrative hearing had been scheduled for 22 October 2012. The hearing took place as scheduled.

Following the 22 October 2012 hearing, the board issued its Final Decision on 6 November 2012. Among the conclusions issued by the board were the following:

> 10. Petitioner must comply with the statutes and administrative rules concerning barber shops, barbering services and use of a barber pole.
>
> 11. The preponderance of the evidence established that it [sic] the Board properly cited Petitioner for misrepresenting itself as a barber shop or barber salon when it failed to have a barber shop permit and a licensed barber at each of its franchise locations in Cary and Raleigh.

The Board then ordered petitioner to "pay one thousand dollars ($1,000.00) in civil penalties for fraudulent misrepresentations concerning attempts to barber and provide barber services without a shop permit and a licensed barber on the premises at the Cary and Raleigh locations[, five hundred dollars ($500.00) per location,]" and to "pay one thousand six hundred fifty dollars ($1,650.00) in attorney's fees and costs for services rendered by the Board Counsel and staff."

On 3 December 2012, petitioner filed a Petition For Judicial Review in Wake County Superior Court seeking review of the Board's Final Decision. After numerous motions by both sides attempting to settle the record, on 26 April 2013, respondent filed a Motion To Dismiss Petition For Judicial Review on the basis that petitioner failed to "specifically state the grounds for exception[.]" Respondent's motion to dismiss came on to be heard with the motions to settle the record on 3 May 2013. Following the hearing, the trial court filed an order denying respondent's motion to dismiss.

Respondent's Petition For Judicial Review came on to be heard in Wake County Superior Court before the Honorable Howard E. Manning, Jr., on 4 September 2013.

In an Order On Petition For Judicial Review filed 11 September 2013, the trial court affirmed the Board's Final Decision in part and reversed in part. Specifically, the trial court found the Board's findings to be supported by substantial evidence and found the board's conclusions to be supported by the findings of fact and the whole record. The trial court also made the following more specific findings:

> 4. The Court affirms in part Paragraph 1 of the Order portion of the Final Agency Decision which holds that

Petitioner's businesses, The Barber Shop – A Hair Salon For Men, were providing barber services without a barber shop permit and a licensed barber on the premises at Respondent's Cary and Raleigh locations.

5. The Court affirms in part the Final Agency Decision, which holds that Petitioner is not allowed to use or display a barber pole for the purpose of offering barbering services, and Petitioner is ordered to remove the barber pole unless licensed by Respondent Board.

6. The Court affirms in part the Final Agency Decision which holds that Petitioner's businesses, advertising of its services as a barber shop is a misrepresentation and confusing and deceptive to the consuming public, and Petitioner is ordered to remove and cease such advertisements unless licensed by Respondent Board.

7. The Court reverses in part the Final Agency Decision in its imposition of fines because the Court concludes that Respondent Board does not have the statutory authority to impose fines on persons or entities not licensed by the Board.

8. The Court reverses in part the Final Agency Decision in its imposition of attorney fees and costs for services rendered by the Board Counsel and staff because the Court concludes that Respondent Board does not have the statutory authority to impose such fees and costs on persons or entities not licensed by the Board.

Based on these findings, the trial court ordered the imposition of civil penalties and the award of attorney's fees and costs for services be reversed. Both petitioner and respondent appealed.

II. Discussion

"When reviewing a superior court order concerning an agency decision, we examine the order for errors of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, __ N.C. App. __, __, 741 S.E.2d 315, 318 (2012) (quotation marks and citations omitted).

A. Petitioner's Appeal

[1] The sole issue raised on appeal by petitioner is whether the trial court exceeded the permissible scope of review when it ordered him to remove the barber pole and cease advertising barber services unless licensed by the Board. Petitioner contends the trial court did and that those portions of the trial court's order must be reversed. We agree.

N.C. Gen. Stat. § 150B-51 governs the scope of judicial review of an agency decision. It provides in pertinent part:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51 (2013).

Pursuant to N.C. Gen. Stat. §§ 86A-5 & -27, the Board has the power to assess civil penalties. *See* N.C. Gen. Stat. § 86A-5(a)(6) (2013). The

Board does not, however, have the power to issue injunctions. Thus, in accordance with its powers, the Board did not enjoin petitioner, but simply found petitioner was properly cited for fraudulent misrepresentations and ordered petitioner to pay civil penalties, attorney's fees, and costs.

As detailed more fully above, petitioner petitioned the trial court to review the Board's assessment of civil penalties, attorney's fees, and costs. Upon reviewing the case, the trial court reversed portions of the Board's Final Decision and held the Board did not have the statutory authority to impose civil penalties, attorney's fees, and costs on non-licensees. The trial court did, however, affirm the Board's conclusions that petitioner was subject to the Barber Act, Chapter 86A of the General Statues, and violated certain rules related to advertising barber services. Yet, in addition to affirming those portions of the Board's Final Decision related to advertising, the trial court ordered petitioner to remove the barber pole and cease advertising barber services unless licensed by the Board.

Defendant now contends the decretal portions of the trial court's order ordering the removal of the barber pole and cessation of advertising barber services were beyond the scope of the trial court's review.

Although the Barber Act provides an avenue for the Board to seek an injunction in superior court, see N.C. Gen. Stat. § 86A-20.1 (2013) ("The Board . . . may apply to the superior court for an injunction to restrain any person from violating the provisions of this Chapter or the Board's rules."), respondent concedes that it did not pursue that avenue, nor raise the issue in the underlying contested case. Nevertheless, citing *In re Alamance County Court Facilities*, 329 N.C. 84, 94, 405 S.E.2d 125, 129 (1991) ("Generally speaking, the scope of a court's inherent power is its 'authority to do all things that are reasonably necessary for the proper administration of justice.' ") (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987)), respondent contends that it was within the inherent power of the court to enjoin petitioner from displaying the barber pole and advertising barber services. We disagree.

Given that N.C. Gen. Stat. § 86A-20.1 provides an avenue for respondent to seek an injunction and respondent did not pursue that avenue, we hold the trial court, acting on its own to issue relief outside the authority of the Board, acted outside the scope of review provided in N.C. Gen. Stat. § 150B-51. The only issues before the trial court for review were those issues decided by the Board – the assessment of civil penalties, attorney's fees, and costs. As a result, we reverse those portions of the

trial court's order that mandate petitioner remove the barber pole and cease advertising barber services.

B. Respondent's Appeal

[2] In respondent's appeal, respondent first argues the trial court erred in its 3 May 2013 order by denying its Motion To Dismiss Petition For Judicial Review. Specifically, respondent contends dismissal was appropriate because petitioner failed to make specific exceptions to the Board's Final Decision.

N.C. Gen. Stat. § 150B-46 governs the contents of petitions for judicial review from final agency decisions. It provides, "[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks." N.C. Gen. Stat. § 150B-46 (2013). This Court has recognized that " '[e]xplicit' is defined in this context as 'characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied.' " *Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 70, 457 S.E.2d 892, 898 (1995) (quoting *Vann v. N.C. State Bar*, 79 N.C. App. 173, 173-74, 339 S.E.2d 97, 98 (1986)). Applying that definition of explicit in both *Gray* and *Vann*, this Court held the trial courts erred in denying the respondents' motions to dismiss because the petitions at issue were not "sufficiently explicit" to allow effective judicial review where the petitioners did not except to particular findings of fact, conclusions of law, or procedures. *Gray*, 119 N.C. App. at 71, 457 S.E.2d at 899, *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98.

Respondent now argues for a similar result in the present case because petitioner did not take exception with specific findings of fact, conclusions of law, or procedures. Respondent claims petitioner made only general assertions of error that fail to meet the required standards of specificity under N.C. Gen. Stat. § 150B-46. We disagree.

Although petitioner did not except to specific findings or conclusions by the Board, petitioner clearly stated exceptions to the Board's Final Decision. These exceptions include the following:

> a. Petitioner is not a licensed or registered barber (hereinafter "a Licensee"), and the Board's powers over individuals who are not Licensees are limited to making a criminal referral alleging a violation of N.C.G.S. § 86A-20, or seeking injunctive relief from the Court as provided for under N.C.G.S. § 86A-20.1. The Board's imposition of fines and costs on Petitioner is beyond the power granted by the General Assembly; the Final Decision is in excess of

the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), the Final Decision must be reversed.

b. Even if N.C.G.S. § 86A-27 applies to individuals who are not Licensees, N.C.G.S. § 86A-27(d) specifically provides that the Board may only impose fees and costs on "the licensee", and Petitioner is not a Licensee. Under the circumstances, imposition of costs and attorney's fees on Petitioner is in excess of the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), the Final Decision must be reversed.

c. N.C.G.S. § 86A-14 provides:

> The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their duties:
>
> . . . .
>
> (5) Persons who are working in licensed cosmetic shops or beauty schools and are licensed by the State Board of Cosmetic Art Examiners.

As the Board recognizes, each of Maybe Someday's locations has a Cosmetic Arts Salon License through Petitioner, and, therefore, in accordance with the provisions of N.C.G.S. § 86A, Petitioner is exempt from the provisions of the Barber Act. Under the circumstances, the Final Decision is in excess of the statutory authority or jurisdiction of the Board, and, in accordance with N.C.G.S. § 150B-51(b)(2), and [sic] it must be reversed.

d. A primary basis for the Board's contention that Petitioner was "attempting to barber by fraudulent misrepresentations" is that Maybe Someday's locations have a "barber pole" in the reception area, without a barber permit for the shop. With respect to the use of the "barber pole", the Board holds that 21 NCAC 06Q.0101 "states that no person shall use or display a barber pole for the purpose of offering barbering services to the consuming public without a barber shop permit." In fact, 21 NCAC 06Q.0101 does not state anything of the sort. The cited section of the North Carolina Administrative Code simply provides

> "[e]very establishment permitted to practice barbering shall display at its main entrance a sign which is visible from the street, and whose lettering is no small[er] than three inches, stating 'barber shop,' 'barber salon,' 'barber styling' or similar use of the designation, 'shop, salon or styling' or shall display a 'barber pole' . . [. .]" Thus, the cited section of the North Carolina Administrative Code imposes obligations on barbers, it does not prohibit any act by individuals who are not Licensees.
>
> . . . .
>
> Under the circumstances, the Final Decision, in accordance with the provisions of N.C.G.S. § 150B-51(b)(2), and/or N.C.G.S. § 150B-51(b)(4), and/or N.C.G.S. § 150B-51(b)(6), must be reversed.

Considering these exceptions in the context of the petition, we find the Petition For Judicial Review "sufficiently explicit" to allow effective judicial review. Thus, we hold the trial court did not err in denying respondent's motion to dismiss.

[3] In the second issue raised by respondent on appeal, respondent argues the trial court erred in concluding that "Respondent Board does not have the statutory authority to impose such fines on persons or entities not licensed by the Board." Upon review of the statutes, regulations, and relevant law, we agree.

Among the powers and duties assigned to the Board is the power "to assess civil penalties pursuant to [N.C. Gen. Stat. §] 86A-27." N.C. Gen. Stat. § 86A-5(a)(6). N.C. Gen. Stat. § 86A-27(a) in turn provides, in pertinent part, "[t]he Board may assess a civil penalty not in excess of five hundred dollars ($500.00) per offense for the violation of any section of this Chapter or the violation of any rules adopted by the Board." N.C. Gen. Stat. § 86A-27 (2013).

A plain reading of N.C. Gen. Stat. § 86A-27(a) reveals no indication that the imposition of civil penalties is limited solely to licensees. In fact, as respondent points out, where portions of the statute are intended to apply exclusively to licensees, the statute unambiguously provides for it; for example, N.C. Gen. Stat. § 86A-27(d), which governs the assessment of attorney's fees and costs in Board proceedings, provides that "[t]he Board may in a disciplinary proceeding charge costs, including reasonable attorneys' fees, *to the licensee* against whom the proceedings were brought." N.C. Gen. Stat. § 86A-27(d) (emphasis added). Where there is

no limiting language in N.C. Gen. Stat. § 86A-27(a), we will not read limiting language into the statute.

Moreover, N.C. Gen. Stat. § 86A-27(c) provides that "[t]he Board shall establish a schedule of civil penalties for violations of this Chapter and rules adopted by the Board." The Board has done so beginning with N.C. Admin. Code tit. 21, r. 6O.0101. As argued by respondent, the rules promulgated by the Board pursuant to the Administrative Procedure Act, Chapter 150B of the General Statutes, indicate that fines may be imposed on non-licensees. *See* N.C. Admin. Code tit. 21, r. 6O.0102 (June 2014) (setting forth a schedule of civil penalties for operating a barber shop without first filing an application for a barber shop license or without a valid permit).

Particularly relevant to this case, the schedule of civil penalties provides that "[t]he presumptive civil penalty for barbering or attempting to barber by fraudulent misrepresentations . . . : 1st offense $500.00." N.C. Admin. Code tit. 21, r. 6O.0107 (June 2014). A subsequent regulation explains that

> [e]xcept as provided in Chapter 86A of the General Statutes, the Board:
>
> (1) will find fraudulent misrepresentation in the following examples:
>
> (a) An individual or entity operates or attempts to operate a barber shop without a permit;
>
> (b) An individual or entity advertises barbering services unless the establishment and personnel employed therein are licensed or permitted;
>
> (c) An individual or entity uses or displays a barber pole for the purpose of offering barber services to the consuming public without a barber shop permit[.]
>
> . . . .

N.C. Admin. Code tit. 21, r. 6Q.0101 (June 2014). Thus, it is clear from the Board rules that civil penalties may be assessed for violations by an "individual or entity", not just against those licensed by the Board.

[4] In response to respondent's argument, petitioner argues that if the Board has statutory authority to impose civil penalties on non-licensees, that authority is unconstitutional because it constitutes a

grant of judicial power to the Board that is not "reasonably necessary" to accomplish the Board's purpose.

North Carolina's Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. As our Supreme Court explained in *State, ex rel Lanier, Comm'r of Ins. v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968),

> The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

Id. at 495, 164 S.E.2d at 166. Our Constitution, however, also provides that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. "Whether a judicial power is 'reasonably necessary as an incident to the accomplishment of the purposes for which' an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred." *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168.

What began as a narrow interpretation of "reasonably necessary" in *Lanier* has since become more liberal, permitting administrative agencies guided by proper standards to exercise discretion in assessing civil penalties. *See In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 381-82, 379 S.E.2d 30, 35 (1989). Applying the less mechanical approach in *In re Civil Penalty*, our Supreme Court upheld a civil penalty imposed by the North Carolina Department of Natural Resources and Community Development for violations of the Sedimentation Pollution Control Act as reasonably necessary. *Id.*

As petitioner states, "[t]he purposes of the Board are to license barbers and to prevent anyone who is not licensed as a barber from practicing barbering." *See* N.C. Gen. Stat. § 86A-1 (2013). As with most agencies, these purposes serve to protect the public.

Now on appeal, petitioner contends the Board has all the tools necessary to accomplish its purposes by referring non-licensees engaged in the practice of barbering for criminal prosecution pursuant to N.C. Gen. Stat. § 86A-20 and seeking to enjoin non-licensees from practicing barbering pursuant to N.C. Gen. Stat. § 86A-20.1. While we recognize that N.C. Gen. Stat. §§ 86A-20 & -20.1 provide means to accomplish the Board's purposes, they are not the exclusive means. As the Court noted in *In re Civil Penalty*, other avenues to prohibit violations, such as injunctions, take time during which irreparable damage may occur. "The power to levy a civil penalty is therefore a useful tool, since even the threat of a fine is a deterrent." 324 N.C. at 381, 379 S.E.2d at 35.

Similarly, in this case we hold that the imposition of civil penalties on non-licensees is reasonably necessary for the Board to serve its purpose of preventing non-licensees from engaging in the practice of barbering.

III. Conclusion

For the reasons discussed above, we affirm the trial court in part and reverse in part.

Affirmed in part; reversed in part.

Judges CALABRIA and ELMORE concur.

LAWSON v. LAWSON

[236 N.C. App. 576 (2014)]

JOHNNIE LEE LAWSON AND BARBARA G. LAWSON, PLAINTIFFS
v.
NOEL LAWSON, HESTER LAWSON JONES, KWAME LAWSON, CLEOTIS LAWSON, JR. AND WIFE, KATRINA LAWSON AND PERRY LAWSON, DEFENDANTS

No. COA14-286

Filed 7 October 2014

1. Real Property—boundary—opinion—referee's report—resolution of complaint

The trial court did not err in a case involving a property boundary by allegedly failing to consider the evidence and give its own opinion and conclusion as to the referee's report. By ordering the referee's report to be entered into judgment as the resolution of plaintiffs' complaint, the trial court signaled its opinion and conclusion that based on the evidence presented, the referee's report was the appropriate resolution of plaintiffs' boundary dispute.

2. Real Property—boundary—referee's report—abandoned issues—competent evidence

The trial court did not err in a case involving a property boundary by concluding that the referee did not err in its findings of fact and conclusions of law. Plaintiffs failed to raise issues 4-10 in their brief, and thus, those arguments were deemed abandoned under N.C. R. App. P. 28(b)(6). Further, the record indicated that the referee's report was supported by competent evidence.

Appeal by plaintiffs from order entered 16 July 2013 by Judge W.O. Smith, III, in Person County Superior Court. Heard in the Court of Appeals 26 August 2014.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for plaintiff-appellants.

The Law Offices of Brian L. Crawford, P.A., by Brian L. Crawford, for defendant-appellees.

BRYANT, Judge.

Where the trial court properly considered the evidence and the referee's findings of fact and conclusions of law, we affirm the decision of the trial court to affirm the referee's report in its entirety.

On 18 November 2010, plaintiffs Johnnie Lee Lawson and Barbara G. Lawson filed a complaint against Noel Lawson, Hester Lawson Jones, Kwame Lawson, Cleotes Lawson, Jr., and wife Katrina Lawson, and Perry Lawson ("defendants"). Plaintiffs brought claims for quiet title and trespass to real property against all defendants, and a claim for destruction of trees against defendant Perry Lawson. Plaintiffs alleged that defendants had trespassed onto, erected buildings and fences on, and removed trees from plaintiffs' property "without consent or permission." On 18 January 2011, defendants answered and counterclaimed for abuse of process, malicious use of process, compensatory damages, and punitive damages.

On 23 March, plaintiffs filed a reply and motion to dismiss defendants' counterclaims. On 24 October, defendants filed a motion for summary judgment. Plaintiffs then filed a motion for reference for appointment of a referee on 28 November, which was granted by order of the trial court on 28 March 2012. The trial court entered an amended order on 24 April after it was determined that the surveyor appointed as the referee had merged with another surveying company.

On 18 June, the referee filed a report which concluded that the placement of the disputed property line was correct as it was currently designated by physical boundary markers and that based on this determination of the property line, defendants had not committed trespass or damage to plaintiffs' property. Plaintiffs timely filed a motion for exceptions to findings of referee on 16 July. Defendants filed a motion for judgment on the pleadings on 21 September.

On 3 October 2012, a hearing was held on plaintiffs' motion for exceptions to findings of referee. In an order entered 16 July 2013, the trial court upheld the findings of the referee and concluded that the plat map generated by the referee should be entered as the judgment and resolution for plaintiffs' complaint. Plaintiffs appeal.

On appeal, plaintiffs raise sixteen issues which can be divided into two central issues: (I) whether the trial court erred by failing to consider the evidence and give its own opinion and conclusion as to the referee's report; and (II) whether the referee erred in its findings of fact and conclusions of law.

I.

[1] Plaintiffs argue that the trial court erred by failing to consider the evidence and give its own opinion and conclusion as to the referee's

report. Specifically, plaintiffs raise three arguments as to whether the trial court: abused its discretion in confirming the referee's report without independently evaluating the evidence and giving its own opinion; erred by failing to make specific findings of fact and conclusions of law in confirming the referee's findings; and erred by failing to make specific findings of fact and conclusions of law during its independent evaluation of the referee's report. As these three issues are closely related and plaintiffs cite little case law in support of them, we address them as a single argument.

Pursuant to our North Carolina Rules of Civil Procedure, "the court may, upon the application of any party or on its own motion, order a reference in the following cases: . . . [w]here the case involves a complicated question of boundary, or requires a personal view of the premises." N.C. Gen. Stat. § 1A-1, Rule 53(a)(2)(c) (2013). Where, as here, a party takes exception to the referee's report,

> it is the duty of the [trial] judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases — use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee's findings in any other way.

Quate v. Caudle, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989) (citation and emphasis omitted). "After conducting this review, the trial court may adopt, modify, or reject the referee's report in whole or in part, remand the proceedings to the referee, or enter judgment." *Gaynor v. Melvin*, 155 N.C. App. 618, 622, 573 S.E.2d 763, 766 (2002) (citations omitted).

> In reviewing the trial court's judgment entered on the referee's report, the findings of fact by a referee, approved by the trial [court], are conclusive on appeal if supported by any competent evidence. Similarly, as the trial court has the authority to affirm, modify, or disregard the referee's findings and make its own findings upon review of the parties' exceptions to the referee's report, different or additional findings by the court are binding on appeal if they are supported by competent evidence. Any conclusions of law made by the referee, however, are reviewed de novo by the trial court, and the trial court's conclusions are reviewed de novo by the appellate court.

Cleveland Constr., Inc. v. Ellis-Don Constr., Inc., 210 N.C. App. 522, 531—32, 709 S.E.2d 512, 520 (2011) (citations and quotation omitted).

Plaintiffs contend the trial court erred by failing to consider the evidence and give its own opinion and conclusion both as to the evidence and the law. We disagree.

In his report, the referee noted that he interviewed plaintiffs and defendants, researched the deed history of plaintiffs' property, and conducted fieldwork of the property. This fieldwork included walking the property to look for physical boundary markers, utilizing both GPS observations and traditional survey methods, noting "numerous signs of continuous long term possession by both the plaintiff and the defendants[,]" and comparing the referee's property measurements to those recorded in deeds held by plaintiffs and defendants. As such, it appears that the referee's findings of fact were based on competent evidence. Moreover, plaintiffs have failed to provide any evidence on appeal to disprove this determination. Although the trial court did not make its own findings of fact in its order upholding the referee's report, it was not obligated to; rather, the trial court could, as it did here, chose to affirm the referee's report in whole. *See id.* As such, the referee's findings of fact, approved by the trial court and supported by the evidence, are binding on appeal.

In reviewing the referee's conclusions of law, the trial court was to consider these conclusions *de novo*. *See id.* The trial court, in its order, made the following conclusion of law: "The Court hereby orders the Report of the Referee entitled 'Final Plat Court[-]ordered Survey for [plaintiffs] and [defendants]' by [the referee] dated June 14, 2012 to be entered into the record as the judgment and resolution for this Complaint." As such, plaintiffs' contention that the trial court was required to give its own separate opinion and conclusion as to the referee's report is without merit.

Here, upon plaintiffs' exceptions to the referee's report, the trial court conducted a hearing and evaluated the evidence. The trial court, by ordering the referee's report to be entered into judgment as the resolution of plaintiffs' complaint, clearly signaled its opinion and conclusion that, based on the evidence presented, the referee's report was the appropriate resolution of plaintiffs' boundary dispute. Moreover, although we cannot rely on a transcript[1] to determine whether the trial court made oral statements of opinion and conclusions of law during

1. Although plaintiffs ordered a transcript of the trial court's hearing to be filed with this Court, a transcript could not be prepared as the court reporter's notes from the hearing were deemed lost. As such, the record on appeal does not contain a transcript of the hearing.

the hearing, it is well-established that "[w]here the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties." *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982) (citations omitted). Accordingly, the trial court did not err in affirming the referee's report as the judgment and resolution for plaintiffs' complaint. Plaintiffs' argument is overruled.

II.

[2] Plaintiffs next argue that the referee erred in its findings of fact and conclusions of law. Specifically, plaintiffs raise thirteen arguments as to whether the referee erred in its findings of fact and conclusions of law regarding the referee's use of physical boundary markers, signs of long-term possession, and research into and use of deeds other than plaintiffs' deed. However, as plaintiffs have failed to raise issues 4-10 in their brief, these arguments are therefore deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

As to plaintiffs' remaining issues contending the referee erred in its findings of fact and conclusions of law, these issues lack merit. As discussed in *Issue I*, the referee's findings of fact are deemed binding on appeal if supported by competent evidence and approved by the trial court. The referee's conclusions of law are reviewed *de novo* by the trial court, and the trial court's conclusions of law are reviewed *de novo* on appeal to this Court. *See Cleveland Constr.*, 210 N.C. App. at 531-32, 709 S.E.2d at 520. Our review finds no error in the conclusions reached by the referee and by the trial court.

Here, the trial court, after conducting a hearing on plaintiffs' exceptions to the referee's report, affirmed the referee's report in its entirety and ordered the referee's plat map to be entered as the judgment and resolution of plaintiffs' complaint. The record indicates that the referee's report was supported by competent evidence and, although no transcript of the hearing was filed, plaintiffs have not shown that the trial court failed to properly review the evidence and the referee's findings of fact and conclusions of law before entering its order affirming and adopting the referee's report in its entirety. As indicated, by ordering the referee's report entered into judgment, the trial court indicated its conclusion that the resolution of the boundary dispute was appropriately resolved by the referee. Accordingly, plaintiffs' argument is overruled.

Affirmed.

Chief Judge McGEE and Judge STROUD concur.

POWER v. POWER

[236 N.C. App. 581 (2014)]

ROSEMARY LYNN GROVE POWER, PLAINTIFF
v.
THOMAS ALFRED POWER, DEFENDANT

No. COA14-249

Filed 7 October 2014

1. Divorce—equitable distribution—potential tax consequences

The trial court was not required to consider potential tax consequences when entering an equitable distribution judgment. Defendant husband failed to present evidence of the potential tax consequences before the close of evidence.

2. Divorce—equitable distribution—valuation—marital cars—opinion testimony

The trial court did not err in an equitable distribution case by excluding defendant husband's Kelley Blue Book values for the marital cars. Although the Kelley Blue Book fell within N.C.G.S. 8C-1, Rule 803(17) as a hearsay exception, defendant was not prejudiced by the omission of such evidence where defendant was permitted to give opinion testimony as to the value of the marital cars.

3. Divorce—equitable distribution—marital property—financial gifts from parent

The trial court did not err in an equitable distribution case by not deducting from the marital estate financial gifts made to plaintiff wife and defendant husband from defendant's father. Defendant failed to show that the monetary gift to the marital couple was not marital property.

Appeal by defendant from equitable distribution judgment entered 28 August 2013 by Judge Christine Walczyk in Wake County District Court. Heard in the Court of Appeals 26 August 2014.

Allen & Spence, PLLC, by Scott E. Allen, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

BRYANT, Judge.

Where defendant failed to present evidence of potential tax consequences before the close of evidence, the trial court was not required

to consider those potential tax consequences when entering an equitable distribution judgment. Although the Kelley Blue Book falls within Rule 803(17) as a hearsay exception, defendant was not prejudiced by the omission of such evidence where defendant was permitted to give opinion testimony as to the value of the marital cars. Where defendant failed to show that a monetary gift to the marital couple was not marital property, the trial court properly considered that money as part of the marital assets.

On 2 July 2012, plaintiff Rosemary Lynn Grove Parker filed a complaint against defendant Thomas Alfred Power seeking equitable distribution, divorce from bed and board, and a temporary restraining order to prevent defendant from wasting marital assets. Defendant answered and counterclaimed for alimony and post-separation support, equitable distribution, and expenses and attorneys' fees.

On 21 May 2013, plaintiff and defendant filed a joint dismissal in which plaintiff dismissed her claim for divorce from bed and board and defendant dismissed his claim for alimony and post-separation support.

A hearing on the parties' competing equitable distribution claims was held on 8 April 2013 in Wake County District Court, the Honorable Christine Walczyk, Judge presiding. On 28 August, the trial court entered a judgment for equitable distribution between the parties. Defendant appeals.

On appeal, defendant raises three issues as to whether the trial court erred in: (I) not considering the tax consequences arising from its equitable distribution judgment; (II) in excluding defendant's Kelley Blue Book values for the marital cars; and (III) in not deducting from the marital estate financial gifts made to plaintiff and defendant.

I.

[1] Defendant argues that the trial court erred in not considering the tax consequences arising from its equitable distribution judgment. We disagree.

> Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. The distribution of marital property is vested in the discretion of the trial courts and the exercise of that discretion will not be upset absent clear abuse. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.

Robinson v. Robinson, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations, quotations, and parentheses omitted).

Defendant contends the trial court erred in not considering the tax consequences of its equitable distribution judgment. Specifically, defendant argues that pursuant to N.C. Gen. Stat. § 50-20(c), the trial court was required to consider tax consequences prior to making its judgment.

North Carolina General Statutes, section 50-20, holds that:

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:
>
> . . .
>
> (11) The tax consequences to each party . . . . The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

N.C.G.S. § 50-20(c)(11) (2013). However, a trial court must consider *all* of the distributional factors in N.C.G.S. § 50-20(c) only when a party presents evidence that an equal distribution would be inequitable. *Embler v. Embler*, 159 N.C. App. 186, 189, 582 S.E.2d 628, 631 (2003) (emphasis added) (citations and quotation omitted).

In its pre-trial order, the trial court noted that both parties had raised contentions, including tax consequences, as to why an equal division of marital assets would not be equitable. However, during the equitable distribution hearing, neither party presented any evidence regarding potential tax consequences caused by an equal distribution. In fact, the record shows that defendant only raised the issue of tax consequences as to a single marital account, a Scottrade account, at the end of the hearing:

> [DEFENDANT]: Does Your Honor also consider that Scottrade account? I shouldn't be penalized with all the tax burden on that if you're weighing the cash-out values.
>
> THE COURT: I'm going to consider -- I mean, you guys didn't put on any evidence about tax consequences, but

> I'm going to consider the liquid or nonliquid nature of assets when I do the division.
>
> [DEFENDANT]: Okay.

As defendant failed to present evidence during the hearing regarding potential tax consequences caused by an equal distribution, the trial court did not err in failing to consider tax consequences in awarding an equitable distribution. *See id.*

Defendant further argues that the trial court erred in not considering the potential tax consequences of its equitable distribution judgment because defendant sent to the trial court, after the equitable distribution hearing, an email challenging plaintiff's proposed equitable distribution order. In his email, defendant asked the trial court to address "a few discrepancies" and to "consider[] the tax consequences on the Defendant's behalf." Plaintiff immediately objected to defendant's email, and the trial court did not respond to either party. In its equitable distribution judgment, the trial court did not make any findings of fact as to tax consequences created by an equal distribution and concluded as a matter of law that "[a]n equal distribution of marital and divisible property is equitable."

Defendant's argument that he offered evidence concerning potential tax consequences to the trial court is without merit, as defendant's email was sent after the close of evidence. *See Wall v. Wall*, 140 N.C. App. 303, 312, 536 S.E.2d 647, 653 (2000) ("The trial court is not required to consider tax consequences unless the parties offer evidence about them. Defendant may not now ascribe error to the trial court's failure to make such findings without demonstrating that such evidence was brought to the trial court's attention before the close of evidence. Defendant has the burden of showing that the tax consequences of the distribution were not properly considered, and he has failed to carry that burden."). Accordingly, the trial court acted within its discretion in ordering an equitable distribution judgment that did not address tax consequences. Defendant's argument is overruled.

II.

[2] Defendant next argues that the trial court erred in excluding defendant's Kelley Blue Book values for the marital cars.

During the equitable distribution hearing, the trial court permitted plaintiff to testify as to the value of the two marital cars. Plaintiff testified that she believed the value of her car to be about $3,500.00, based on existing mechanical and cosmetic issues with the car and based on an

appraisal of the car by Carmax. Plaintiff then testified that she believed the value of defendant's car to be somewhere between $2,673.00 and $2,773.00, based on the Kelley Blue Book. Defendant did not object to plaintiff's testimony.

When defendant testified as to the value of the marital cars, he sought to admit into evidence copies of the Kelley Blue Book values of the cars. The trial court sustained plaintiff's objection to this evidence, stating it was "hearsay information" and that defendant could "tell me what your opinion is about the value of the car, but you can't show me the Blue Book value." Defendant then gave his opinion that plaintiff's car was worth $7,197.00 and his own car $3,001.00, based on the Kelley Blue Book values.

Defendant contends the trial court erred in refusing to admit his evidence of the cars' Kelley Blue Book values and that this "preclusion of [defendant's] opinion evidence substantially prejudiced [him]." This Court has previously held that the Kelley Blue Book falls within Rule 803(17) as a hearsay exception for market reports. *See State v. Dallas*, 205 N.C. App. 216, 220, 695 S.E.2d 474, 477 (2010) ("Rule 803(17) of the Rules of Evidence provides that [m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations are not excluded by the hearsay rule. We hold that both the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception."). As such, the trial court erred in refusing to admit defendant's Kelley Blue Book values as evidence.

However, even though the trial court erred in not admitting this evidence, defendant has failed to show how this error "substantially prejudiced" him. The record indicates that plaintiff and defendant each gave opinion testimony as to the value of the two marital cars, including each party noting that they consulted the Kelley Blue Book in determining the cars' values. Defendant did not offer additional testimony regarding the condition of the cars, other than the Kelley Blue Book values, nor did defendant contest plaintiff's evidence concerning the cars' conditions and values. As such, defendant was not prejudiced because the trial court heard and weighed the testimony of both parties as to the value of the cars before making its determination that each party should keep its respective car as part of the equitable distribution judgment. *See id.* at 220-21, 695 S.E.2d at 477 (noting that the defendant failed to demonstrate prejudice where the testimony of the witnesses as to the value of several cars was given, considered, and weighed,

even though the testimony varied as to the cars' values). Accordingly, the trial court's error about which defendant argues was not prejudicial to defendant.

III.

[3] Finally, defendant argues that the trial court erred in not deducting from the marital estate financial gifts made to plaintiff and defendant. We disagree.

Pursuant to N.C. Gen. Stat. § 50-20, marital property includes all property "acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property[,]" while separate property includes all property "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C.G.S. § 50-20(b)(1),(2) (2013). "The party claiming a certain classification has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification." *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996) (citation omitted).

During the hearing, defendant argued that the trial court should not consider $51,000.00 as part of the marital estate because that money was given to defendant by defendant's father as a series of gifts. Plaintiff testified that defendant's father had gifted $51,000.00 to her and defendant over a period of time for the purpose of depleting defendant's father's financial interests so he could receive assisted-living care through the government, if needed. When questioned by defendant as to where this money was currently located, plaintiff responded that she did not know where the money was specifically located, other than "[i]t was just all in the funds. . . . I don't know where it's at." Plaintiff also agreed with defendant's assertion that defendant had deposited the funds "into our joint account." Defendant did not offer any evidence as to where the money was located, such as in a separate ear-marked account; rather, defendant only asserted that the funds were a gift to him from his father.

The trial court, in its equal distribution order, noted that: "During the marriage, the parties received regular gifts from the Defendant's father.

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1. We note that the trial court made a typographical error in this finding by stating in its second sentence that "The Plaintiff failed to establish . . . ." A review of the hearing transcript indicates that defendant, not plaintiff, raised the issue of whether the $51,000.00 was in fact marital property. As defendant failed to establish that this money was not marital property, we therefore correct the trial court's finding as presented above.

The [defendant][1] failed to establish that there were any funds left from these gifts on the date of separation that were separate and apart from the accounts already distributed hereunder."

Even assuming that the $51,000.00 was given as a gift solely to defendant and not as a joint gift to both parties, the evidence showed that these funds were commingled with the parties' marital funds in their joint account. Thus, defendant had the burden of proof "to trace the initial deposit into its form at the date of separation." *Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) (citation omitted).

> Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into its form at the date of separation.

Id. (citations omitted).

Here, defendant failed to present any evidence tracing the gift of $51,000.00 from his father to show where these funds were located as of the date of separation. Therefore, as defendant failed to prove that the aggregate sum of $51,000.00 was not marital property, the trial court did not err in refusing to classify these funds as defendant's separate property. Accordingly, defendant's argument is overruled.

Affirmed.

Judges McGEE and STROUD concur.

STATE v. EDMONDS

[236 N.C. App. 588 (2014)]

STATE OF NORTH CAROLINA
v.
JOHN BURTON EDMONDS, JR., DEFENDANT

STATE OF NORTH CAROLINA
v.
JAMES RYAN EDMONDS, DEFENDANT

No. COA 14-158

Filed 7 October 2014

1. Evidence—hearsay—witness relating detective's statements—not offered for truth of the matter stated

Defendant James Edmonds argued that the trial court erred by overruling his objection to the testimony of a witness about statements that a detective had made to the witness because the testimony constituted inadmissible hearsay. However, the testimony was merely offered to illustrate how the detective purportedly influenced the witness into making a statement and was not offered for the truth of the matter asserted (that Detective Briggs believed defendant James committed the robbery). Even assuming that the testimony was inadmissible hearsay, defendant did not argue that he was prejudiced by its admission.

2. Evidence—questions containing facts not in evidence—no prejudice

The trial court did not err by failing to declare a mistrial ex mero motu where defendant contended that the State was allowed to ask questions containing facts not in evidence, thereby putting prejudicial hearsay before the jury. Defendants' motion in limine was denied; there was nothing in the record to indicate that the prosecutor's questions were asked in bad faith; and the trial court sustained objections, struck one question from the record, and issued a curative instruction.

3. Witnesses—cross-examination—limited—verdict not improperly influenced

The trial court's limiting of defendant's cross-examination of a State's witness did not constitute reversible error where defendant did not establish that the cross-examination improperly influenced the verdict.

4. Sentencing—colloquy with defendant—not held—harmless error

Defendant was not entitled to a new sentencing hearing where the trial court failed to address him personally and conduct the colloquy required by N.C.G.S. §§ 15A-1022.1(b) and -1022.1(a)(2013), but the error was harmless because defendant did not object or present any argument or evidence contesting the sole aggravating factor.

5. Judgments—clerical errors—remanded for correction

Clerical errors in defendant's Judgment and Commitment form were remanded for correction, correcting defendant's Prior Record Level from II to IV and correcting the amount of attorney's fees owed from $13,004.45 to $6,841.50.

Appeal by defendants from judgments entered 25 July 2013 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 27 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Heather Freeman, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant James Ryan Edmonds.

Russell J. Hollers III, for defendant John B. Edmonds.

ELMORE, Judge.

On 5 March 2012, the Buncombe County grand jury returned bills of indictment against defendant John Burton Edmonds, Jr. ("defendant John") for robbery with a dangerous weapon in 11 CRS 64719, and against his son, James Ryan Edmonds ("defendant James") for robbery with a dangerous weapon in 11 CRS 64716. On 18 April 2013, the State filed a Motion for Joinder, requesting that the trial court join the cases for trial. The motion was granted and the case came on for trial on 5 June 2013. The jury found both men guilty of robbery with a dangerous weapon. Defendant John admitted the aggravating factor that he committed the offense while on pretrial release, and he was sentenced to 97 to 129 months imprisonment with a 28-day credit. Defendant James also admitted that he committed the offense while on pretrial release. He was sentenced to 73 to 100 months imprisonment with a 10-day credit. Both defendant John and defendant James (collectively "defendants") now

appeal their convictions. After careful consideration, we find that defendant John received a trial free from error and defendant James received a trial free from prejudicial error. However, we remand for a correction of clerical errors in defendant John's Judgment and Commitment form.

I. Background

At trial, the State called Leslie Pruitt, customer service manager at Forrest Hills Commercial Bank. Ms. Pruitt testified that in September 2011, defendant John opened a bank account at Forrest Hills Commercial Bank that was funded by loan proceeds in the amount of $65,000.00. Ms. Pruitt testified that after this account was opened, large amounts of cash were withdrawn daily until the account was overdrawn. The bank's fraud detection system flagged the account as "a suspect of suspicious activity." Ms. Pruitt tracked the account activity and recommended it be closed. In November 2011, Forrest Hills Commercial Bank closed the account.

Anne Garrett, customer service representative at Forrest Hills Commercial Bank, testified that she was familiar with defendant John because he frequented the bank and called "all of the time" regarding his account. On 7 December 2011, one day before the robbery, defendant John and defendant James arrived together at the bank at 1:33 p.m. Ms. Garrett testified that the men approached her desk and defendant John took a seat. The surveillance video showed that defendant James stood to the side of Ms. Garrett's desk before moving behind it. Ms. Garrett testified that she particularly remembered defendant James that afternoon because he encroached on the personal space behind her desk.

On 8 December 2011, the day of the robbery, Ms. Garrett saw defendant John enter the bank on three separate occasions. At 11:00 a.m., defendant John first entered the bank and paced the lobby while talking on his cell phone. He did not speak to any bank employee. According to Ms. Garrett, it was customary for defendant John to be on his phone when he entered the bank. At 12:20 p.m., defendant John entered the bank once more. He adamantly asked bank personnel to open an account for him. He left after being informed that he could not open an account. Ms. Garrett testified that defendant John entered the bank for a third time at approximately 1:20 p.m. Defendant approached Ms. Garrett's desk, and she opened her cash drawer to put her work away. Defendant John took a seat despite the fact that Ms. Garrett was on the phone and there were other customer service representatives available to assist him. Shortly after defendant John sat down, Ms. Garrett testified that the bank door flung open and a masked man brandishing a gun

ran directly to her with "no hesitation at all." The robber grabbed Ms. Garrett's cash drawer—forcing her hands off of it. He took the cash and ran out the door.

In a statement made to Detective Kevin Briggs after the robbery, Ms. Garrett noted that the robber wore a blue mask and was about 5'7" tall. She also stated she believed the gun was fake because it had an orange cap. At trial, Ms. Garrett testified that she no longer thought the gun was fake. Ms. Garrett testified that the robber's build resembled defendant James'. She testified, "[a]s soon as everything happened and we closed the doors, I said that's [] John's son." Ms. Garrett also recognized that the robber wore the same shoes that defendant James had worn to the bank the previous day.

Sergeant Mark Allen with the Town of Biltmore Police Department testified on behalf of the State at trial. On 8 December 2011, Sergeant Allen responded to a bank robbery at Forest Hills Commercial Bank at approximately 1:22 p.m. As he approached the bank, defendant John was leaving. Sergeant Allen ordered him to stop. Defendant John informed Sergeant Allen that he was a patron of the bank and that it had just been robbed. Defendant John stated that he chased the robber out of the bank, that the robber was Hispanic, wore a black shirt and black mask, and fled across the parking lot into the wooded area behind the bank. Based on the information defendant John provided, Sergeant Allen set up a perimeter and radioed for a tracking K-9 unit.

After viewing the surveillance video of the robbery, Sergeant Allen named defendant John a suspect because (1) the direction defendant John said the robber fled did not match the video, (2)the robber's mask was not black, and (3) defendant John acted eager to leave the scene.

Jamie Johnson, defendant James' former girlfriend, testified for the State over defense counsels' objections. Jamie Johnson stated she and defendant James were living together in December 2011, at which time she was eight months pregnant with his child. Jamie Johnson testified that she drove a gold 2001 Mazda Tribute in December 2011, which defendant James frequently borrowed. This testimony was relevant because the bank's surveillance video from 8 December 2011 showed a gold Mazda Tribute pass defendant John in the bank's parking lot after the robbery. The same vehicle was shown on the surveillance video on 7 December 2011 after the men left the bank. Jamie Johnson alleged that defendant James frequently borrowed her vehicle and that he had done so on 8 December 2011.

On 7 December 2011 at 1:15 p.m., defendant James sent Jamie Johnson the following text message: "Jamie, if you want me to have money in the morning, I have have [sic] all the gas that's in your car to be able to do everything I have to, so if you run any gas out we really will be f-----." Jamie Johnson alleged that on the evening of 8 December 2011, defendant James and defendant John arrived at her home with $2,000 cash and pills. Jamie Johnson admitted that she was addicted to oxycodone. Jamie Johnson also admitted that she threw defendant James' shoes into the river the following day per his request. Jamie Johnson also stated that defendant James kept a black Taurus revolver in his night stand.

Sergeant John Thomas of the Buncombe County Sheriff's Department testified that he obtained search warrants for defendant James, defendant John, and Jamie Johnson's cell phone records. The records evidence multiple calls between defendants on 8 December 2011, including calls originating at 1:17 p.m., 1:18 p.m., and 1:19 p.m., each utilizing cell towers near the bank. The surveillance video shows the robber entering the bank at 1:22 p.m. The next call between defendants occurred at 1:31 p.m. There were subsequent calls exchanged at 1:36 p.m., 1:46 p.m., 1:52 p.m., and 1:53 p.m.

Beau Dean, a network switch engineer for U.S. Cellular, testified for the State regarding defendants' cell phone usage on the requisite dates. His testimony corroborated Sergeant Thomas' in that defendants exchanged numerous calls on 8 December 2011 while utilizing cell towers in close proximity to the bank.

II. Analysis

A. Objection to Jamie Johnson's testimony

[1] Defendant James argues that the trial court erred in overruling his objection to the hearsay testimony of Jamie Johnson. Specifically, defendant James argues that Jamie Johnson's testimony regarding alleged statements that Detective Briggs made to her constitutes inadmissible hearsay opinion testimony of a law enforcement officer regarding defendant James' guilt. We disagree.

"The North Carolina Rules of Evidence define 'hearsay' as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2013). "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87,

558 S.E.2d 463, 473 (2002). The erroneous admission of hearsay is not always so prejudicial as to require a new trial. *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984).

At trial, Jamie Johnson testified on direct examination for the State as follows:

> Q. On December 9th of 2011, did Detective Briggs attempt to have an interview with you?
>
> A. I think that he came to my house. I think that's the day that he came to my house with my mother and his partner, and they told me that I should leave my house, that it probably wasn't safe and to come down—I think that he wanted me to come down to the station or somewhere and have an interview with him at that point, yeah. And I told him that I would rather wait.
>
> Q. You were nervous and upset, anxious at that time, right?
>
> A. Yes.
>
> Q. Didn't really want to talk to Detective Briggs; isn't that true?
>
> A. No. He had come into my house with my mom. I had told my mom what was going on with the bank robbery. And he called her and, I think, went to her house, and they rode together over to my house. **And he basically told me that [defendant James] robbed a bank, that it was for sure**; and that he had opened up my eyes to a very dangerous man.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.

Defendant James argues it was error for the trial court to overrule his objection to the admission of the above testimony, particularly the statement made by Detective Briggs "that [defendant James] robbed a bank, that it was for sure[.]" Relying on *State v. Turnage*, 190 N.C. App. 123, 129, 660 S.E.2d 129, 133 (2008), defendant notes that law enforcement witnesses are prohibited from expressing an opinion as to defendant's guilt as that would impermissibly invade the province of the jury. Defendant James avers, "[b]y overruling [defendant's] proper objection to inadmissible evidence, the trial judge erroneously allowed the jury to

consider, without limitation, the opinion of a Detective with twenty-two years of experience investigating major crimes[.]"

Defendant James is misguided. Here, it was Jamie Johnson, not Detective Briggs, who was testifying, and Detective Briggs did not advance his opinion as to defendant James' guilt. Nevertheless, on appeal defendant James cites cases, including, *inter alia*, *Turnage*, *supra*, *State v. White*, 154 N.C. App. 598, 572 S.E.2d 825 (2002), and *State v. Carrillo*, 164 N.C. App. 204, 595 S.E.2d 219 (2004), wherein our courts have held it is impermissible for a law enforcement officer to express an opinion as to a defendant's guilt. These cases are not applicable to the situation at bar.

We note that Jamie Johnson's testimony was not offered for the truth of the matter asserted—that Detective Briggs believed defendant James committed the robbery. Thus, Jamie Johnson's statement was admissible as it was merely offered to illustrate how Detective Briggs purportedly influenced her into making a statement in the case. Assuming *arguendo* that Jamie Johnson's testimony constituted inadmissible hearsay testimony, defendant James has likewise neglected to argue that he was in fact prejudiced by the admission of this testimony. *See State v. Hickey*, 317 N.C. 457, 473, 346 S.E.2d 646, 657 (1986) ("The defendant must still show that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed."). Defendant James' argument is overruled.

B. Mistrial

[2] Defendant James argues that "the trial court erred by allowing the State to put prejudicial hearsay before the jury by means of questions containing facts not in evidence." More specifically, the crux of defendant James' argument is best summarized as follows: defendant contends that the trial court erred in failing to declare a mistrial *ex mero motu* in response to acts of prosecutorial misconduct during his trial. We disagree.

A trial court's decision not to intervene *ex mero motu* to declare a mistrial on the basis of a prosecutor's questions to a witness "will not be disturbed on appeal unless the trial court clearly has abused its discretion." *State v. Jaynes*, 342 N.C. 249, 280, 464 S.E.2d 448, 467 (1995). Where a prosecutor's questions are improper, the trial court has the authority to provide a curative instruction to the jury or to declare a mistrial. *See, e.g.*, *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1996). This is true even where, as here, the defendant never asked the trial court to declare a mistrial. *See Jaynes*, 342 N.C. at 280, 464 S.E.2d

at 467 (considering whether there was error in the trial court's failure to declare a mistrial *ex mero motu* on the basis of alleged improper questions by the prosecutor despite the fact that the defendant made no motion for a mistrial).

Here, both defendants joined in a motion in limine prior to trial, each seeking to exclude "all testimony from Jamie Johnson relating to a gun being thrown in a river or her hearing a splash, [and] any mention of the gun in particular[.]" The trial court denied the motion in limine. The State questioned Jamie Johnson as follows:

> PROSECUTOR: State whether or not, Ms. Johnson, you and [Detective Briggs] were talking about a gun?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: Move to strike.
>
> THE COURT: Allowed. Don't consider that, members of the jury, without any further foundation other than what you've got now.
>
> . . .
>
> PROSECUTOR: Did you tell [Detective Briggs] that you had heard the gun being thrown into the river?
>
> MR. SMITH [Attorney for Defendant John]: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: I can't hear you talking when you're walking with your back –
>
> PROSECUTOR: I'm sorry, Your Honor. The time that you were speaking to Detective Briggs, state whether or not you had told him you had heard a gun being thrown into the river.
>
> MR. SMITH: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained.
>
> PROSECUTOR: So if Detective Briggs would have documented that through an audio conversation with you and him and then also now a transcription, which would be

> more correct about you hearing a gun being thrown in the river, what you're saying now or what you said then?
>
> MR. SMITH: Objection.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained. It hasn't been established what she said then.

Defendant James contends that the State's line of questioning "appears to have been a deliberate tactic to inform the jury through questions what could not be proved through admissible evidence" and "[q]uestions that place inadmissible information before the jury are improper."

We disagree. The prosecutor did not place inadmissible information before the jury. Again, we note that defendants' motion in limine was denied. Our Supreme Court has held that "[q]uestions asked on cross-examination will be considered proper unless the record shows they were asked in bad faith." *State v. Lovin*, 339 N.C. 695, 713, 454 S.E.2d 229, 239 (1995). There is nothing in the record to indicate that the prosecutor's questions were asked in bad faith. In addition, the trial court sustained the objections, struck one question from the record, and issued a curative instruction. As such, there was no prejudicial evidence introduced in response to the prosecutor's questions. The trial judge's action in sustaining the objections was sufficient to remedy any harm that resulted from the asking of the questions. *See Jaynes*, 342 N.C. at 280, 464 S.E.2d at 467 (holding that the trial court's actions in sustaining the defendant's objections were sufficient to remedy any possible harm resulting from the mere asking of the three questions by the prosecutor); *cf. State v. McLean*, 294 N.C. 623, 634-35, 242 S.E.2d 814, 821 (1978) (holding that the trial court did not abuse its discretion in denying defendant's motion for mistrial where the trial court sustained defendant's objections to a question by the prosecutor containing improper information and instructed the jury to disregard the question). We overrule defendant James' argument. We note that defendant John advances the same argument on appeal. For the foregoing reasons, we also overrule defendant John's argument.

C. Exclusion of evidence of cell phone use

[3] Defendant James next argues that the trial court's limiting of his cross-examination of the State's witness, Beau Dean, constitutes reversible error. We disagree.

In North Carolina, a "trial court has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citation omitted). The trial court's ruling regarding the scope of cross-examination "will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination." *State v. Woods*, 307 N.C. 213, 221, 297 S.E.2d 574, 579 (1982).

During Beau Dean's cross-examination, defendant John attempted to elicit testimony regarding the total number of cell phone minutes he and defendant James used during the 28 October to 27 November 2011 billing cycle. Defense counsel asked Beau Dean, "how many minutes were used in this billing cycle?" The State objected, and the trial court sustained the objection. On appeal, defendant James contends the trial court erred in sustaining the State's objection to this question because "the outstanding feature of the State's case was the extraordinary frequency of cell phone communications between [defendant John and defendant James] at and around the time of the robbery[,]" and the excluded evidence was therefore relevant to show that the high level of communication by each defendant was not peculiar to the day of the robbery.

Here, both the cell phone records entered into evidence and the testimony of Beau Dean established that defendant James and defendant John used their cell phones to communicate with persons besides each other on 8 December 2011. In addition, two bank employees, Anne Garrett and Judy Price, testified that it was not uncommon for defendant John to be on the phone when he entered the bank. Finally, defendants' cell phone records spanning from 5 December 2011 to 9 December 2011 were entered into evidence. Thus, there was evidence before the jury that illustrated defendants' cell phone usage habits. Defendant James has failed to establish that the trial judge's limitation on Beau Dean's cross-examination improperly influenced the verdict in his case.

D. Admission of aggravating factor

[4] Defendant James argues he is entitled to a new sentencing hearing because the trial court failed to address him personally and comply with the procedures set forth under N.C. Gen. Stat. § 15A-1022.1(b) and N.C. Gen. Stat. § 15A-1022.1(a) (2013). We agree that the trial court erred. However, we hold that the error is harmless.

Under North Carolina's Blakeley Act, codified in N.C. Gen. Stat. § 15A-1022.1 (2013), we recognize that a defendant may admit to the

existence of an aggravating factor or to the existence of a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7) before or after the trial of the underlying felony. N.C. Gen. Stat. § 15A-1022.1(d). In all cases in which a defendant admits to the existence of an aggravating factor, N.C. Gen. Stat. § 15A-1022.1 provides that the trial court shall comply with the provisions of N.C. Gen. Stat. § 15A-1022(a).

Under N.C. Gen. Stat. § 15A-1022(a),

> a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and: (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him; (2) Determining that he understands the nature of the charge; (3) Informing him that he has a right to plead not guilty; . . .

N.C. Gen. Stat. § 15A-1022 (2013). The trial court must also address the defendant personally and advise the defendant that he or she (1) is entitled to have a jury determine the existence of any aggravating factors or points under N.C. Gen. Stat. § 15A-1340.14(b)(7); and (2) has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge. N.C. Gen. Stat. § 15A-1022.1(b) (2013).

During defendant James' sentencing hearing, defense counsel admitted the following statutory aggravator under N.C. Gen. Stat. § 15A-1340.16(d)(12): that defendant James committed the offense while on pretrial release.

> THE STATE: regarding the defendant, James Ryan Edmonds, in 11-CRS-64716, it's been alleged on the indictment returned March the 5th of 2012 for robbery with a dangerous weapon that occurred on or about December the 8th of 2011 that Mr. James Ryan Edmonds committed allegedly the robbery with a dangerous weapon offense while on pretrial release on another charge. Does he admit the existence of the aggravating factor listed on the indictment beyond a reasonable doubt or does he deny the existence of the aggravating factor that he committed—allegedly committed this offense while on pretrial release on another charge?
>
> DEFENSE COUNSEL: Your Honor, . . . we would admit that at the time of the offense [defendant James] was on pretrial release for another offense; again, maintain

innocence in terms of this charge, but we would admit that at the time we were on pretrial release.

. . .

THE COURT: All right. Does [defendant James] waive any further notice of that aggravating factor?

DEFENSE COUNSEL: He would.

THE COURT: Has he had sufficient notice that it exists?

DEFENSE COUNSEL: He has.

THE COURT: And that the State intended to proceed on it?

DEFENSE COUNSEL: He has.

THE COURT: And that if admitting it, it could enhance the punishment against him?

DEFENSE COUNSEL: Yes, sir.

THE COURT: And increase the punishment he could receive?

DEFENSE COUNSEL: Yes, sir.

THE COURT: Does he desire to have a jury determine it?

DEFENSE COUNSEL: No, sir.

The crux of defendant's argument is that his stipulation or admission of the aggravating factor was not made knowingly and voluntarily given that the trial court failed to address him personally and conduct the colloquy required by N.C. Gen. Stat. §§ 15A-1022.1(b) and 15A-1022(a).

We recognize that North Carolina's Blakely Act requires the trial court to address defendants personally, advise them that they are entitled to a jury trial on any aggravating factors, and ensure that their admission is the result of an informed choice. N.C. Gen. Stat. §§ 15A–1022.1(b), (c) (2013). A review of the transcript in the instant case shows that the trial court neglected to follow this procedure. We review such errors for harmlessness. *State v. Blackwell*, 361 N.C. 41, 49, 638 S.E.2d 452, 458 (2006). "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* (citation and quotations omitted).

> The defendant may not avoid a conclusion that evidence of an aggravating factor is uncontroverted by merely raising an objection at trial. *See, e.g.*, *Neder*, 527 U.S. at 19, 119 S.Ct. 1827. Instead, the defendant must bring forth facts contesting the omitted element, and must have raised evidence sufficient to support a contrary finding.

Id. at 50, 638 S.E.2d at 458 (citations and quotations omitted).

Here, the aggravating factor found by the trial judge, not the jury, was that the crime was committed while defendant was on pre-trial release. Defense counsel specifically admitted "that at the time of the offense [defendant James] was on pretrial release for another offense." Defendant James neither objected at trial to this admission nor did he present any argument or evidence contesting the sole aggravating factor. On appeal, defendant James similarly makes no argument that he was not in fact on pretrial release on 8 December 2011. Thus, he has raised no evidence to support a contrary finding of the aggravating factor. We hold that defendant James' failure to object and his failure to present any argument or evidence contesting the sole aggravating factor constitute uncontroverted and overwhelming evidence that defendant committed the present crimes while on pretrial release for another offense. Should this case be remanded to the trial court for a jury determination of this aggravating factor, the State could offer evidence in support of the aggravator "in the form of official state documents and the testimony of state record-keepers." *Id.* at 51, 638 S.E.2d at 459. Accordingly, the Blakely error which occurred at defendant James' trial was harmless beyond a reasonable doubt.

E. Defendant John's argument

[5] Defendant John argues, and the State concedes, that his Judgment and Commitment form contain clerical errors and must be remanded for correction. We agree.

The transcript of defendant John's sentencing hearing shows that the trial judge sentenced him as a Prior Record Level IV offender and ordered him to pay $6,841.50 in attorney's fees. However, defendant John's Judgment and Commitment form incorrectly lists him as a Prior Record Level II offender and states that defendant John owes $13,004.45 in attorney's fees. This sum is the amount of attorney's fees owed by defendant James. Defendant concedes that his sentence of a minimum 97 months and a maximum of 129 months is correct.

Here, the trial court committed a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117-18 (2003) (defining clerical error 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"). "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." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (citations and quotations omitted). Accordingly, we remand for the correction of the clerical errors described above in the Judgment and Commitment form (correcting defendant's Prior Record Level from II to IV and correcting the amount of attorney's fees owed from $13,004.45 to $6,841.50).

III. Conclusion

In sum, the sole error the trial court made in defendant James' trial was harmless error. The trial court did not err in defendant John's trial. However, defendant John's Judgment and Commitment form contains a clerical error. Accordingly, we remand for the correction of the clerical errors described above.

No prejudicial error in part; no error in part; remanded for correction of clerical error.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
DWAYNE ANTHONY ELLIS, DEFENDANT

No. COA14-77

Filed 7 October 2014

Indictment and Information—fatally defective—injury to personal property—owners legal entities capable of owning property

The trial court lacked subject matter jurisdiction over an injury to personal property charge where the information charging defendant with that crime was fatally defective because it failed to allege that the owners of the injured property were legal entities capable of owning property. Defendant's injury to personal property conviction was vacated and the matter was remanded for resentencing on defendant's remaining convictions.

Appeal by defendant from judgments entered 2 August 2013 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

GEER, Judge.

Defendant Dwayne Anthony Ellis appeals from his convictions of felony larceny, injury to personal property, first degree trespass, and possession of stolen property. Defendant's sole argument on appeal is that the information charging defendant with injury to personal property was fatally defective because it failed to allege that the owners of the injured property -- "North Carolina State University (NCSU) and NCSU High Voltage Distribution" -- are legal entities capable of owning property.

Under *State v. Campbell*, ___ N.C. App. ___, 759 S.E.2d 380 (2014), when an indictment alleges that the property at issue has multiple owners, the indictment must also show that each owner is capable of owning property. Because the information fails to allege with respect to the charge of injury to personal property that "NCSU High Voltage

Distribution" is a legal entity capable of owning property, the information is fatally flawed. Accordingly, we vacate defendant's injury to personal property conviction and remand for resentencing on defendant's remaining convictions.

Facts

The State's evidence tended to show the following facts. On 23 April 2011 at around 4:30 a.m., Sergeant Ian Kendrick of the North Carolina State University ("NCSU") Police initiated a traffic stop of a Chrysler 300 with an attached trailer that had exited from a parking lot near an electrical substation. Defendant, the driver of the vehicle, was taken into custody for an unrelated matter. During a pre-impoundment inventory search of the Chrysler, law enforcement officers discovered four large rolls of copper wire and wet, muddy clothing. It was later discovered that the copper wire had been taken from a fenced in area of the electrical substation. Because the copper wire had been cut, it could no longer be used at the electrical substation.

On 12 July 2011 defendant was indicted in case file number 11 CRS 210130 for felony larceny, misdemeanor injury to personal property, and first degree trespass in connection with the 23 April 2011 theft of the stolen copper wire. The same day, defendant was indicted in case file number 11 CRS 211154 for felony possession of stolen goods relating to a separate incident on 14 February 2011. On 23 July 2013, defendant waived the finding and return of an indictment and consented to being tried on superseding informations alleging the same offenses. With respect to each charge in 11 CRS 210130, the State alleged that the copper wire was the personal property of "North Carolina State University (NCSU) and NCSU High Voltage Distribution."

The trial court granted the State's motion to join the two cases for trial, and on 2 August 2013, a jury found defendant guilty of felony larceny, misdemeanor injury to personal property, and first degree trespass in 11 CRS 210130 and of misdemeanor possession of stolen goods in 11 CRS 211154. The trial court consolidated the convictions in 11 CRS 210130 into one judgment and sentenced defendant to a presumptive-range term of six to eight months imprisonment, followed by a consecutive term of 45 days imprisonment for the conviction in 11 CRS 211154. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court lacked subject matter jurisdiction over the injury to personal property charge

because the information was fatally defective in that it failed to allege that "North Carolina State University (NCSU) and NCSU High Voltage Distribution" are legal entities capable of owning property.

It is well settled that a valid indictment alleging all of the essential elements of the offense is required for a trial court to obtain subject matter jurisdiction over the charge. *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005). When, as in this case, the defendant properly waives the indictment, the trial court may proceed on an information, which must "charge the crime or crimes in the same manner" as an indictment. N.C. Gen. Stat. § 15A-923(b) (2013). Although defendant did not challenge the sufficiency of the information below, "[a] challenge to the facial validity of an indictment may be brought at any time, and need not be raised at trial for preservation on appeal." *State v. LePage*, 204 N.C. App. 37, 49, 693 S.E.2d 157, 165 (2010). This Court reviews the sufficiency of an indictment -- or, in this case, an information -- de novo. *State v. Chillo*, 208 N.C. App. 541, 543, 705 S.E.2d 394, 396 (2010).

This Court has previously addressed the requirements for indictments for injury to personal property and the similar crime of larceny:

> To convict a defendant of injury to personal property, the State must prove that the personal property was that "of another," i.e., someone other than the person or persons accused. N.C. Gen. Stat. § 14-160 (2004) ("If any person shall wantonly and willfully injure the personal property of another he shall be guilty . . . ."); *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981). Moreover, "an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v. Downing*, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). Thus, to be sufficient, an indictment for injury to personal property or larceny must allege the owner or person in lawful possession of the injured or stolen property.

State v. Price, 170 N.C. App. 672, 673-74, 613 S.E.2d 60, 62 (2005). Moreover, " '[i]f the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property[.]' " *Id.* at 674, 613 S.E.2d at 62 (quoting *State v. Phillips*, 162 N.C. App. 719, 721, 592 S.E.2d 272, 273 (2004)).

Count II of the information in 11 CRS 210130 alleged that defendant

> unlawfully and willfully did wantonly injure and damage personal property, 228 feet of 350 primary copper wire,

> the personal property of North Carolina State University (NCSU) and NCSU High Voltage Distribution, resulting in damage in excess of $200. This act was done in violation of NCGS § 14-160.

With respect to indictments alleging multiple owners of personal property, as the information did in this case, this Court has recently explained:

> Where an indictment alleges two owners of the stolen property, the State must prove that each owner had at least some property interest in it. *See State v. Greene*, 289 N.C. 578, 585, 223 S.E.2d 365, 370 (1976) ("If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit."); *State v. Burgess*, 74 N.C. 272, 273 (1876) ("If one is charged with stealing the property of A, it will not do to prove that he stole the joint property of A and B."); *State v. Hill*, 79 N.C. 656, 659 (1878) (holding that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners). If one of the owners were incapable of owning property, the State necessarily would be unable to prove that both alleged owners had a property interest. *Therefore, where the indictment alleges multiple owners, one of whom is not a natural person, failure to allege that such an owner has the ability to own property is fatal to the indictment.*

Campbell, ___ N.C. App. at ___, 759 S.E.2d at 384 (emphasis added).

In *Campbell*, the indictment for larceny alleged two owners of the stolen property -- a natural person and "Manna Baptist Church" -- but did not allege that the church was a legal entity capable of owning property. *Id.* at ___, 759 S.E.2d at 384. This Court held that the indictment was fatally flawed and vacated the defendant's conviction for larceny. *Id.* at ___, 759 S.E.2d at 384.

Although *Campbell* involved an indictment for larceny, the same reasoning applies to the information for injury to personal property in this case. *See State v. Lilly*, 195 N.C. App. 697, 702, 673 S.E.2d 718, 721-22 (2009) ("Since this Court has previously held that both larceny and injury to personal property have the same requirement that the indictment allege ownership or lawful possession of the property, we

think the Court's reasoning in [*State v.*]*Liddell*, [39 N.C. App. 373, 250 S.E.2d 77 (1979),] addressing a larceny indictment, applies with equal force in the context of a prosecution for injury to personal property."). Accordingly, we hold that to be sufficient, the information in this case must have shown that both NCSU and "NCSU High Voltage Distribution" are legal entities capable of owning property.

With respect to NCSU, the State argues that it is clear from the information that NCSU is a legal entity capable of owning property. We agree. In *State v. Turner*, 8 N.C. App. 73, 75, 173 S.E.2d 642, 643 (1970), this Court upheld an indictment for larceny that named the " 'City of Hendersonville' " as the owner of the stolen property. The Court took judicial notice of the public act establishing Hendersonville as a municipal corporation and explained that "the words 'City of Hendersonville' denote a municipal corporate entity. Municipal corporations are expressly authorized to purchase and hold personal property." *Id.*

As with the municipality in *Turner*, the legislature has provided, in N.C. Gen. Stat. § 116-4 (2013), that North Carolina State University is a constituent institution of the University of North Carolina, "a body politic and corporate" expressly authorized under N.C. Gen. Stat. § 116-3 (2013) to own property. Thus, we hold that the words "North Carolina State University" sufficiently allege a legal entity capable of owning property.

In contrast to *Turner*, this Court held in *Price* that an indictment for larceny and injury to personal property alleging that the property at issue was owned by " 'City of Asheville Transit and Parking Services,' " without more, was fatally defective. 170 N.C. App. at 674, 613 S.E.2d at 62. The Court distinguished *Turner* "in which 'City of Hendersonville' was sufficient as it clearly denoted a municipal corporation, because the additional words after 'City of Asheville' make it questionable what type of organization it is." *Id.*

Similarly, here, the words "NCSU High Voltage Distribution" do not identify a legal entity necessarily capable of owning property because the additional words after "NCSU" do not indicate what type of organization it is. The information is, therefore, insufficient to show that "NCSU High Voltage Distribution" is a legal entity capable of owning property. *See also State v. Strange*, 58 N.C. App. 756, 757, 294 S.E.2d 403, 404 (1982) (holding indictment for larceny naming owner as "Granville County Law Enforcement Association" was fatally defective).

Because the information failed to allege that one of the owners, "NCSU High Voltage Distribution," is a legal entity capable of owning

property, we hold that the information is fatally defective and vacate defendant's conviction for injury to personal property. Defendant does not, however, challenge any of his remaining convictions on appeal.

We note that the trial court consolidated defendant's conviction for injury to personal property with the other offenses in case file number 11 CRS 210130 and sentenced defendant under the Class H felony of larceny to a presumptive-range term of six to eight months imprisonment. Our Supreme Court has explained that "[s]ince it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). Accordingly, we remand for resentencing on defendant's remaining convictions in case file number 11 CRS 210130.

No error in part; vacated in part; and remanded.

Judges STEELMAN and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JAMES E. FOSTER

No. COA14-187

Filed 7 October 2014

Appeal and Error—preservation of issues—failure to argue constitutional issue at trial—unrecorded bench conferences—appellate review not frustrated

The trial court did not commit prejudicial error in an assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon case when it conducted multiple off-the-record bench conferences. The record did not reflect that defendant raised his constitutional argument before the trial court. Further, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction was without merit.

STATE v. FOSTER

[236 N.C. App. 607 (2014)]

Appeal by defendant from judgment entered 12 August 2013 by Judge Anna Mills Wagoner in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 August 2014.

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

Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where our review is not frustrated, defendant cannot establish that he was prejudiced by the trial court's failure to reconstruct arguments made during unrecorded bench conferences. Accordingly, we find no prejudicial error in defendant's trial.

On 23 May 2011, a Mecklenburg County grand jury indicted defendant on two counts of assault with a deadly weapon with intent to kill inflicting serious injury and two counts of assault with a deadly weapon with intent to kill. A trial commenced on 5 August 2013, in Mecklenburg County Superior Court, the Honorable Anna Mills Wagoner, Judge presiding.

Evidence at trial tended to show that at 2:36 a.m. on 8 May 2011, Charlotte-Mecklenburg Police Department received a 9-1-1 call from 1616 Lynford Drive. Upon arrival, the reporting police officer observed medical personnel outside the residence treating a young male in severe pain. Inside the residence, an adult female was also being attended to by medical personnel. The woman's name was Robin Lewis and the young man was her son, Quinton.[1] While paramedics worked, Lewis stated to the officer that she had been shot by James Foster, defendant. Later that morning, the Charlotte-Mecklenburg Police Department received a 9-1-1 call from 5305 Lyrica Lane informing them that defendant wanted to turn himself in.

Lewis later testified at trial that she had been in a dating relationship with defendant and that the two had lived together for ten months. Lewis had four children—a son, Quinton, another son, and two daughters—who also lived with Lewis and defendant. On the evening of 7 May 2011, Lewis and defendant had an argument that escalated until defendant struck Lewis in the face. Defendant left the home. When he returned, Lewis testified that defendant was intoxicated to the point he vomited on the floor and passed out. Lewis—a licensed practical nurse—became

1. A pseudonym has been used to protect the identity of the minor.

concerned when defendant began sweating profusely. Defendant was a diabetic, and there was a risk defendant could slip into a diabetic coma. Lewis applied ice to cool defendant's body temperature. Defendant remained unconscious for two and a half hours. When defendant awoke, everyone in the residence was awake.

> A. It seems like everything just broke loose. When he first woke up he jumped up saying where's his wallet, where's his keys, somebody took his money, can't find this. . . . [H]e started blaming me. . . . And I was, like, here's your stuff right here.
>
> Q. Where was it?
>
> A. Right there on my bed.
>
> . . .
>
> And he continued to -- I started continuing the conversation about you have to leave.
>
> Q. And how did that go?
>
> A. He said he'd leave and he started grabbing his things, grabbing those steri-lite totes out of the closet, taking them down the steps one by one. . . .
>
> . . .
>
> Q. How was -- what was his response about moving out? Did he become agitated or angry?
>
> A. He became angry.

While defendant moved his things out, Lewis and her children gathered on the landing at the top of the stairs leading from the first to second floor. Defendant was at the bottom of the stairs. Lewis testified that at some point she saw that defendant had a gun. While she was trying to push her children back, she heard a lot of shots, and she felt two sharp pains. Defendant then left the residence, and one of Lewis' daughters called 9-1-1. A handgun was later found on the floor near where defendant had been standing. Quinton suffered from two gunshot wounds: one to his intestines and another to his leg. Lewis also suffered two gunshot wounds to her pelvic region.

At the close of the evidence, the jury found defendant guilty of two counts of assault with a deadly weapon with the intent to kill inflicting serious injury and two counts of assault with a deadly weapon. The

trial court entered a consolidated judgment in accordance with the jury verdicts and sentenced defendant to an active term of 69 to 92 months. Defendant appeals.

On appeal, defendant argues the trial court committed prejudicial error when it conducted multiple off-the-record bench conferences. Specifically, defendant contends that the failure to record bench conferences amounts to a constitutional violation warranting a new trial. We disagree.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2013).

Here, defendant has couched his contention that the trial court failed to record bench conferences as a constitutional due process violation; however, defendant fails to provide any support for this contention. Moreover, the record does not reflect that defendant raised his constitutional argument before the trial court. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal."). Yet despite this initial contention, we note that in his argument defendant cites as his primary authority our Supreme Court's opinion in *State v. Pittman*, 332 N.C. 244, 420 S.E.2d 437 (1992).

In *Pittman*, the defendant moved for a complete recordation of all proceedings including bench conferences. The trial court held unrecorded bench conferences. On appeal, the defendant charged that the failure to record the bench conferences amounted to a constitutional violation. Our Supreme Court analyzed the issue against General Statutes, section 15A-1241. Notably, in the instant case, defendant does not provide any argument that a constitutional violation occurred at trial; therefore, we review only for possible statutory violation.

Pursuant to General Statutes, section 15A-1241,

> [t]he trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;

> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.

N.C. Gen. Stat. § 15A-1241(a) (2013). In *State v. Cummings*, our Supreme Court stated that it "[did] not believe the enactment of this statute by the legislature in 1977 was intended to change the time-honored practice of off-the-record bench conferences between trial judges and attorneys." 332 N.C. 487, 498, 422 S.E.2d 692, 698 (1992). The phrase in subsection (a), " 'statements from the bench[,]' does not include private bench conferences between trial judges and attorneys." *Id.* at 497, 422 S.E.2d at 697. "If, however, a party requests that the subject matter of a private bench conference be put on the record for appellate review, section 15A–1241(c) requires the trial judge to reconstruct the matter discussed as accurately as possible." *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000) (citation omitted); *see also* N.C. Gen. Stat. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made.").

In *Pittman*, the defendant made a pre-trial motion for complete recordation of all proceedings, specifically including bench conferences. *See Pittman*, 332 N.C. at 250, 420 S.E.2d at 440. Our Supreme Court held that "the trial court, having allowed defendant's motion for complete recordation, should have required recordation of all conferences and its failure to do so constituted error. We must now determine whether defendant was prejudiced by this error." *Id.* at 250, 420 S.E.2d at 440. After reviewing what occurred prior to and after the bench conferences, the Supreme Court determined that "[b]ased on the record facts and defendant's failure to specifically allege how he was prejudiced by the lack of complete recordation, we hold that the trial court's failure to require complete recordation was harmless beyond a reasonable doubt." *Id.* at 252, 420 S.E.2d at 441.

Here, defendant filed a pretrial motion "to have the Court Reporter record all phases of the proceedings . . . including pre-trial hearings, voir dire, motions, opening statements, and closing arguments." The trial court granted the motion from the bench prior to the commencement of the jury selection.

> [Prosecutor]: Your Honor, I believe [defense counsel] also has a motion for complete recordation. Obviously we're not opposed to that.

> THE COURT: I'll allow the motion. That's for jury selection and everything; is that right?
>
> [Defense counsel]: Yes, Your Honor. . . .
>
> THE COURT: . . . [T]he Court will allow the motion for complete recordation without objection.

On appeal, defendant *lists* seventeen instances in which the trial court conducted unrecorded bench conferences and states that each unrecorded conference was a violation of the trial court's order. However, defendant *specifically challenges* only two unrecorded bench conferences. Therefore, we focus only on the two bench conferences defendant discusses to determine whether defendant suffered prejudice from the trial court's failure to record or reconstruct them.[2]

In his first challenge, defendant contends he was prejudiced by the lack of any memorialization of the arguments made at a bench conference during the testimony of Detective Bryan Crum. Detective Crum—assigned to the Violent Crimes Division, homicide, of the Charlotte-Mecklenburg Police Department—met victim Robin Lewis at Carolinas Medical Center the morning she was shot. During the State's examination of Detective Crum, the following exchange occurred:

> Q. Did you make contact with Robin Lewis at the hospital?
>
> A. I did. She was in one of the bays in the emergency department. After she was initially taken care of or settled down with the medical staff, I went to speak with her.
>
> Q. And what did she tell you?
>
> A. She told me that basically that something had happened earlier in the night, that a person that she lived with -- and I took a statement from her, -- said that someone had come home and --
>
> [Defense counsel]: Objection, Your Honor, asked to be heard.
>
> THE COURT: Sustained.

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2. Of the remaining fifteen instances, five occurred during jury selection and ten during trial.

> [Prosecutor]: Your Honor, may we approach?
>
> [Defense counsel]: Your Honor, I would ask to be heard on the record since we have –
>
> THE COURT: Just come up here now and afterward we'll do that.
>
> (WHEREUPON, the Court, [both prosecutors], and [defense counsel] conferred off the record. Afterward, the State's examination continued.)
>
> Q. Did you have a chance to observe Robin Lewis physically, what she looked like once you spoke with her?
>
> A. I did.
>
> Q. And what if anything did you notice with regards to any injury?

Here, the trial court's failure to reconstruct the substance of the bench conference for the record was a violation of section 15A–1241(c). *See* N.C.G.S. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made."); *see also Blakeney*, 352 N.C. at 307, 531 S.E.2d at 814.

However, on this record as otherwise recorded, we discern no prejudice in the trial court's failure to reconstruct the substance of the bench conference for the record. The transcript reflects that the trial court sustained defendant's objection to the prosecutor's line of questioning. Following the bench conference, the trial court did not amend its ruling and defendant's objection remained sustained. When the prosecutor's examination resumed, Detective Crum was questioned regarding his personal observations of the victim Robin Lewis rather than her statements to him. From this context, it appears defendant's objection was made on hearsay grounds, and there is no indication that the parties at the bench conference discussed any matter other than the hearsay nature of the prosecutor's examination. Therefore, defendant's argument that appellate review was frustrated by the lack of recordation or reconstruction is without merit.

Defendant also asserts that he was prejudiced by the lack of recordation during a bench conference held during defendant's cross-examination of Robin Lewis.

Q. Well, your blood alcohol level was high, wasn't it?

A. I don't know.

Q. Have you been allowed to see a copy of your medical report?

A. No, ma'am.

Q. If I showed you a copy of your medical report would it help refresh your recollection about what your level of intoxication was?

A. You can show it to me, but I know what my level of intoxication is. I was not intoxicated.

. . .

[Prosecutor]: Your Honor, I would ask to be heard.

THE COURT: All right, come up here.

(WHEREUPON, the Court, [both prosecutors, and defense counsel] conferred off the record.)

THE COURT: I'll sustain your objection. Rephrase your question.

Q. Ms. Lewis, I'm going to ask you in terms of how much you had to drink that night, you're aware that the hospital took your blood; correct?

A. Yes, ma'am.

Defendant contends that the substance of the bench conference cannot be ascertained from the context of the examination and as such, appellate review is frustrated to his prejudice. Again, we disagree.

Defendant attempted to present Lewis with her medical report from the hospital prepared on the night of her shooting. Specifically, defendant asked, "If I showed you a copy of your medical report would it help *refresh your recollection* about what your level of intoxication was?" Lewis responded, "I know what my level of intoxication [was]." The prosecutor then asked to be heard, and during the bench conference, apparently, lodged an objection. While the exact content of the conference is unclear, it is quite apparent that the document defendant wished the witness to examine was not needed to refresh her recollection and, therefore, would not be proper cross-examination material. *See* N.C. Gen. Stat. § 8C-1, Rule 803(5) (2013) ("Recorded Recollection"). A

recorded recollection, as defined by our Rules of Evidence, is "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable [her] to testify fully and accurately[.]" *Id.* § 8C-1, Rule 803(5).

> Under present recollection refreshed, the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch, and [she] testifies from [her] memory so refreshed. The evidence presented at trial comes from the witness' memory, not from the aid upon which the witness relies[.]

State v. Ysut Mlo, 335 N.C. 353, 367, 440 S.E.2d 98, 104 (1994) (citations and quotations omitted).

After the conference, the trial court sustained the objection on the record and had defendant re-phrase the question. Robin Lewis then testified unequivocally, "I know what my level of intoxication [was]. I was not intoxicated." Lewis did not indicate that her memory was insufficient. Therefore, presentation of the medical report was not appropriate as either past recollection recorded or present recollection refreshed. *See* N.C.G.S. § 8C-1, Rule 803(5); *Ysut Mlo*, 335 N.C. at 367, 440 S.E.2d at 104. Given the context, our review of the trial court's ruling is not frustrated. We see no error in the trial court's ruling that sustained the prosecutor's objection to an improper question. Accordingly, defendant's arguments are overruled.

No prejudicial error.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
SANTONIO THURMAN JENRETTE

No. COA13-1353

Filed 7 October 2014

1. Criminal Law—joinder—multiple charges, victims, counts—transactional connection

The trial court did not abuse its discretion by granting the State's motion for joinder of all 12 of the offenses for which defendant was charged. The events were factually related even though they occurred over a period of two months and the transactional connection between these events was sufficient to support joinder.

2. Homicide—instructions—multiple theories—any error cured by verdict sheet

There was no plain error in the trial court's instructions to the jury regarding first-degree murder where defendant contended that the jury could have construed the not guilty mandate as applying solely to the theory of lying in wait as opposed to the overall charge of first-degree murder. While the instruction was not worded with perfect clarity, any confusion stemming from the trial court's instructions was remedied by the verdict sheet.

3. Homicide—instructions—lying in wait—any error cured by other theories

Any error in a first-degree murder prosecution in an instruction on lying in wait would not have affected convictions on the theories of premeditation and deliberation and felony murder.

4. Criminal Law—instructions—verdict sheets—multiple charges, victims, counts—no plain error

There was no plain error in a prosecution involving two murders and other offenses where defendant argued that the trial court erred by failing to instruct the jury to consider each offense individually. The trial court's instructions, along with the verdict sheets, made clear to the jury the number of charges, victims, and counts.

5. Homicide—instructions—felony murder—underlying assaults—only one required

There was no plain error in a felony murder instruction in a prosecution involving numerous charges surrounding two murders

where defendant argued that the jury was not told which assault could be the basis for the felony murder charge. Only one felony is required to support a felony murder conviction.

6. Homicide—instructions—felony murder—second conviction —no prejudice

Any error in the trial court's decision to instruct the jury on felony murder did not affect defendant's conviction for the first-degree murder of his second victim on a theory of premeditation and deliberation.

Appeal by defendant from judgments entered 3 July 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 9 April 2014.

Roy Cooper, *Attorney General*, *by Marc X. Sneed*, *Assistant Attorney General*, *for the State.*

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

Santonio Thurman Jenrette ("Defendant") appeals from his convictions of two counts of first-degree murder, possession with intent to sell and/or deliver cocaine, two counts of possession of a firearm by a felon, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and two counts of conspiracy to commit first-degree murder. On appeal, he contends that the trial court erred in (1) granting the State's motion to join all of the charges against him for trial; (2) failing to provide an adequate not guilty mandate at the conclusion of its jury instructions as to one of the first-degree murder charges; (3) instructing the jury on a charge of first-degree murder based on the lying in wait doctrine; (4) failing to adequately distinguish between the separate offenses with which Defendant was charged in its jury instructions; and (5) instructing the jury on a charge of first-degree murder based on the felony murder doctrine where there was insufficient evidence of the predicate felonies. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 21 September 2007, a confrontation took place between

Connail Reaves ("Reaves") and Eugene Williams ("Williams") at a high school football game in Columbus County, North Carolina between East Columbus High School and Whiteville High School. Williams and Reaves were members of two rival gangs with a history of animosity toward each other. Williams was a member of the "Chadbourne Boys" and Reaves — like Defendant — was a member of the "Whiteville Circle Boys." Members of both groups, including Reaves and Williams, were prepared to fight as a result of the confrontation but ultimately backed down due to the presence of law enforcement officers at the game.

After the game, several members of the Chadbourne Boys, including Williams, Darnell Frink ("Frink"), Travis Williams, Jason Williams, and William Inman ("Inman"), went to the stadium parking lot where they ran into Reaves again. Reaves was talking on his cellphone, and when he saw them, he pointed his finger at them as if he was pulling the trigger of a gun. Without engaging Reaves, they got into Jason Williams' Chevrolet Tahoe and drove to a local gas station, Sam's Pitt Stop.

At Sam's Pitt Stop, Williams, Frink, Travis Williams, Jason Williams, and Inman parked in front of a gas pump and were standing around the Tahoe when Jason Williams and Inman noticed a Ford Taurus pulling up toward them with the windows down. Jason Williams saw gun barrels protruding from both the front passenger window and the rear passenger-side window of the Taurus. He yelled "get down" and immediately thereafter occupants of the Taurus — all of whom were wearing ski masks — opened fire on them. Defendant, Reaves, and Defendant's 14-year-old cousin Rashed[1] Delamez Jones ("Jones") were three of the occupants of the Taurus who fired guns.

Inman and Frink were both struck by bullets fired by the masked persons in the Taurus. Frink died as a result of his gunshot wounds. Inman was wounded in his left thigh and was taken to the hospital for treatment. A bystander, Antwan Waddell, was struck by bullets in his left thigh and ankle.

Shortly after the shooting, Sabrina Moody ("Moody") saw a Taurus containing Defendant, Marquell Hunter, and an unknown person pull into Stanley Circle directly in front of her parked car. Moody saw Defendant and the other two men get out of their vehicle, remove guns from the back of the Taurus, and then quickly run across the street in order to place the guns inside another vehicle.

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1. The trial transcript at times spells Rashed as "Rasheed." Both spellings, however, refer to the same person.

The Taurus was found burning in a field off of Prison Camp Road later that night. It was ultimately identified as a car belonging to Johnny Sellers ("Sellers"), a used car salesman, that had been stolen along with Sellers' .25 caliber semi-automatic pistol from the dealership lot the evening of the shooting.

The following evening, Defendant and Reaves were driving a black Acura when they were pulled over by Officers Donald Edwards ("Officer Edwards") and Edward Memory ("Officer Memory") of the Whiteville Police Department because the rear taillight of the Acura was not working. Upon inspecting the backseat of the vehicle where Reaves was sitting, Officer Edwards observed two pistols between Reaves' legs. Defendant and Reaves were removed from the vehicle, and the firearms were seized.

Officer Donnie Hedwin ("Officer Hedwin") of the Whiteville Police Department, who had arrived on the scene, patted down Defendant, handcuffed him, and placed him in the backseat of Officer Memory's patrol car. However, while the officers were securing the scene, Defendant managed to force open the door of Officer Memory's car and escape unobserved.

Upon searching the backseat of Officer Memory's car after Defendant had escaped, Officer Edwards discovered two baggies containing a substance that was later identified as cocaine wedged underneath the seat. A .45 caliber pistol recovered from the Acura was identified as the same weapon used in the shooting at Sam's Pitt Stop.

On 19 November 2007, approximately two months after the shooting, Defendant, who was still at large, took Jones out to the woods in a car he had borrowed from a woman named Rebecca White on the pretext of getting in some "target practice." While in the woods, Defendant shot Jones five times, killing him. Defendant then left Jones' body in the woods after wedging it under several nearby wooden pallets. The next day, Jones' mother and aunt, who were searching for Jones, saw Defendant walking along the side of the road. When Jones' mother asked him whether he had seen Jones, Defendant "just kept walking, he wouldn't look at [her]." On 5 December 2007, Jones' body was discovered in the woods off of Barney Tyler Road in Hallsboro, North Carolina.

Defendant fled to Gary, Indiana, where he was eventually apprehended and extradited back to North Carolina. Prior to being apprehended, Defendant filmed a video of himself performing a piece of rap music that he had composed. The lyrics of the song mentioned both

the location where Jones' body was found and the manner in which he had been killed.

While in custody pending trial, Defendant told Aaron McDowell ("McDowell"), Defendant's cellmate at the Columbus County Jail, how and why he had killed Jones, explaining that he had done so in order to prevent Jones from revealing Defendant's role in the 21 September 2007 shooting. He also told McDowell he had taken Jones out to a secluded area in Hallsboro to shoot him.

Jeffrey Morton ("Morton"), another inmate in the Columbus County Jail who was incarcerated in the same cell block as Defendant, overheard Defendant talking to a third inmate, Rufus McMillian, about the murder of Jones. Specifically, Morton heard Defendant state that he considered Jones to be "a weak link," that he took Jones "to a wooded area for target practice[,]" and that he "basically . . . smoked a couple of blunts with this young guy and took him out and gave him a pistol and they shot some and then he turned the pistol on him and shot him five or six times."

Defendant was indicted on (1) two counts of possession of a firearm by a felon; (2) the first-degree murder of Frink; (3) two counts of assault with a deadly weapon with intent to kill inflicting serious injury; (4) two counts of conspiracy to commit first-degree murder; (5) the first-degree murder of Jones; (6) first-degree kidnapping; (7) conspiracy to commit first-degree kidnapping; (8) one count of possession with intent to sell and/or deliver cocaine; and (9) possession of a stolen firearm. A jury trial was held in Columbus County Superior Court on 24 June 2013. At the close of all the evidence, the trial court dismissed the charge of possession of a stolen firearm.

Defendant was convicted of all remaining charges except for the charges of first-degree kidnapping and conspiracy to commit first-degree kidnapping. With regard to the murder of Frink, the jury found him guilty on theories of premeditation and deliberation, felony murder, and lying in wait. As to the murder of Jones, the jury found him guilty on theories of premeditation and deliberation and felony murder.

Defendant was sentenced to two consecutive life sentences without the possibility of parole for the murders of Frink and Jones. In addition, he was sentenced to (1) 8-10 months for possession with intent to sell and/or deliver cocaine; (2) 15-18 months for each count of possession of a firearm by a felon; (3) 100-129 months for each count of assault with a deadly weapon with intent to kill inflicting serious injury; and

(4) 189-236 months for each count of conspiracy to commit murder. These sentences were ordered to run concurrently with the sentence imposed for the first-degree murder of Jones. Defendant gave notice of appeal in open court.

Analysis

I. Joinder

[1] Defendant argues that the trial court abused its discretion in allowing all 12 of the offenses for which he was charged to be joined for trial. Specifically, he contends that joinder was improper due to the lack of a sufficient transactional similarity between the 12 charges.

"The motion to join is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent an abuse of discretion. However, if there is no transactional connection, then the consolidation is improper as a matter of law." *State v. Simmons*, 167 N.C. App. 512, 516, 606 S.E.2d 133, 136 (2004) (internal citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 359 N.C. 325, 611 S.E.2d 844 (2005). "On appeal, the question of whether offenses are transactionally related so that they may be joined for trial is a fully reviewable question of law." *State v. Huff*, 325 N.C. 1, 22, 381 S.E.2d 635, 647 (1989) (citation omitted), *vacated on other grounds*, 497 U.S. 1021, 111 L.E.2d 777 (1990).

We have held that

> in ruling upon a motion for joinder, a trial judge must utilize a two-step analysis: (1) a determination of whether the offenses have a transactional connection and (2) if there is a connection, a consideration of whether the accused can receive a fair hearing on the consolidated offenses at trial. . . . In determining whether offenses are part of the same series of transactions, the following factors must guide the court: (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. No single factor is dispositive.

Simmons, 167 N.C. App. at 516, 606 S.E.2d at 136-37 (internal citations and quotation marks omitted).

In the present case, while the charges against Defendant stemmed from a series of events that occurred over the course of approximately two months, they were factually related. The State's evidence tended to

show that Defendant was present during, and participated in, the shooting at Sam's Pitt Stop along with Reaves and Jones. The following night, Defendant and Reaves were pulled over, and two firearms were recovered from their possession, one of which was ultimately shown to have been used in the shooting the previous evening. This evidence shows a direct link between the possession of a firearm by a felon charges and the charges arising directly out of the shooting at the gas station. Furthermore, the discovery of the cocaine forming the basis for the charge of possession with intent to sell and/or deliver cocaine occurred during the course of the traffic stop.

The charges related to the killing of Jones were also transactionally related. In *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *vacated on other grounds*, 494 U.S. 1022, 108 L.Ed.2d 602 (1990), our Supreme Court held that two murders are transactionally related when the second is committed in order to cover up the first. "It is apparent that the second murder in this case was an act connected to the first murder. The second murder was committed to avoid detection for the first murder. This transactional connection supports the consolidation of all the charges for trial pursuant to N.C.G.S. § 15A-926(a)." *Id.* at 421, 373 S.E.2d at 410.

Similarly, the evidence in the present case tended to show that Defendant killed Jones so as to avoid being implicated in the murder of Frink. As such, we are satisfied that the transactional connection between these events was sufficient to support the trial court's granting of the State's motion for joinder of all of these charges. Furthermore, Defendant has failed to offer any persuasive argument why the consolidation of these charges rendered him unable to receive a fair trial on all of the charges against him. *See State v. Bowen*, 139 N.C. App. 18, 29, 533 S.E.2d 248, 255 (2000) (where "[t]here is no evidence defendant was hindered or deprived of his ability to defend one or more of the charges [against him] . . . [t]he trial court's error in joining the offenses for trial was harmless" (internal citation and quotation marks omitted)).

Based on our consideration of the factors set out in *Simmons*, we conclude that the trial court did not abuse its discretion in granting the State's motion for joinder. Therefore, Defendant's argument on this issue is overruled.

II. Not Guilty Mandate

[2] Defendant next contends that the trial court erred in its instructions to the jury regarding the first-degree murder charge as to Frink by failing to adequately instruct the jury of its duty to return a verdict of not guilty if the State failed to establish his guilt beyond a reasonable doubt.

Where, as here, a defendant does "not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." *State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005), *disc. review denied*, 362 N.C. 368, 628 S.E.2d 9 (2006).

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

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

Our Supreme Court has held that "[e]very criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) (citation and quotation marks omitted); *see also State v. McArthur*, 186 N.C. App. 373, 380, 651 S.E.2d 256, 260 (2007). Furthermore, "[i]t is well established that the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *McHone*, 174 N.C. App. at 294, 620 S.E.2d at 907 (citation and quotation marks omitted).

In order to fully understand Defendant's argument on this issue, it is necessary to quote in full the trial court's instructions on first-degree murder with regard to the killing of Frink:

> The defendant has been charged with the first degree murder of Darnell Antonio Frink. Under the law and the evidence in this case it is your duty to return a verdict of either guilty of first degree murder or not guilty. You may find the defendant guilty of first degree murder on either the basis of malice, premeditation and deliberation or under the first degree felony murder rule, or on the basis of lying in wait, or any combination of those three.
>
> First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing

of a human being with malice and with premeditation and deliberation.

First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of an assault with a deadly weapon with intent to kill inflicting serious injury.

For you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt.

First, that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will or spite, as is ordinarily understood, to be sure that is malice, but it also means that condition of the mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.

If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all of the facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. A firearm is a deadly weapon.

Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence, it must be ordinarily be (sic) proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim. If the killing of the intended person would be with malice, then the killing of the different person would also be with malice.

Fourth, that the defendant acted after premeditation; that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.

And, fifth, that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind, which does not mean there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof. It may be proved by proof of circumstances from which they may be inferred, such as lack of provocation by the victim, conduct of the defendant before, during and after the killing, use of grossly excessive force, brutal or vicious circumstances of the killing or the manner in which or means by which the killing was done.

I further charge you that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove three things beyond a reasonable doubt:

First, that the defendant committed the offense of assault with a deadly weapon with intent to kill inflicting serious injury.

I've read this before, but I'm going to go back over it one more time, the elements for assault with a deadly weapon with intent to kill inflicting serious injury are:

First, that the defendant assaulted the victim by intentionally, without justification or excuse, discharging a firearm into a group of people.

Second, that the defendant used a deadly weapon; a firearm is a deadly weapon.

Third, the State must prove the defendant had a specific intent to kill the victim. I remind you, I've already given the instruction twice as to transferred intent, again, that instruction applies as to intent.

And, fourth, that the defendant inflicted a serious injury.

Second, that while committing assault with a deadly weapon with intent to kill inflicting serious injury, the defendant killed the victim with a deadly weapon.

Third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

The defendant has also been accused of first degree murder perpetrated while lying in wait. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant lay in wait for the victim; that is, he waited and watched for the victim in ambush for a private attack on him. It is not necessary that he be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at the time the victim does not know of the assassin's presence, or if he does know, is not aware of his purpose to kill him, the killing constitutes a murder perpetrated by lying in wait. One who lays in wait does not lose his status because he is not concealed at the time he shoots his victim. The fact that he reveals himself or the victim discovers his presence does not permit the murder from being perpetrated by lying in wait. Indeed a person may lie in wait in a crowd as well as being — excuse me, as well as behind a log or a hedge.

Second, that the defendant intentionally assaulted the victim.

And, third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, acause without which the victim's death would not have occurred.

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant assaulted the victim while lying in wait for him and that the defendant's act proximately caused the victim's death, it would be your duty to return a verdict of guilty of first degree murder.
>
> *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

(Emphasis added.)

As quoted above, at the conclusion of the first-degree murder instruction and immediately following the portion of the instruction addressing the theory of lying in wait — which was the third and final theory submitted to the jury regarding this charge — the trial court ended the instruction by giving the following mandate:

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

Defendant asserts that the jury could have construed this not guilty mandate as applying solely to the theory of lying in wait as opposed to applying to the overall charge of first-degree murder as to Frink.

Our Supreme Court addressed the sufficiency of a final not guilty mandate in *Chapman*. In that case, the defendant wounded one passenger of a car and killed another when he fired his rifle into the victims' car from his own vehicle while both vehicles were traveling on the highway. *Chapman*, 359 N.C. at 337-38, 611 S.E.2d at 804-05. The defendant was charged with first-degree murder based on three separate theories — premeditation and deliberation, felony murder based upon attempted first-degree murder, and felony murder based upon discharging a firearm into occupied property. *Id.* at 380, 611 S.E.2d at 831. The defendant claimed that he was entitled to a new trial because the trial court failed to provide a not guilty mandate as to the theory of felony murder based upon attempted first-degree murder. *Id.* at 380, 611 S.E.2d at 830-31.

The Supreme Court acknowledged that the trial court did not instruct the jury that it was their duty to return a verdict of not guilty if the State failed to establish felony murder based upon attempted first-degree murder. However, the Court observed that

> [a]t the conclusion of the trial court's mandate on all three theories of first-degree murder, the trial judge instructed

> the jurors as follows: "If you do not find the defendant guilty of first-degree murder on the basis of malice, premeditation and deliberation and if you do not find the defendant guilty of first-degree murder under the felony murder rule, it would be your duty to return a verdict of not guilty."

Id. In light of the presence of this final mandate at the conclusion of the trial court's overall instructions on the charge of first-degree murder, the Supreme Court concluded that the absence of a not guilty mandate as to one of the three theories submitted did not constitute error. *Id.*

> Because defendant confuses the trial court's instructions on the three separate theories of first-degree murder with instructions on first-degree murder itself, and because the trial court gave a proper mandate at the closure of the first-degree murder instruction, we determine that the trial court instructed the jury that it could find defendant not guilty of first-degree murder. Accordingly, this assignment of error is overruled.

Id.

In *McHone*, upon which Defendant primarily relies in his argument on this issue, the defendant was convicted of robbery with a dangerous weapon and first-degree murder on theories of both premeditation and deliberation and felony murder. *McHone*, 174 N.C. App. at 291, 620 S.E.2d at 905-06. The defendant argued on appeal that the trial court committed plain error by (1) failing to include the option of not guilty of first-degree murder in its final mandate to the jury; and (2) omitting the not guilty option from the verdict sheet for that offense despite including a not guilty option on the verdict sheet for the robbery with a dangerous weapon charge. *Id.*

In our analysis regarding this issue, we set out three factors that must be weighed in determining whether the failure to give an appropriate not guilty mandate rises to the level of plain error.

> We first consider the jury instructions on murder in their entirety in determining whether the failure to provide a not guilty mandate constitutes plain error. . . . The instruction, then, in the absence of a final not guilty mandate, essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by defendant on the

> basis of at least one of the theories. Telling the jury "not to return a verdict of guilty" as to each theory of first degree murder does not comport with the necessity of instructing the jury that it *must or would* return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder.

McHone, 174 N.C. App. at 297, 620 S.E.2d at 909 (internal brackets omitted).

After considering the not guilty mandate, this Court next considered the composition of the verdict sheet submitted to the jury:

> Secondly, we consider the content and form of the first degree murder verdict sheet in determining whether the failure to provide a not guilty mandate constitutes plain error. Here, the trial court initially informed the jury that it was their "duty to return one of the following verdicts: guilty of first-degree murder or not guilty." However, the verdict sheet itself did not provide a space or option of "not guilty." And while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated "if" it found defendant guilty of first degree murder, we repeat our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return — a not guilty verdict.

Id. at 297-98, 620 S.E.2d at 909.

Finally, we stated the need to compare the challenged instruction to the instructions given for other charged offenses:

> Thirdly, we consider the instructions and verdict sheet for the armed robbery/larceny offenses in determining whether the failure to provide a not guilty final mandate for the murder charge constitutes plain error. As to these taking offenses, the trial court judge *did* provide a not guilty mandate. After instructing the jury that it must consider the offense of larceny should they reject the armed robbery, the court properly charged the jury, "If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty as to that charge." Rather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge, the presence of a not guilty final mandate as to the taking offenses

> likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.[2] Likewise, the content and form of the verdict sheet on the taking offenses, which *did* afford a space for a not guilty verdict, also likely *reinforced* the suggestion that defendant must have been guilty of first degree murder on some basis . . . .

Id. at 298, 620 S.E.2d at 909.

This Court has addressed this issue in several cases since *McHone* was decided. In *State v. Wright*, 210 N.C. App. 697, 709 S.E.2d 471, *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011), the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury and first-degree burglary. *Id.* at 699, 709 S.E.2d at 473. During the final mandate on the charge of first-degree burglary, the trial court instructed the jury as follows: "If you do not so find or have a reasonable doubt as to one or more of these things, *you will not return a verdict of guilty of first-degree burglary*." *Id.* at 704, 709 S.E.2d at 476. We determined that this final not guilty mandate was insufficient, reasoning that "the trial court failed to add at the end of the mandate that 'it would be your duty to return a verdict of not guilty.' We have held that the failure to give the final not guilty mandate constitutes error." *Id.*

However, applying *McHone*, we next examined the verdict sheet in order to determine whether the absence of the final not guilty mandate constituted plain error.

> In *McHone*, this Court's plain error analysis centered upon the fact that the trial court *impermissibly suggested* that the defendant must have been guilty of first degree murder on some basis. This Court concluded that the jury instructions in that case constituted plain error. This conclusion was based not only on the importance of

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2. "The versions of *McHone* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online also contains this full sentence. *State v. McHone*, 620 S.E.2d at 909. However, the subject of the sentence is missing from the hard copy of the N.C. Court of Appeals Reports. The N.C. Court of Appeals Reports has only the following incomplete sentence: 'Rather than help correct the failure to provide a similar not guilty mandate with respect to the taking offenses likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder.' *McHone*, 174 N.C.App. at 298, 620 S.E.2d 903."

Gosnell, __ N.C. App. at __, n. 1, 750 S.E.2d at 596, n. 1.

> the jury receiving a not guilty mandate from the presiding judge, *but also on the form and content of the particular verdict sheets utilized in this case.*

Id. at 706, 709 S.E.2d at 477 (internal citations and quotation marks omitted).

Upon inspection of the verdict sheet for the first-degree burglary charge, we determined that the not guilty option had been included therein.

> In the instant case, there was nothing that would support the proposition that the trial court impermissibly suggested that defendant must be guilty of first-degree burglary. The trial court gave the jury a choice of returning a verdict of guilty of first-degree burglary or not returning a verdict of guilty of first-degree burglary if they had a reasonable doubt as to one or more of the elements of the crime. There were no alternative theories that the jury could consider or lesser-included offenses. The verdict sheet for first-degree burglary provided a space for the jury to check "Guilty of First Degree Burglary" or "Not Guilty." Likewise, the verdict sheet for the other offense in this case also included a space for a verdict of guilty or not guilty.
>
> While it was error for the trial court to fail to deliver the final not guilty mandate, this error does not rise to the level of plain error.

Id. at 706, 709 S.E.2d at 477.

In *State v. Gosnell*, __ N.C. App. __, 750 S.E.2d 593 (2013), the trial court instructed the jury on two theories as to which it could find the defendant guilty of first-degree murder — premeditation and deliberation and lying in wait. While its instructions on the lying in wait theory contained a not guilty mandate, no such mandate was given in the portion of the jury instructions relating to the theory of premeditation and deliberation. *Id.* at __, 750 S.E.2d at 595.

In conducting a plain error review, we applied the three-factor test set forth in *McHone* and concluded that

> [t]he verdict sheet provided a space for a "not guilty" verdict, and the trial court's instructions on second-degree murder and the theory of lying in wait comported with

> the requirement in *McHone*. The trial court did not commit plain error in failing to instruct that the jury would or must return a "not guilty" verdict if it did not conclude that Defendant committed first-degree murder on the basis of premeditation and deliberation.

Id. at __, 750 S.E.2d at 596.

In *State v. Jenkins*, 189 N.C. App. 502, 658 S.E.2d 309 (2008), the defendant was charged both with assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury. *Id.* at 503, 658 S.E.2d at 310. While the verdict sheet did contain a not guilty option for the charge of assault inflicting serious bodily injury, it failed to include a not guilty option for the charge of assault with a deadly weapon inflicting serious injury. *Id.* at 504-05, 658 S.E.2d at 311. We held that the defendant was entitled to a new trial because the trial court's not guilty mandate in its jury instructions was "not clear enough to support a verdict sheet that omits a 'not guilty' option . . . ." *Id.* at 507, 658 S.E.2d at 313.

In the present case, the trial court did issue a not guilty mandate at the conclusion of the instruction on first-degree murder as to Frink, stating the following:

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

While the better practice would have been for the trial court to make clear to the jury that its final not guilty mandate applied to all three theories of first-degree murder, this — by itself — is not sufficient to establish plain error. Instead we must examine the second and third factors of the *McHone* test.

With regard to the second factor, we are unable to identify any error in the verdict sheet regarding the first-degree murder charge as to Frink. This portion of the verdict sheet stated as follows:

> ____ 1. GUILTY of FIRST DEGREE MURDER of Darnell Antonio Frink
>
> IF YOU ANSWERED "YES," IS IT:
>
> A. On the basis of malice, premeditation and deliberation?
>
> ANSWER:_____
>
> B. On the basis of the first degree felony murder rule?

ANSWER:_____

C. On the basis of lying in wait?

ANSWER:_____

OR

____ 2. NOT GUILTY

We are satisfied that this portion of the verdict sheet clearly informed the jury of its option of returning a not guilty verdict regarding this charge. Indeed, Defendant does not contend otherwise.

We next turn to the third factor enumerated in *McHone*. It is particularly appropriate to compare the not guilty mandate regarding the first-degree murder charge as to Frink with the analogous mandate regarding the first-degree murder charge as to Jones. This is so because not only were both instructions for the offense of first-degree murder but, in addition, both charges involved more than one theory of guilt upon which Defendant could be convicted.[3] The instruction on the first-degree murder charge as to Jones — with the portions containing a not guilty mandate italicized — stated in pertinent part as follows:

> The defendant has been charged with the first degree murder of Rasheed Delamez Jones.
>
> Under the law and the evidence of this case it is your duty to return one of the following verdicts, either guilty of first degree murder or not guilty.
>
> You may find the defendant guilty of first degree murder either on the basis of malice, premeditation and deliberation or under the first degree felony murder rule, or both.
>
> First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and premeditation and deliberation.
>
> First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of first degree kidnapping.

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3. With regard to both murder charges, the jury was instructed on theories of premeditation and deliberation and felony murder. However, as noted above, the jury was also instructed on a theory of lying in wait as to the death of Frink.

For you to find the defendant guilty of first degree murder on the basis of malice premeditation and deliberation, the State must prove five things beyond a reasonable doubt:

First, that the defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will or spite, as it is ordinarily understood, to be sure that is malice, but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse or justification.

If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, you may infer first that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inference along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. A firearm is a deadly weapon.

Second, the State must prove the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

Fourth, that the defendant acted after premeditation; that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.

And, fifth, that the defendant acted with deliberation, which means he acted while he was in a cool state of mind, this does not mean there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly

aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof, it may be proved by proof of circumstances from which they may be inferred such as the lack of provocation by the victim, the conduct of the defendant before, during and after the killing, use of gross excessive force, brutal or vicious circumstances of the killing, or the manner in which or means by which the killing was done.

I further charge you that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove four things beyond a reasonable doubt:

First, that the defendant committed first degree kidnapping. I remind you the elements of first degree kidnapping are as follows:

. . . .

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant acted with malice, killed the victim with a deadly weapon, thereby proximately causing the victim's death, that the defendant intended to kill the victim and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

Whether or not you find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether he is guilty of first degree murder under the first degree felony murder rule.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully removed a person from one place to another and that the person had not reached his sixteenth birthday

> and his parent or guardian did not consent to his removal and that this was done for the purpose of facilitating the defendant's commission for (sic) the murder of Rasheed Delamez Jones, and that this removal was a separate, complete act, independent of and apart from the murder, and that the person removed was not released by the defendant in a safe place or was seriously injured and that while committing first degree kidnapping, the defendant killed the victim and that the defendant's act was a proximate cause of the victim's death, and that the defendant committed first degree kidnapping with the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.
>
> *If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty, excuse me, you would return a verdict of not guilty.*
>
> *Let me make sure it's absolutely clear on that language. Again under — for Mr. Frink, you will have three choices under first degree murder. You will go through and consider each of those three bases for first degree murder, consider all three. You will only render not guilty if you find that none of those three exist.*
>
> *As to Mr. Jones, the same situation, first degree murder there are two bases, you will consider both of those bases, only if you found (sic) that neither of those bases exist, then you go to not guilty.*

(Emphasis added.)

Initially, we note that Defendant has not challenged on appeal the trial court's not guilty mandate contained in its first-degree murder instruction as to Jones. In comparing the first-degree murder instructions as to Frink and Jones, several observations can be made. First, the final not guilty mandate in the Frink instruction is worded more appropriately than that in the Jones instruction. The former informed the jury of its "duty" to return a verdict of not guilty while the latter merely stated that the jury "would" return a not guilty verdict if the State failed to prove Defendant's guilt beyond a reasonable doubt.

Second, in the Jones instruction, the trial court gave a not guilty mandate both after its instruction on the theory of premeditation and deliberation and then again at the conclusion of the overall first-degree

murder charge. Conversely, as discussed above, with regard to the Frink charge, the trial court only gave a not guilty mandate at the conclusion of the overall first-degree murder instruction rather than after each specific theory of guilt.

Finally, at the end of the Jones first-degree murder charge, the trial court referenced the Frink first-degree murder charge, stating the following:

> Let me make sure it's absolutely clear on that language. Again under — for Mr. Frink, you will have three choices under first degree murder. You will go through and consider each of those three bases for first degree murder, consider all three. You will only render not guilty if you find that none of those three exist.

We acknowledge that this reference by the trial court to the jury's obligation regarding the Frink first-degree murder charge was not worded with perfect clarity and that it would have been more appropriate for the trial court to emphasize the jury's duty to return a verdict of not guilty in the event that it found the State had failed to prove Defendant's guilt beyond a reasonable doubt. Nevertheless, we are satisfied that any confusion that may have arisen stemming from the trial court's instructions was remedied by the verdict sheet, which — as discussed above — clearly provided an option of not guilty.

Even assuming, without deciding, that the trial court's instructions relating to this charge were not free from error, based on our careful review of the jury instructions in their entirety and the caselaw discussed above, we conclude that Defendant has failed to show plain error. Therefore, Defendant's argument on this issue is overruled.

III. Lying in Wait

[3] Defendant also contends that the trial court erred by instructing the jury — over the objection of his trial counsel — on first-degree murder based upon a theory of lying in wait with regard to the death of Frink.

> Preserved legal error is reviewed under the harmless error standard of review. . . . North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show 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.

Lawrence, 365 N.C. at 512-13, 723 S.E.2d at 330-31 (internal citations and quotation marks omitted).

In the present case, Defendant was convicted of first-degree murder as to Frink based upon three separate theories — premeditation and deliberation, felony murder, and lying in wait. On appeal, Defendant has only challenged the sufficiency of the evidence with regard to the lying in wait theory.

A similar issue was presented in *Gosnell*. In that case, the defendant was convicted of first-degree murder both on a theory of lying in wait and a theory of premeditation and deliberation. *Gosnell*, __ N.C. App. at __, 750 S.E.2d at 598. However, on appeal, he argued only that it was error for the trial court to have submitted the theory of lying in wait to the jury. *Id.* at __, 750 S.E.2d at 596. This Court held that because the jury had separately convicted him based on premeditation and deliberation, "[e]ven assuming Defendant can show error on this basis, Defendant cannot show prejudice resulting from the error because there is no possibility that, had the error in question not been committed, a different result would have been reached at trial." *Id.* at __, 750 S.E.2d at 598.

Therefore, even assuming, without deciding, that the jury instruction on lying in wait was erroneous, such error would not have affected Defendant's conviction of first-degree murder as to Frink on the theories of premeditation and deliberation and felony murder. Consequently, Defendant has failed to demonstrate how a different result would have been reached at trial had the challenged theory not been submitted to the jury.

IV. Failure to Adequately Individualize Charges

[4] Defendant next makes a series of arguments in which he contends that the trial court erred by failing to instruct the jury to consider each offense individually. Because Defendant did not object to any of these instructions at trial, we again apply a plain error standard of review. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. We address each of his specific arguments in turn.

First, Defendant asserts that "[f]or the assault with a deadly weapon with intent to kill inflicting serious injury charges for two victims, the court named both victims, but then gave an instruction as to 'the victim.' " Based on our Supreme Court's holding in *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635, Defendant's argument lacks merit.

In *Huff*, the defendant was being tried on two separate counts of first-degree murder. *Id.* at 51-54, 381 S.E.2d at 664-66. On appeal, he

cited as plain error various instructions that referred to a single victim, a single case, and a single decision to be made. *Id.* He contended that these references were misleading and could have led jurors to believe that they were permitted to make a joint determination of guilt. *Id.* He argued that the trial judge had (1) periodically referred to a single "victim" (although there were *two* victims); (2) stated that the State had the burden of "proving the case" (although there were *two* cases for the State to prove); and (3) instructed the jury that the "decision in the case must be unanimous" (although the jury was required to make decisions in each of *two* cases). *Id.* The defendant also contended that the trial court erred by giving a single joint instruction on the affirmative defense of insanity. *Id.*

In rejecting the defendant's argument, the Supreme Court explained that although "[t]he trial judge did not specifically instruct the jurors to consider each charge separately[,] . . . the instructions which he did give achieved that result; taken as a whole, they make clear that in the determination of defendant's guilt or innocence the jury was to consider each charge separately." *Id.* at 52, 381 S.E.2d at 664. The Court held that if a trial court identifies each victim for each separate count of the same charged offense, it is not plain error for the trial court to then describe the elements of the offense only once:

> The trial judge proceeded to the instruction on first-degree murder. He instructed on the first element, an intentional killing by the defendant of the victim with malice. After giving the general instruction which applied to both cases, [the trial judge] specifically referred to the Gail Strickland case and gave the specific instruction which applied only in the shooting death . . . He said, "In your consideration of the case in which Gail Strickland is the victim . . . ." By referring to the Gail Strickland case by name, he distinguished it from the case in which Crigger Huff was the victim and indicated that the jury should consider the evidence of the Gail Strickland case separately from the evidence in the Crigger Huff case.

Id. at 52-53, 381 S.E.2d at 665. The Supreme Court in *Huff* further held that

> [t]he format of the verdict sheet and the trial judge's instruction describing it are additional evidence that the instructions as a whole made clear that the jury was to consider each charge separately. The record on appeal

> shows that the verdict form lists each charge separately and states the permitted verdicts under each charge. This separate treatment clearly requires that the two charges be addressed separately.

Id. at 54, 381 S.E.2d at 665.

In the present case, as in *Huff*, all charges against Defendant were listed separately on separate verdict sheets and each sheet set forth all permissible verdicts under each charge. In addition, the trial court referred to Waddell and Inman as separate victims of two different counts of assault with a deadly weapon with intent to kill inflicting serious injury:

> The defendant has been charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injury in regards to William Inman and Antwan Waddell. For you to find the defendant guilty of those two, offenses, the State must prove four things beyond a reasonable doubt[.]

We believe that the trial court's instructions — coupled with the verdict sheets — made clear to the jury that there were two separate counts and two separate victims regarding this charge.

While Defendant also contends the trial court failed to separately instruct on the two counts of conspiracy to commit first-degree murder, the trial court likewise informed the jury that there were two counts for its consideration as to that offense by stating the following: "The defendant has been charged with conspiracy to commit murder of Darnell Antonio Frink and Rasheed Delamez Jones, two counts as to that offense." Furthermore, the verdict sheets made clear that there were two separate counts regarding the conspiracy charge as each count was listed on a separate verdict sheet. Consequently, based on *Huff*, we cannot say that this instruction constituted plain error.

In his brief, Defendant also contends that "the [trial] court combined the two charges of felon in possession [of a firearm] without specifying the dates of the offenses or instructing the jurors that guilt for one of the offenses did not mean guilt for the other offense." Our review of the trial transcript, however, reveals that the trial court did specifically indicate the dates of the offenses and make clear that there were two separate counts of that offense by stating that "[t]he defendant has been charged with two counts of possession of a firearm by a felon . . . and the two alleged dates, the first being September 21st, 2007 and the second being

November 19th, 2007." Furthermore, the jury was given two separate verdict sheets reflecting the two counts of this offense and the respective dates of each count was clearly contained on each verdict sheet. Therefore, Defendant has also failed to show plain error with regard to this instruction.

[5] Defendant next asserts that with regard to the felony murder instruction regarding the death of Frink, the jury was not informed which assault could form the basis for the felony murder charge. However, this error does not rise to the level of plain error. *See State v. Coleman*, 161 N.C. App. 224, 234-35, 587 S.E.2d 889, 896 (2003) ("[T]he trial court's instructions to the jury were ambiguous as to what underlying felony formed the basis of [the] felony murder charge. . . . Only one underlying felony is required to support a felony murder conviction, and in this case, the jury convicted defendant of four separate felonies which could have served as the underlying felony. . . . [B]ecause the instructions in the instant case allowed the jury to convict defendant of a single wrong by alternative means the instructions were not fatally ambiguous." (internal citation and ellipses omitted)). Therefore, based on *Coleman*, Defendant has also failed to establish plain error with regard to this instruction.

Finally, Defendant briefly argues that "[t]he [trial] court gave the mandate for the Jones murder, but gave no mandate for the underlying felony, kidnapping." However, our review of the trial transcript reveals that the trial court did, in fact, expressly provide such a mandate. Therefore, this argument fails as well.

V. Felony Murder

[6] Defendant's final argument is that the trial court committed plain error by instructing the jury on the theory of felony murder regarding the death of Jones because there was insufficient evidence of the predicate felonies, first-degree kidnapping and conspiracy to commit first-degree kidnapping.

However, Defendant was convicted of first-degree murder as to the death of Jones based not only on a theory of felony murder but also based on a theory of premeditation and deliberation. Therefore, as discussed above in connection with Defendant's challenge to the lying in wait instruction as to the death of Frink, any error in the trial court's decision to instruct the jury on felony murder would not have affected his conviction for the first-degree murder of Jones on a theory of premeditation and deliberation. *See Gosnell*, __ N.C. App. at __, 750 S.E.2d at 598. Thus, this argument is overruled.

Conclusion

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

NO PREJUDICIAL ERROR.

Judges ELMORE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
SHAWN MOORE, DEFENDANT

No. COA14-244

Filed 7 October 2014

Evidence—admission of prior statement—corroborative purposes

The trial court did not err in a robbery with a dangerous weapon case by admitting into evidence a prior statement of a witness for corroborative purposes. The prior statement did not differ significantly from the witness' trial testimony.

Appeal by defendant from judgment entered 31 October 2013 by Judge Richard Brown in Scotland County Superior Court. Heard in the Court of Appeals 26 August 2014.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

BRYANT, Judge.

Where the prior statement of a witness did not differ significantly from the witness' trial testimony, the trial court did not abuse its discretion in admitting the statement for corroborative purposes.

On 24 June 2013, defendant Shawn Moore was indicted by a Scotland County grand jury for robbery with a dangerous weapon. The matter came on for trial during the 28 October 2013 criminal session of Scotland County Superior Court, the Honorable Richard Brown, Judge presiding. At trial, the State's evidence tended to show the following.

On 15 March 2012, Sergeant Jeffrey Cooke of the Scotland County Sheriff's Office responded to an emergency call. When Sergeant Cooke arrived at the scene, he found Travis McLean lying on the ground bleeding from a foot injury. McLean told Sergeant Cooke that three men came to his house to look at some electronic equipment. The men then grabbed McLean's shotgun and shot McLean in the foot before taking McLean's cell phone and fleeing in McLean's car, a lavender-colored 1994 Cadillac Fleetwood Brougham. McLean's car was later found abandoned and seriously damaged in Marlboro, South Carolina.

At trial, McLean testified that he knew one of the three men who robbed him because his cousin once introduced the two men. This man, defendant, was known to McLean as "Mook" or "Mooky." McLean stated that defendant and two other men, later identified as Michael Liles and Ari Miles, came to McLean's house to buy a half pound of marijuana. McLean testified that because he did not have enough marijuana to sell, he texted his supplier "Scottie" to bring additional marijuana to his house.

While the men waited for the marijuana, defendant noticed McLean's shotgun in the corner of the living room and asked if he could buy it. After McLean declined to sell the shotgun, defendant then asked if he could shoot it; McLean said yes. After defendant fired the shotgun outside in the backyard, defendant asked McLean to show him McLean's car's electronics. McLean went to his car and turned it on to run the audio system.

After McLean turned on his car's audio system, he stated that he received a phone call and began to walk back towards his house. McLean testified that as he walked back towards his house, Ari Miles suddenly stepped in front of him, pointed the shotgun at him, and demanded McLean give Miles his cell phone. Miles then fired the shotgun towards McLean's feet. McLean threw his cell phone at Miles and began to run away but realized that he had been shot in the left foot and ankle and was unable to run. McLean testified that immediately after the shooting, defendant got into McLean's car and drove away. Liles and Miles both left in Liles' car. McLean stated that the shotgun damage to his foot was so severe his Achilles tendon had to be removed.

The State also presented the testimony of Ari Miles at trial. Miles was currently being held at the Scotland County Correctional facility following his conviction for the armed robbery of McLean. Miles testified that he went with defendant and Liles to McLean's house to purchase marijuana and that while McLean was trying to find more marijuana for

them, defendant told Miles he wanted to steal McLean's car. Miles said defendant threatened him by flashing a gun tucked into his waistband and ordered Miles to use McLean's shotgun for the robbery. Miles testified that he did not want to hurt McLean and that he thought he had only shot at the ground, rather than hitting McLean's left foot and ankle. Miles said that after the robbery, he traded McLean's cell phone to another person for a different cell phone.

On 29 October 2013, defendant filed a motion *in limine* to exclude/redact statements or exhibits. During the pre-trial hearing, the trial court heard arguments from counsel regarding two of the State's exhibits: a statement made by Ari Miles on 28 March 2012; and a statement by Ari Miles made 9 October 2013. The trial court denied defendant's motion on grounds that the two statements were not significantly different but noted that if Miles testified at trial and his testimony changed significantly from the prior statements, the trial court would reconsider its decision.

Ari Miles testified during trial as to his involvement with defendant and the robbery of McLean. Defendant then objected during the testimony of Investigator Laviner when Miles' 28 March 2012 statement was read aloud to the jury. The trial court, after reconsidering the arguments of counsel and the statement in question, overruled defendant's objection and allowed the statement to be admitted for corroborative purposes. The trial court also gave limiting instructions to the jury regarding their consideration of Miles' prior statement.

On 31 October, a jury convicted defendant of robbery with a dangerous weapon. Defendant was found to be a prior record level II and was sentenced to 59 to 83 months imprisonment. Defendant appeals.

In his sole issue on appeal, defendant argues that the trial court erred in allowing Ari Miles' 28 March 2012 statement to be admitted for corroborative purposes, and that defendant was prejudiced as a result. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cook*, 193 N.C. App. 179, 181, 666 S.E.2d 795, 797 (2008) (citation and quotation omitted). "The abuse of discretion standard applies to decisions by a trial

court that a statement is admissible for corroboration." *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations omitted).

Defendant contends the trial court erred in admitting Miles' 28 March 2012 statement into evidence because the statement contained significant differences from Miles' own testimony during trial and these differences resulted in prejudicial error entitling defendant to a new trial.

> [C]orroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be admissible as corroborative evidence, a witness'[] prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.

Id. at 526-27, 684 S.E.2d at 740 (citations omitted). "The trial court is [ultimately] in the best position to determine whether the testimony of [one witness as to a prior statement of another witness] corroborate[s] the testimony of [the latter]." *State v. Bell*, 159 N.C. App. 151, 156, 584 S.E.2d 298, 302 (2003) (citation omitted). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Tellez*, 200 N.C. App. at 527, 684 S.E.2d at 740 (citation omitted).

Ari Miles testified at trial that he went with Michael Liles and defendant to McLean's house to purchase marijuana. Miles stated that defendant became interested in McLean's shotgun and that after discussing the marijuana purchase with him and Liles, told Miles "he was going to give me the shotgun for me to stick [McLean] up." Miles said defendant then began to ask McLean questions about McLean's car, and McLean turned the car and its audio system on. Miles stated that once McLean began to walk away from the car, defendant signaled for Miles to rob McLean. After Miles fired the shot gun at McLean, McLean "threw his cell phone and ran" while defendant got into McLean's car. Miles stated that defendant threatened him by flashing a gun tucked into defendant's waistband before driving away. Miles further said that he

gave the shotgun to Liles and fled in Liles' car, and traded McLean's cell phone to another person for a different type of cell phone.

During his testimony, Investigator Laviner read a statement made by Ari Miles on 28 March 2012. In his statement, Miles described his trip with Liles and defendant to McLean's house to purchase marijuana, defendant's interest in McLean's shotgun, and defendant asking McLean to show him the audio system in McLean's car. Miles said in his statement that defendant said he wanted to rob McLean and that if Miles did not shoot McLean, defendant "would do [Miles.]" In his statement, Miles further said that he shot at the ground and McLean threw his cell phone at him in response; Miles then ran back to Liles' car and left. Defendant was described as taking the shotgun and driving the car down to the sand hills.

Defendant's contention that there were significant differences between Miles' testimony and prior statement is without merit. In reviewing Miles' testimony and prior statement, the differences between the two are slight. Moreover, both substantiate defendant's participation in McLean's robbery, including defendant's decision to rob McLean for McLean's car, defendant getting Miles to use the shotgun as part of the robbery by threatening Miles, and defendant leaving the scene in McLean's car. As such, the trial court did not abuse its discretion in allowing Miles' prior statement to be admitted, as the differences between Miles' testimony and prior statement were slight and did not change Miles' account of McLean's robbery. *See State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) ("[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." (citation omitted)).

Defendant further contends the trial court erred in its admission of Miles' prior statement as corroborative evidence based on our Supreme Court's decisions in three cases: *State v. Frogge*, 345 N.C. 614, 481 S.E.2d 278 (1997); *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976); and *State v. Fowler*, 270 N.C. 468, 155 S.E.2d 83 (1967). However, these cases are not applicable to the instant case.

In *Frogge*, *Warren*, and *Fowler*, the defendants were convicted of first-degree murder. On appeal, the defendants challenged the trial court's admission of prior statements of witnesses as corroborative evidence, arguing that the prior statements were so substantially different from testimony given during the trial that the defendants were prejudiced as a result. Our Supreme Court agreed, finding that in each

case the prior statements were contradictory to testimony given during the trial and, because the evidence directly affected the first-degree murder charges facing the defendants, the admission of such evidence was indeed prejudicial. *See Frogge*, 345 N.C. at 616-18, 481 S.E.2d at 279-80 (ordering a new trial for the defendant on grounds of prejudice caused by the improper admission of corroborative evidence where "the inconsistencies between [defendant's] prior statement and his trial testimony went to the heart of the prosecution's case for felony murder[]"); *Warren*, 289 N.C. at 553-59, 223 S.E.2d at 319-22 (holding that corroborative evidence was prejudicial to the defendant where the testimony "went beyond and contradicted" other testimony that was essential to the defendant's charged offense of first-degree murder); *Fowler*, 270 N.C. at 469-72, 155 S.E.2d at 84-87 (ordering a new trial where the differences in the corroborative testimony could account for the difference between the defendant receiving life imprisonment and the death penalty).

Here, defendant was charged with the offense of robbery with a dangerous weapon. As previously discussed, there were only slight differences between Ari Miles' testimony and his prior statement. Further, Miles' testimony and prior statement were substantially consistent regarding defendant's involvement in McLean's robbery including events leading up to, during, and immediately after the robbery. Any "inconsistencies between [Miles'] prior statement and his trial testimony [did not go] to the heart of the prosecution's case for [robbery with a dangerous weapon]." *See Frogge*, 345 N.C. at 616-18, 481 S.E.2d at 279-80.

Defendant also argues that the trial court erred by admitting as corroborative evidence Miles' testimony and prior statement because Miles' prior statement "introduced a murderous intent on the part of the defendant" and "this inadmissible and highly prejudicial testimony resulted in prejudicial error entitling the defendant to a new trial." We disagree for, as discussed above, the differences that existed between Miles' testimony at trial and his prior consistent statement made within days of the robbery were only slight and did not go to the heart of defendant's charged offense of robbery with a dangerous weapon. Defendant is unable to demonstrate prejudice from the admission of Miles' prior statement. *See State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) ("The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." (citations omitted)). We further note that the evidence presented against defendant,

particularly the testimony of McLean, was overwhelming such that the differences in Miles' testimony and prior statement would not affect the outcome of defendant's trial. *See State v. Moses*, 52 N.C. App. 412, 421-24, 279 S.E.2d 59, 65-66 (1981) (holding that the trial court did not abuse its discretion in admitting evidence of corroborative statements where there were no fundamental differences between the statements, nor did the defendant receive an unfair trial where the defendant presented no evidence and the State's evidence against the defendant was overwhelming). Accordingly, the trial court did not abuse its discretion in admitting Miles' prior statement for corroborative purposes, where the statement tended to add weight and credibility to Miles' testimony at trial.

No error.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
MELISSA LEE OTT

No. COA13-1412

Filed 7 October 2014

Drugs—trafficking by sale—entrapment—jury instruction—sufficient evidence

The trial court erred in a trafficking of opium by sale; trafficking of opium by possession, and possession of opium with the intent to sell and deliver case by denying her request to instruct the jury on the defense of entrapment. Defendant offered sufficient evidence of entrapment where, taken in the light most favorable to defendant, the evidence showed that the plan to sell the pills originated in the mind of Eudy (an informant), who was acting as an agent for law enforcement, and defendant was only convinced to do so through trickery and persuasion.

Appeal by defendant from judgment entered 5 July 2013 by Judge Julia L. Gullett in Rowan County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Oliver G. Wheeler, IV, for the State.

James R. Glover for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Melissa Lee Ott appeals from the judgment entered after a jury convicted her of: (1) trafficking in 28 grams or more of opium by sale; (2) trafficking in 28 grams or more of opium by possession; and (3) possession of opium with the intent to sell and deliver. On appeal, defendant argues that the trial court erred by denying her request to instruct the jury on the defense of entrapment.

After careful review, because defendant offered sufficient evidence of entrapment, the trial court erred in refusing to instruct the jury on the defense of entrapment. Accordingly, we vacate the judgment and remand for trial.

Background

In 2011, Emily Eudy ("Eudy"), a friend of defendant, contacted the Rowan County Sheriff's Office and offered to serve as a confidential informant in an attempt to receive a more lenient sentence for her pending drug charges. Eudy informed Rowan Sherriff's Detective Jay Davis ("Detective Davis") that defendant had narcotics for sale and agreed to introduce an undercover officer to defendant to make a purchase. Eudy and defendant had been friends for about one year.

On 27 July 2011, the Rowan County Sherriff's office provided Detective Kevin Black ("Detective Black") with an undercover vehicle, $150 in special funds, and a recording device. Detective Black drove Eudy to defendant's house. According to the audio/video recording which was shown to the jury at trial, the following interaction took place: defendant told Detective Black that she usually only dealt drugs to six people and asked Detective Black to pull up his shirt to prove that he was not a police officer. Detective Black told defendant that he had $150 to spend on pills. Defendant pulled three pill bottles out of her purse and asked if he was interested in "5's" (5 milligram pills). Detective Black acknowledged that he was interested in purchasing the pills, and defendant poured a bottle of white pills onto the table and counted out 40 5 mg pills of hydrocodone and acetaminophen. Defendant told Detective Black that she could sell him the white pills for $3 and asked if he also wanted to buy 10 mg pills. After Detective Black said he did, defendant

poured blue and yellow pills onto the table and told him that she could get $7 to $8 for the blue pills. Defendant also asked Detective Black if he wanted some speed and claimed that she sold 90 percent of her speed to truckers.

In total, defendant sold Detective Black 34.2 grams of pills which included 40 white pills, 9 blue pills, and 1 yellow pill. Analysis by the Iredell County Sherriff's lab confirmed the presence of hydrocodone in the blue and white pills.

On 31 July 2011, defendant was indicted for (1) trafficking in 28 grams or more of a preparation opium by sale to Detective Black; (2) trafficking in 28 grams or more of a preparation opium by possession; and (3) possession of a preparation opium with intent to sell and deliver. The matter came on for trial on 2 July 2013.

At trial, defendant took the stand in her own defense; she testified that she was a drug user, not a seller, and only sold the pills as a favor to Eudy. Defendant claimed that she "absolute[ly]" would not have sold the pills but for Eudy's involvement. According to defendant, Eudy "wanted [her] to sell the pills to [Detective Black] and convince him that . . . he could keep coming back for more . . . so that [Eudy] wouldn't get in trouble with her husband." Defendant also alleged that, on the morning of the sale, Eudy gave her three bottles of pills, coached her on what to say, and told her that she could keep the 7.5 mg pills for herself for helping Eudy complete the sale. Defendant claimed that she was just trying to "complete the act [Eudy] wanted [her] to do" and was only "talking the talk" when she spoke to Detective Black about pricing, people she usually dealt with, and selling speed to truckers. In other words, according to defendant, Eudy provided her details on exactly what to say to Detective Black during the sale. However, defendant did admit that, on two prior occasions, she sold cocaine to Eudy and had previously been convicted of possession of cocaine and drug paraphernalia.

At trial, Eudy also testified as a witness for the defense. Eudy refuted defendant's claim that she did not sell drugs, claiming that defendant had been selling crack cocaine and pain pills for the entire time she knew defendant. Moreover, she denied providing the pills to defendant. Eudy was not convicted of the pending trafficking charge but was convicted of attempted trafficking and received a probationary sentence.

At the beginning of the charge conference, the trial court listed the jury instructions it intended to give, including an instruction on the defense of entrapment. The State objected, and, after hearing arguments from both parties, the trial judge ruled that the evidence established

defendant's predisposition to commit the crime and, therefore, declined to give the defense instruction. On 5 July 2013, the jury found defendant guilty of all three charges. The trial court sentenced defendant to a minimum term of 225 months to a maximum term of 279 months imprisonment and fined her $500,000. Defendant gave timely notice of appeal.

Discussion

Defendant's sole argument on appeal is that the trial court erred by failing to give the requested instruction on the defense of entrapment. Specifically, defendant contends that, taken in the light most favorable to defendant, the evidence shows that the plan to sell the pills originated in the mind of Eudy, who was acting as an agent for law enforcement, and defendant was only convinced to do so through trickery and persuasion. Therefore, the evidence was sufficient to justify a jury instruction on entrapment. We agree.

Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo. *State v. Redmon*, 164 N.C. App. 658, 662-664, 596 S.E.2d 854, 858-859 (2004). "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) (internal quotation marks omitted).

"Entrapment is complete defense to the crime charged." *State v. Branham*, 153 N.C. App. 91, 99, 569 S.E.2d 24, 29 (2002). To be entitled to the defense of entrapment, a defendant must present "some credible evidence," *State v. Thomas*, __ N.C. App. __, __, 742 S.E.2d 307, 309, *disc. review denied*, __ N.C. __, 747 S.E.2d 555 (2013), of the following elements: "(1) acts of persuasion, trickery, or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, [and that] (2) . . . the criminal design originated in the minds of the government officials, rather than the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities[,]" *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978). A "defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant." *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983). "The issue of whether or not a defendant was entrapped is generally a question of fact to be determined by the jury," *State v. Collins*, 160 N.C. App. 310, 320, 585 S.E.2d 481, 489 (2003), and when the "defendant's evidence creates an issue of

fact as to entrapment, then the jury must be instructed on the defense of entrapment[,]" *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002).

However, the entrapment defense is not available to a defendant who has a "predisposition to commit the crime independent of governmental inducement and influence." *State v. Hageman*, 307 N.C. 1, 29, 296 S.E.2d 433, 449 (1982). "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in a criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 296 S.E.2d at 450.

Here, taking the evidence in a light most favorable to defendant and, in particular, defendant's testimony, there was sufficient evidence that defendant was induced to commit the sale through acts of persuasion and trickery to warrant the instruction. Specifically, according to defendant's evidence, Eudy was acting as an agent for the Sherriff's office when she approached defendant, initiated a conversation about selling pills to her buyer, provided defendant the pills, and coached her on what to say during the sale. While it is undisputed that defendant was a drug user, defendant claimed that she had never sold pills to anyone before. In fact, the only reason she agreed to sell them was because she was "desperate for some pills," and she believed Eudy's story that she did not want her husband to find out what she was doing. Defendant's testimony established that Eudy told defendant exactly what to say such that, during the encounter, defendant was simply playing a role which was defined and created by an agent of law enforcement. In sum, this evidence, if believed, shows that Eudy not only came up with the entire plan to sell the drugs but also persuaded defendant, who denied being a drug dealer, to sell the pills to Detective Black by promising her pills in exchange and by pleading with her for her help to keep the sale secret from her husband. Furthermore, viewing defendant's evidence as true, she had no predisposition to commit the crime of selling pills. Although Eudy disputed this fact at trial, as this Court has noted, "[f]or purposes of the entrapment issue, we must assume that [the] defendant's testimony is true[,]" *State v. Foster*, __ N.C. App. __, __, __ S.E.2d __, ___ (Aug. 5, 2014) (No. COA13-1084). Thus, defendant's evidence was sufficient to create an issue as to inducement and lack of predisposition to commit the offense, and the trial court should have instructed on entrapment.

The case of *State v. Jamerson*, 64 N.C. App. 301, 307 S.E.2d 436 (1983), provides guidance. In *Jamerson*, this Court held that the defendant introduced sufficient evidence of inducement to justify a jury

instruction on entrapment by showing: (1) an undercover officer and his informant initiated a conversation about selling drugs with the defendant; (2) the officer repeatedly urged the defendant to provide the drugs; (3) the informant located a person who would sell the drugs and drove the officer and the defendant to the location; and (4) the officer then provided the defendant the money to buy the drugs. *Id.* at 303-304, 307 S.e.2d at 437. In a similar case, this Court has also held that there is sufficient evidence of inducement to justify a jury instruction on entrapment when the defendant is promised something in return for participating in the sale of drugs. *State v. Blackwell*, 67 N.C. App. 432, 438, 313 S.E.2d 797, 801 (1984) (defendant was promised a job if he would sell drugs to an undercover officer).

Similarly, in *State v. Stanley*, 288 N.C. 19, 32-33, 215 S.E.2d 589, 597-98 (1975), our Supreme Court held that the evidence was sufficient to establish that the defendant was entrapped as a matter of law. In *Stanley*, the undisputed evidence showed that an undercover officer befriended the defendant based on false pretenses, repeatedly asked the defendant about purchasing drugs, persuaded the defendant to purchase drugs for him, and supplied the defendant with the money to do so. *Id.* at 32, 215 S.E.2d at 597. Prior to his arrest for possession of a controlled substance, the defendant admitted to purchasing drugs that turned out to be counterfeit. *Id.* at 22, 215 S.E.2d at 591. The Supreme Court held that this evidence was sufficient to demonstrate that the criminal design originated with the law enforcement officer, and there was no evidence that defendant was predisposed to commit the crime. *Id.* at 32-33, 215 S.E.2d at 597.

We believe that the facts of this case are analogous to *Jamerson* and *Stanley*. Here, defendant testified that she was approached by Eudy, an agent of law enforcement, who initiated the discussion about selling drugs. Defendant testified that not only did Eudy initiate the conversation, but that the entire plan was Eudy's idea. Similar to the *Jamerson* and *Stanley* defendants, defendant did not locate the drugs on her own but they were provided to her by Eudy. Furthermore, defendant testified that Eudy instructed her on what to say and how to act during the sale.

In sum, viewed in a light most favorable to defendant, defendant's testimony, if believed, would permit the jury to find that the idea for the crime of selling pills originated with and was pursued by Eudy, with no indication that defendant had a predisposition to sell pills. Thus, as in *Jamerson* and *Stanley*, the evidence was sufficient to warrant an instruction on entrapment.

The State, nevertheless, argues that defendant was predisposed to commit the crime and that Eudy simply afforded defendant the opportunity to sell the pills. Consequently, relying on *State v. Thompson*, 141 N.C. App. 698, 707, 543 S.E.2d 160, 166 (2001), the State contends that defendant was not entitled to the instruction on entrapment, noting that this Court has consistently held that the sale of drugs as a favor is "not evidence of inducement, just opportunity to commit the offense." We disagree.

In *Thompson*, *id.* at 699, 543 S.E.2d at 162, the sheriff's office received information from a confidential informant that the defendant was selling narcotics. In order to "ascertain the validity of the informant's information," law enforcement officers arranged for and observed the confidential informant buy cocaine from the defendant. *Id.* The informant then introduced an undercover narcotics detective to the defendant. *Id.* When the undercover officer initially asked to buy cocaine, defendant claimed that he "could not help" because he only used heroin. *Id.* at 700, 543 S.E.2d at 162. According to the defendant, however, the informant told him that the defendant's upstairs neighbor was a supplier. Id. On two separate occasions, the defendant purchased cocaine from his upstairs neighbor for the undercover officer. *Id.* At trial, the defendant testified that, although he was a recovering heroin addict, he had no prior convictions for drug dealing, had never gotten cocaine for the confidential informant before, and did not know that the upstairs neighbor was a drug dealer. *Id.* The trial court denied his request for an entrapment instruction. *Id.* at 699, 543 S.E.2d at 162.

On appeal, the defendant argued that the trial court committed reversible error by refusing to instruct on entrapment. However, this Court disagreed, noting:

> Neither the informant nor O'Neil provided gifts or made promises before asking to purchase cocaine from defendant. Also, although defendant testified that he had been reluctant to sell cocaine to the informant and O'Neil, his own testimony showed defendant required little urging before acquiescing to their requests. "That [the undercover officer] gave defendant the money and asked him to obtain the cocaine is not evidence of inducement, just an opportunity to commit the offense." *State v. Martin*, 77 N.C. App. 61, 67, 334 S.E.2d 459, 463 (1985), *cert. denied*, 317 N.C. 711, 347 S.E.2d 47 (1986). As we held in *Martin*, selling drugs as a favor and taking no profit from the

> transaction does not entitle a defendant to an instruction on entrapment. *See also State v. Booker*, 33 N.C. App. 223, 234 S.E.2d 417 (1977). Defendant failed to introduce sufficient evidence of persuasion by either the informant or O'Neil to suggest that the criminal design originated with the law enforcement agents and not with defendant.

Id. at 707, 543 S.E.2d at 166. Thus, the Court concluded that the evidence did not warrant the instruction. *Id.*

However, we find the facts of the present case distinguishable. Unlike *Thompson*, here, there was no "ascertain[ment]" of the validity of Eudy's information. Although Detective Davis testified that Eudy made a "controlled buy" from defendant prior to the incident where she sold the pills to Detective Black, Detective Davis acknowledged that the "controlled buy" was not witnessed by law enforcement nor recorded. Instead, Eudy brought him 0.5 grams of hard cocaine that she claimed she had purchased from defendant. However, at trial, when asked about the previous "controlled buy," Eudy pled the Fifth Amendment and refused to answer. Thus, unlike *Thompson* where the police actually observed the defendant sell drugs to the informant, here, police had no way of ascertaining the validity of the "controlled buy" nor the reliability of Eudy's information about defendant, especially since Eudy was unwilling to confirm this prior purchase at trial. Furthermore, construing defendant's testimony as true, Eudy, the agent of law enforcement, did not simply point defendant to a supplier but actually supplied defendant the pills to sell and told her what to say during the interactions with Detective Black. Once the transaction was complete, the money would go to Eudy with defendant being paid in pills. In other words, the entire drug transaction flowed through Eudy, an agent of law enforcement; there were no other suppliers or third parties involved as in *Thompson* where the defendant had to go to an outside, unrelated supplier to get the drugs.

Finally, unlike the defendant in *Thompson*, defendant, who admitted that she was a pill user, did receive pills in exchange for selling Detective Black the pills, pills which defendant admitted she was "desperate" for. In contrast, however, the *Thompson* defendant received nothing in exchange for selling the cocaine—his entire motivation was to do a favor for the confidential informant, and he "[took] no profit from the transaction." *Id.* at 707, 543 S.E.2d at 166. Thus, in sum, the evidence does not simply show that defendant was given an "opportunity" to sell the drugs; there was sufficient evidence of persuasion and evidence that

the entire criminal design, including the supply of the drugs and the details of how defendant should act, originated with law enforcement. Accordingly, the State's reliance on *Thompson* is misplaced.

In contrast, viewing the evidence in a light most favorable to defendant and "assum[ing]" defendant's testimony is true, *Foster*, __ N.C. App. at ___, ___ S.E.2d at ___, Eudy initiated a conversation with defendant and asked her to sell pills to Detective Black. Eudy introduced defendant to Detective Black, coached defendant on exactly what to do during the encounter, and supplied the drugs. Although a user of pills, defendant denied ever selling them and steadfastly claimed that she would never have sold them but for Eudy's persistence and offer to provide defendant pills. Accordingly, defendant presented sufficient evidence of the elements of entrapment, and the trial court erred in refusing to instruct on this defense at trial.

Conclusion

In sum, we hold that defendant presented sufficient evidence to warrant submission of the entrapment defense to the jury. Defendant is, therefore, entitled to a new trial.

NEW TRIAL.

Judges DILLON and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 October 2014)

BASS v. HARNETT CNTY. No. 14-261	N.C. Industrial Commission (X65648)	Affirmed
FLEMING v. FLEMING No. 13-1347	Gaston (07CVD4408)	Vacated and Remanded
GEIGER v. CENT. CAROLINA SURGICAL EYE ASSOCS., P.A. No. 14-169	Guilford (12CVS5477)	No Error
HALL v. HALL No. 13-921	Catawba (11CVD2481-82)	Vacated and Remanded
IN RE A.M.B. No. 14-309	Mecklenburg (12JT32)	Affirmed
IN RE C.O.W. No. 14-517	Alamance (12JT101)	Affirmed
IN RE COTTRELL No. 14-519	Lincoln (13CVS25)	Affirmed
IN RE J.M.L. No. 14-563	Lincoln (12JT8)	Affirmed
IN RE L.D.S. No. 14-524	Guilford (12JT75)	Affirmed
IN RE M.T. No. 14-385	Robeson (12JT17-18)	Vacated
JEFFRIES v. MILLER No. 14-263	Forsyth (12CVS1970)	Dismissed
SANDY GROVE BAPTIST CHURCH v. FINCH No. 14-199	Nash (11CVS1177)	Dismissed
STATE v. ALLEN No. 14-152	Robeson (07CRS57605-07 (07CRS57688) (08CRS53434) (08CRS53570-77) (08CRS53579-84) (09CRS1362)	Vacated and Remanded

STATE v. ALLEN No. 14-290	Mecklenburg (12CRS233035-36) (13CRS599)	No prejudicial error
STATE v. AVANT No. 14-436	Alamance (11CRS54334)	Vacated and remanded.
STATE v. BROOKS No. 14-203	Cleveland (08CRS774)	No Error
STATE v. CARDEN No. 14-151	Alamance (12CRS50143-44) (12CRS9106)	No Error
STATE v. COOK No. 14-393	Durham (13CRS57905)	Affirmed
STATE v. CRISP No. 14-232	Johnston (12CRS2809) (12CRS54938)	No error in part; no prejudicial error in part.
STATE v. GAYTAN No. 14-277	Guilford (13CRS71032)	No Error
STATE v. HARRIS No. 14-430	Guilford (12CRS98056)	No Error
STATE v. HILL No. 14-344	Cleveland (12CRS56659) (13CRS386)	No Error
STATE v. JOLLIFF No. 14-422	Wake (13CRS212414)	No Error
STATE v. LUCKEY No. 14-12	Union (10CRS56329) (10CRS56331) (11CRS2523) (13CRS717)	No Error
STATE v. MARTIN No. 13-1432	Buncombe (11CRS394) (11CRS395) (11CRS55315)	No Error In Part; Remanded In Part to Correct A Clerical Error.
STATE v. MEEKS No. 14-340	Jackson (13CRS146) (13CRS147)	No error in part; no prejudicial error in part.
STATE v. MORE No. 14-139	Wake (12CRS223968)	No Error

STATE v. PICKENS No. 14-320	Buncombe (12CRS61206) (12CRS61207) (12CRS61251) (12CRS701) (13CRS382)	No Error
STATE v. RIQUELME No. 14-289	Union (12CRS52806)	No Error
STATE v. RODGERS No. 14-558	Pamlico (07CRS50615)	Reversed and remanded.
STATE v. SEVILLA-BRIONES No. 14-240	Mecklenburg (12CRS252339-41)	Dismissed in part; no error in part; no prejudicial error in part.
STATE v. THORPE No. 14-346	Orange (12CRS245) (12CRS53107)	No error; remanded for correction of clerical error.
STATE v. WILLIAMS No. 14-342	Durham (09CRS894-897)	No Error

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