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# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*JUNE 28, 2016*

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

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**OF**

**NORTH CAROLINA**

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[2] 1 January 2016.

# COURT OF APPEALS

## CASES REPORTED

### FILED 21 OCTOBER 2014



## CASES REPORTED WITHOUT PUBLISHED OPINIONS



**HEADNOTE INDEX**

**APPEAL AND ERROR**

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**Appeal and Error—interlocutory orders and appeals—improper Rule 54(b) certification—no substantial right—writ of certiorari—**Plaintiff wife's appeal from an interlocutory order vacating her judgment of absolute divorce under N.C.G.S. § 1A-1, Rule 60(b) was dismissed. The trial court's order could not properly be certified under N.C.G.S. § 1A-1, Rule 54(b). Further, plaintiff failed to meet her burden of showing that the order deprived her of a substantial right. The Court of Appeals declined plaintiff's request to construe her appellate filings as a petition for a writ of certiorari. **Campbell v. Campbell, 1.**

CRIMINAL LAW



EMOTIONAL DISTRESS



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## SCHEDULE FOR HEARING APPEALS DURING 2016

## NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2016:

January 11 and 25

February 8 and 22

March 7 and 28

April 11 and 25

May 9 and 23

June 6

July None

August 8 and 22

September 5 and 19

October 3, 17, and 31

November 14 and 28

December 12

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

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SUZANNE DAVIS CAMPBELL, PLAINTIFF
v.
WILLIAM TAYLOR CAMPBELL, III, DEFENDANT

No. COA14-329

Filed 21 October 2014

**Appeal and Error—interlocutory orders and appeals—improper Rule 54(b) certification—no substantial right—writ of certiorari**

Plaintiff wife's appeal from an interlocutory order vacating her judgment of absolute divorce under N.C.G.S. § 1A-1, Rule 60(b) was dismissed. The trial court's order could not properly be certified under N.C.G.S. § 1A-1, Rule 54(b). Further, plaintiff failed to meet her burden of showing that the order deprived her of a substantial right. The Court of Appeals declined plaintiff's request to construe her appellate filings as a petition for a writ of certiorari.

Appeal by plaintiff from order entered 21 October 2013 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 11 September 2014.

*Allman Spry Davis Leggett & Crumpler, P.A., by Joslin Davis, Loretta C. Biggs and Anna E. Warburton, for plaintiff-appellant.*

*Wilson, Helms & Cartledge, LLP, by Gray Wilson and Lorin J. Lapidus, and Morrow, Porter, Vermitsky & Fowler, PLLC, by John F. Morrow, Sr. and John C. Vermitsky, for defendant-appellee.*

DIETZ, Judge.

Plaintiff Suzanne Davis brings this interlocutory appeal from the trial court's order vacating her judgment of absolute divorce under Rule 60(b) of the Rules of Civil Procedure. The trial court, exercising its discretion under Rule 60(b), set aside Ms. Davis' divorce judgment so that her ex-husband William Campbell could assert a belated claim for equitable distribution.

This Court has held that an appeal from a trial court order setting aside an absolute divorce judgment "is interlocutory and subject to dismissal." *See Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994). Applying this precedent, our Court recently granted a motion to dismiss for lack of appellate jurisdiction in an appeal with facts nearly identical to those presented here. *See Steele v. Steele*, No. COA 14-231 (N.C. App. 2014). Mr. Campbell did not file a motion to dismiss this appeal, but we are obliged to review our own jurisdiction in every case. We hold that, although there may be factual circumstances in which the grant of a Rule 60(b) motion setting aside a divorce judgment affects a substantial right, Ms. Davis did not make a sufficient showing in this case. Accordingly, we dismiss this appeal for lack of jurisdiction.

**Factual Background**

After a decade of marriage, Plaintiff Suzanne Davis and Defendant William Campbell separated on 11 May 2012. On 16 November 2012, Ms. Davis filed a complaint for equitable distribution, among other claims. Mr. Campbell filed an answer and counterclaim in that action, but mistakenly failed to assert his own claim for equitable distribution. Both parties engaged in several months of vigorous discovery and motions practice on the issue of equitable distribution.

On 13 May 2013, Ms. Davis filed a separate complaint for absolute divorce and to resume use of her maiden name. On 1 July 2013, the trial court granted Ms. Davis' unopposed motion for summary judgment on that absolute divorce claim.

At some point during this process, Ms. Davis determined that it was no longer in her interests to pursue equitable distribution, although neither party's brief explains precisely why this was so. Just over a month after obtaining her absolute divorce judgment, Ms. Davis voluntarily dismissed her equitable distribution claim. Under North Carolina law, the entry of an absolute divorce judgment bars any new claims for equitable distribution. *See* N.C. Gen. Stat. § 50-11(e) (2013). As a result, although

Mr. Campbell still desired to complete the equitable distribution process, Ms. Davis' voluntary dismissal of her own claim (the only pending equitable distribution claim) permanently ended all equitable distribution litigation.

Mr. Campbell promptly filed a motion to set aside the divorce judgment under Rule 60(b) of the Rules of Civil Procedure. He contended that his failure to timely assert his own claim for equitable distribution before entry of the absolute divorce judgment was the result of excusable neglect. Specifically, he asserted that, at the time he filed his initial counterclaim in the equitable distribution action, his counsel had recently given birth to a premature baby who weighed less than two pounds. The child was hospitalized with life-threatening conditions through much of this litigation. Mr. Campbell argued that he instructed his counsel to file a claim for equitable distribution and that his counsel, distracted by her newborn's medical needs, mistakenly thought she had done so.

On 21 October 2013, the trial court granted Mr. Campbell's Rule 60(b) motion in an order containing detailed findings of fact and conclusions of law. The court set aside the absolute divorce judgment and ordered Mr. Campbell to file an answer and counterclaim for equitable distribution within 30 days. Ms. Davis appealed the trial court's order that same day. This Court allowed Ms. Davis' petition for a writ of supersedeas and stayed the trial court's Rule 60(b) order pending disposition of this appeal.

**Analysis**

Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court. *See Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963). An interlocutory order entered before final judgment is immediately appealable "in only two circumstances: (1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Robinson v. Gardner*, 167 N.C. App. 763, 767, 606 S.E.2d 449, 452 (2005) (quotation marks omitted).

The trial court's Rule 60(b) order in this case is a textbook example of a non-final, interlocutory order; it took an otherwise final judgment and re-opened it, requiring "further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also Metcalf v. Palmer*, 46 N.C. App. 622, 624, 265 S.E.2d 484, 484 (1980) (holding that orders

granting a Rule 60(b) motion are, by their nature, interlocutory). Thus, the trial court's order in this case is appealable only if it is properly certified under Rule 54(b) or if it affects a substantial right.

Ms. Davis first asserts that the trial court's order is appealable because "[t]he trial court entered a Certification of Order for Immediate Appeal" under Rule 54(b) in this case. And, indeed, the trial court entered an order in this case entitled "Certification of Order for Immediate Appellate Review." That order purports to authorize an immediate appeal under Rule 54(b) of the Rules of Civil Procedure.

But Rule 54(b) does not apply here. Under Rule 54(b), a trial court may certify a case for immediate appeal when it enters "a final judgment as to one or more but fewer than all of the claims or parties" in the case. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b). The Rule 60(b) order from which Ms. Davis appeals did not enter a final judgment on some but not all claims; rather, it set aside an earlier final judgment under Rule 60(b), re-opening the case in its entirety. Thus, the trial court's order could not properly be certified under Rule 54(b).

It is well-settled that the trial court's mistaken certification of a non-final order under Rule 54(b) is ineffective and does not confer appellate jurisdiction on this Court. *See*, *e.g.*, *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 248, 507 S.E.2d 56, 61 (1998). Accordingly, we reject Ms. Davis' argument that her appeal is properly before us based on the trial court's improper Rule 54(b) certification.

Next, Ms. Davis asserts that the trial court's Rule 60(b) order affects a substantial right. This Court, and our Supreme Court, repeatedly have held that Rule 60(b) motions setting aside the entry of summary judgment (as happened here) do not affect a substantial right. *See*, *e.g.*, *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978); *Braun v. Grundman*, 63 N.C. App. 387, 388, 304 S.E.2d 636, 637 (1983); *Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (2005). In *Baker*, this Court acknowledged that an appeal from a "trial court's order setting aside the judgment of absolute divorce and permitting defendant to file her answer and counterclaim for equitable distribution" was "interlocutory and subject to dismissal." 115 N.C. App. at 339, 444 S.E.2d at 480. Relying on this precedent, this Court recently dismissed an appeal from a Rule 60(b) order in an absolute divorce case involving facts nearly identical to both *Baker* and the present case. *See Steele v. Steele*, No. COA 14-231 (N.C. App. 2014).

Ms. Davis argues that this precedent is not controlling because the trial court's Rule 60(b) order is "analogous" to the denial of a motion

based on collateral estoppel, which affects a substantial right. *See Hillsboro Partners LLC v. City of Fayetteville*, ___ N.C. App. ___, ___, 738 S.E.2d 819, 823 (2013). This is so, according to Ms. Davis, because of the effect of Section 50-11(e) of the General Statutes. Section 50-11(e) states that "[a]n absolute divorce obtained within this State shall destroy the right of a spouse to equitable distribution . . . unless the right is asserted prior to judgment of absolute divorce." N.C. Gen. Stat. § 50-11(e) (2013). Ms. Davis argues that the trial court's Rule 60(b) order is immediately appealable because, as a consequence of § 50-11(e) and the entry of her absolute divorce judgment, Mr. Campbell was "effectively collaterally estopped as a matter of law from asserting a new equitable distribution claim."

We cannot accept this argument because it ignores why our appellate courts hold that denial of a motion based on collateral estoppel affects a substantial right. Collateral estoppel is intended to "prevent repetitious lawsuits." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). It ensures that parties (or those in privity) are not forced to re-litigate issues that were fully litigated and actually determined in previous legal actions. *Id.* Our appellate courts have concluded that an order denying a motion based on collateral estoppel is immediately appealable because "parties have a substantial right to avoid litigating issues that have already been determined by a final judgment." *Id.*

That is not the situation here. The trial court's order will not force Ms. Davis to re-litigate equitable distribution issues that already were determined by a court in an earlier proceeding. Indeed, in the only similar proceeding between the parties, Ms. Davis voluntarily dismissed her equitable distribution claim, preventing the trial court from determining that issue on the merits.

In effect, Ms. Davis argues not that she is compelled to re-litigate an issue previously determined by a court, but instead that she must fully litigate—for the first time—an issue that she thought was precluded by the judgment she obtained. But that argument can be made in virtually every Rule 60(b) case and our appellate courts have long rejected it as a basis for immediate appeal. *See Waters*, 294 N.C. at 208, 240 S.E.2d at 344; *Robinson*, 167 N.C. App. at 768, 606 S.E.2d at 452. In short, because no court has yet adjudicated the parties' equitable distribution claim, Ms. Davis cannot rely on our collateral estoppel precedent to immediately appeal the trial court's Rule 60(b) order.

Ms. Davis also argues that the trial court's order results in "the possibility of having to litigate two separate equitable distribution cases on

the same claims with inconsistent verdicts." But Ms. Davis voluntarily dismissed her own equitable distribution claim after obtaining her absolute divorce judgment—meaning there was no verdict on that claim. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a) (dismissal without prejudice is not "an adjudication upon the merits"). Simply put, the trial court's Rule 60(b) order does not expose Ms. Davis to the risk of a second, inconsistent equitable distribution verdict because there was never a first equitable distribution verdict.

Finally, Ms. Davis argues that she might "be forced to take steps to invalidate the true representations she has made in reliance on the Divorce Judgment to establish herself as a single individual." But she does not explain how changing those "true representations" about her marital status would rise to the level of affecting a substantial right. From this record, it is impossible to tell whether this would be a complicated process or something as simple as filling out some additional paperwork. As this Court has repeatedly held, "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

Moreover, Ms. Davis has provided no reason why she could not renew her motion for entry of the absolute divorce judgment as soon as Mr. Campbell asserts his claim for equitable distribution. The trial court already considered and granted that motion once before, and likely would do so promptly a second time. Thus, the time period in which Ms. Davis would be deprived of her previously entered divorce judgment likely would be exceedingly short. Ms. Davis offers no evidence or argument to the contrary. Accordingly, we hold that Ms. Davis "has not met [her] burden of showing this Court that the order deprives [her] of a substantial right." *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003).

In dismissing this appeal, we do not suggest that no litigant can satisfy the substantial rights test in similar circumstances. We can imagine a number of specific factual circumstances in which a Rule 60(b) motion setting aside a judgment for absolute divorce, and effectively remarrying the parties, might affect a substantial right. But "[t]he extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis." *Hamilton v. Mtge. Info. Serv., Inc.*, 212 N.C. App. 73, 78, 711 S.E.2d 185, 189 (2011). Here, as in the *Steele* appeal that we

dismissed several months ago, the appellant did not make a sufficient showing to satisfy the substantial rights test.

**Conclusion**

For the reasons discussed above, we dismiss this appeal for lack of appellate jurisdiction. We also decline Ms. Davis' request to construe her appellate filings as a petition for a writ of certiorari. Ms. Davis will have a full and fair opportunity for appellate review of the trial court's Rule 60(b) order after entry of final judgment in this case. Thus, certiorari is not appropriate here. *See Sood v. Sood*, ___ N.C. App. ___, ___, 732 S.E.2d 603, 609, *appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012).

DISMISSED.

Judges STEELMAN and GEER concur.

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PENNY FOX, PLAINTIFF
v.
SARA LEE CORPORATION AND JOHN ZIEKLE, DEFENDANTS

No. COA14-326

Filed 21 October 2014

**Emotional Distress—intentional infliction—ratification of conduct**

The trial court did not err by granting summary judgment for defendant on plaintiff's claim for intentional infliction of emotional distress. Plaintiff failed to present any evidence that defendant ratified the tortious actions of its employee, who allegedly assaulted plaintiff.

Appeal by plaintiff from order entered 3 December 2013 by Judge David L. Hall in Superior Court, Forsyth County. Heard in the Court of Appeals 9 September 2014.

*Stephen A. Boyce, for plaintiff-appellant.*

*Constangy, Brooks & Smith, LLP by Robin E. Shea, for defendants-appellees.*

STROUD, Judge.

Plaintiff appeals the trial court order granting defendant Sara Lee Corporation's motion for summary judgment and dismissing her claim. Because plaintiff failed to present any evidence that defendant Sara Lee ratified the tortious actions of its employee, defendant John Ziekle, we affirm the trial court's order granting summary judgment and dismissing plaintiff's claim.

## I. Background

In 2005, plaintiff and defendant Ziekle were both employees of defendant Sara Lee and worked "in the Sara Lee Corporation Madison Park facility in Winston-Salem, North Carolina." Plaintiff was employed as an analyst in defendant Sara Lee's business government department, while defendant Ziekle worked in the information technology department and one of his duties was to service "the computer systems the Plaintiff used in her work." This case arises out of defendant's Ziekle's alleged sexual assault of plaintiff on 24 August 2005. Plaintiff's complaint was previously dismissed by the trial court and appealed to this Court. *Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 707, 709 S.E.2d 496, 498 (2011) ("*Fox I*"). We set forth the procedural background for this case in the first appeal, in *Fox I*:

> Penny Fox (Plaintiff) filed a complaint against Sara Lee Corporation (Sara Lee) and John Ziekle (Mr. Ziekle) (collectively, Defendants) on 24 September 2009. In her complaint, Plaintiff alleged that she had been an employee at Sara Lee, and that Mr. Ziekle had been a co-worker. Plaintiff contended that she had been sexually assaulted by Mr. Ziekle and, as a result, suffered severe mental health problems that led to the loss of her job with Sara Lee. Plaintiff asserted claims of assault, battery, false imprisonment, intentional infliction of emotional distress and negligence, and sought damages. Sara Lee filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(6), contending that all of Plaintiff's claims were barred by the statute of limitations. In an order entered 21 January 2010, the trial court granted Sara Lee's motion and dismissed Plaintiff's complaint in its entirety with prejudice. Plaintiff appeals.

*Id.* at 707, 709 S.E.2d at 497-98.

In *Fox I*, we determined that plaintiff had abandoned "her claims for assault, battery, and false imprisonment." *Id.* at 708, 709 S.E.2d at 498. The only remaining issue in *Fox I* was "whether the trial court properly granted Sara Lee's motion to dismiss Plaintiff's claims based on emotional distress" because they were barred by the statute of limitations. *Id.* In *Fox I*, this Court reversed the dismissal of plaintiff's claim based on the statute of limitations because

> Plaintiff's complaint sufficiently alleged that: (1) Plaintiff became an incompetent adult for the purposes of tolling the statute of limitations; and (2) Plaintiff was under a disability at the time she suffered the severe emotional distress which caused her claims to accrue. Therefore, we reverse the trial court's order granting Sara Lee's N.C.G.S. § 1A–1, Rule 12(b)(6) motion to dismiss as to Plaintiff's claims for emotional distress and remand to the trial court.

*Id.* at 715, 709 S.E.2d at 502 (quotation marks omitted). *Fox I* was filed 5 April 2011. *See Fox I*, 210 N.C. App. 706, 709 S.E.2d 496.

On 25 April 2011, defendant Sara Lee answered plaintiff's complaint and alleged various defenses. On 29 May 2012, the trial court entered default against defendant Ziekle based upon his failure to file "an answer, motion, or other responsive pleading, and he has not obtained an enlargement of time to do so." On 29 August 2013, the trial court entered a default judgment against defendant Ziekle ordering him to pay plaintiff $752,492.00; this default judgment was entered without any prejudice to defendant Sara Lee.

On 18 November 2013, plaintiff voluntarily dismissed her claim for negligent infliction of emotional distress against defendant Sara Lee. Thus, the only remaining claim was plaintiff's claim against defendant Sara Lee for intentional infliction of emotional distress, based upon defendant Sara Lee's alleged ratification of defendant Ziekle's conduct. On 4 November 2013, defendant Sara Lee filed for summary judgment alleging plaintiff's claim was "barred because she cannot create a genuine issue of material fact that Sara Lee ratified the alleged conduct of Defendant" Ziekle. On 3 December 2013, the trial court granted defendant Sara Lee's motion for summary judgment and dismissed plaintiff's only remaining claim. Plaintiff appeals.

## II. Summary Judgment

Defendant Sara Lee's motion for summary judgment alleged three possible bases for the trial court to grant summary judgment dismissing

plaintiff's claim: (1) expiration of the statute of limitations, (2) workers' compensation exclusivity bars the claim, and (3) lack of sufficient evidence that defendant Sara Lee ratified defendant Ziekle's allegedly wrongful conduct. The order granting summary judgment does not state which of the rationales the trial court relied upon in dismissing plaintiff's claim.

Much of plaintiff's argument on appeal addresses her severe emotional distress and details of her disability, psychiatric diagnoses, and treatment. We do not doubt the validity and seriousness of plaintiff's emotional distress. We will assume *arguendo* for purposes of this appeal, viewing the evidence in the light most favorable to plaintiff, that her mental health was so severely impaired that the statute of limitations was tolled and that her claims were therefore timely filed. For this reason, we will not address plaintiff's arguments regarding the severity of her distress and its ramifications on her daily life nor will we address the statute of limitations; we will address only the merits of plaintiff's substantive claim, which is that defendant Sara Lee is liable to her for intentional infliction of emotional distress because it ratified defendant Ziekle's allegedly tortious conduct.

Thus turning to the trial court's summary judgment order on the merits of plaintiff's claim:

> A trial court appropriately grants a motion for summary judgment when the information contained in any depositions, answers to interrogatories, admissions, and affidavits presented for the trial court's consideration, viewed in the light most favorable to the non-movant, demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. As a result, in order to properly resolve the issues that have been presented for our review in this case, we are required to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party. When there are factual issues to be determined that relate to the defendant's duty, or when there are issues relating to whether a party exercised reasonable care,

> summary judgment is inappropriate. We review orders granting or denying summary judgment using a de novo standard of review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court.

*Trillium Ridge Condominium Ass'n, Inc. v. Trillium Links & Village, LLC*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (Sept. 16, 2014) (No. COA14-183) (citations, quotation marks, and brackets omitted).

Plaintiff argues that there are genuine questions raised by the evidence as to several facts: (1) "whether Prudy Yates was the Plaintiff's immediate supervisor on August 24, 2005[;]" (2) "whether Manager Yates told the Plaintiff not to report the Ziekle assault[;]" (3) "whether Manager Yates ever reported the Ziekle assault[;]" and (4) "[w]hether Manager Yates' instructions to not report the Ziekle assault and her failure to immediately report the assault herself were done in the line of duty and within the scope of Manager Yates' employment." (Original in all caps.) Plaintiff notes in her brief, deposition testimony and affidavits that present slightly varying descriptions of each of these facts. To the extent that there are any genuine issues raised by the evidence, we find that they are not material, since even if we view the evidence in the light most favorable to plaintiff, it does not support ratification by defendant Sara Lee.

In August of 2005, defendant Ziekle worked in defendant Sara Lee's information technology department and one of his duties was to service "the computer systems the Plaintiff used in her work." Plaintiff testified in her deposition that late in the day on Wednesday, 24 August 2005, she was preparing to leave work when defendant Ziekle came up behind her, trapped her in her cubicle, put his arm around her neck, and fondled her breast against her will. Plaintiff acknowledged that prior to the 24 August 2005 incident she could not remember thinking or feeling anything specifically "off putting" about defendant Ziekle.

After plaintiff got home from work, she called Ms. Prudy Yates, a manager in her department, and told her what defendant Ziekle had done to her. According to plaintiff, Ms. Yates told her told her to not report defendant Ziekle's alleged wrongful conduct, and if she did report it, she should not provide names. The evidence shows, as summarized by plaintiff's brief, that

> [t]he day after the Ziekle assault and the telephone conversation with Manager Yates, Plaintiff Fox called HR Director Bostwick and arranged to meet with her the

following Friday. (App. P. 36, Fox Dep. Vol. I, P. 235, L. 1-10)

> Plaintiff Fox first met with Director Bostwick on Friday, August 26 and again on Wednesday, August 31, 2005. The Plaintiff testified that she described the Ziekle assault and her telephone conversation with Manager Yates during both meetings. She told Director Bostwick that Manager Yates had told her not to report the assault. Director Bostwick told the Plaintiff that she would investigate the Manager Yates telephone conversation, but the Plaintiff could not refer to Manager Yates in any complaint about the Ziekle assault. (App. P. 38-51, Fox Dep. Vol. I, P. 237, L. 11 – P. 250, L. 10)[.]

Whatever the truth may be about who first notified Ms. Amy Bostwick and how,[1] it is undisputed that she was the Director of Human Resources and that she initiated the investigation of defendant Ziekle immediately upon plaintiff's report to her.

Ms. Bostwick then contacted Mr. Nathan Chapman, who was the Senior Human Resources Manager over defendant Ziekle's work department. Mr. Chapman interviewed defendant Ziekle on Friday, 2 September 2005; defendant Ziekle claimed that he did not recall whether he had inappropriately touched plaintiff. Because defendant Ziekle did not deny the allegation, Mr. Chapman suspended defendant Ziekle that same day. Defendant Ziekle never returned to work at defendant Sara Lee after that day, and he was officially terminated on 12 September 2005. There was no contact between plaintiff and defendant Ziekle after the 24 August 2005 incident. Plaintiff never returned to work with defendant Sara Lee, except for a few days in December 2005, though from the perspective of defendant Sara Lee she was free to do so. On 31 August 2006, plaintiff claims she received a letter of termination because she "had been out on medical leave for one year."[2]

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1. In her deposition Ms. Yates testified that on Thursday, 25 August 2005, she went to check on plaintiff. Ms. Yates said she asked plaintiff if she had contacted Ms. Bostwick; plaintiff informed her she did not have her phone number; so Ms. Yates gave plaintiff Ms. Bostwick's phone number and said, "You have got to call her." Ms. Bostwick's affidavit states that on 25 August 2005, Ms. Yates contacted her and told her she "needed to get in touch with" plaintiff.

2. There are no issues on appeal regarding plaintiff's medical leave or ultimate termination with defendant Sara Lee.

In considering the alleged genuine issues of material fact posited by plaintiff, even if we assume that (1) "Prudy Yates was the plaintiff's immediate supervisor on August 24, 2005[;]" (2) "Manager Yates told the Plaintiff not to report the Ziekle assault[;]" (3) "Manager Yates [never] reported the Ziekle assault[;]" and (4) "Manager Yates' instructions to not report the Ziekle assault and her failure to immediately report the assault herself were done in the line of duty and within the scope of Manager Yates' employment[;]" this does not demonstrate that defendant Sara Lee ratified defendant Ziekle's actions.

Essentially, at best, plaintiff claims that Ms. Yates' erroneous advice -- not to report the defendant Ziekle's assault -- caused her to delay reporting defendant Ziekle's actions to Ms. Bostwick for a period of time from the evening of 24 August 2005 until 25 August 2005. As summarized by plaintiff's brief, "[t]he day after the Ziekle assault and the telephone conversation with Manager Yates, Plaintiff Fox called HR Director Bostwick and arranged to meet with her the following Friday[,]" which was the Friday after the Wednesday on which the incident occurred. We are unable to discern what effect, if any, Ms. Yates' allegedly erroneous instructions to plaintiff had upon plaintiff's actions, as she disregarded these instructions and on Thursday called to arrange an appointment with Ms. Bostwick and met with her on Friday. There is no dispute that from the time that plaintiff notified Ms. Bostwick, defendant Sara Lee investigated the claim promptly and terminated defendant Ziekle's employment.

Plaintiff's theory of ratification is based solely upon one phone call in which she alleges Ms. Yates told her not to report the incident, but if she did, not to use the name of the party involved. In *Denning-Boyles v. WCES, Inc.*, this Court described the legal bases for an employer's liability for a wrongful intentional act by an employee as follows:

> An employer may be held liable for the torts of an employee under the doctrine of *respondeat superior* in circumstances where: (1) the employer expressly authorizes the employee's act; (2) the tort is committed by the employee in the scope of employment and in furtherance of the employer's business; or (3) the employer ratifies the employee's tortious conduct. For plaintiff to have survived summary judgment as to [defendant], therefore, the evidence must necessarily have tended to show that the acts of [co-worker] and the conduct of [defendant] fell into one of the aforementioned categories. We conclude plaintiff presented a sufficient forecast of the evidence to

move forward on the theory of ratification, and thus do not discuss the remaining categories.

This Court has held that:

> In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act.

In addition,

> the jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. Such course of conduct may involve an omission to act.

Finally, although the employer must have knowledge of all material facts relative to its employee's acts in order to effect ratification,

> if the purported principal is shown to have knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge which he has.

123 N.C. App. 409, 411-15, 473 S.E.2d 38, 40-42 (1996) (citations, quotation marks, and brackets omitted). Black's Law Dictionary defines "ratification" as "[a]doption or enactment" or "[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done" or "[a] person's binding adoption of an act already completed[.]" Black's Law Dictionary 1376 (9th ed. 2009).

Plaintiff contends that her case is analogous to *Brown v. Burlington Industries, Inc.*, in which the plaintiff told her supervisor over the course of approximately two years about her co-workers' numerous acts of alleged sexual harassment, but the supervisor failed to take any action to protect the plaintiff or to investigate her claims. *See Brown*, 93 N.C. App. 431, 432, 378 S.E.2d 232, 233 (1989), *disc. review improvidently allowed per curiam*, 326 N.C. 356, 388 S.E.2d 769 (1990). Eventually, the plant manager found out about the plaintiff's co-worker's conduct and

fired him within approximately a month of receiving the information. *Id.* at 432-33, 378 S.E.2d at 233. This Court determined that the supervisor's inaction ratified the co-worker's tortious conduct. *See id.* at 437-38, 378 S.E.2d at 236.

In *Denning-Boyles*, this Court also found that the defendant employer ratified the offending employee's action where multiple co-workers complained over a span of approximately four months about the repeated tortious conduct. *See id.* at 415, 473 S.E.2d at 41. In *Denning-Boyle*s, the plaintiff was asked to stop complaining and the defendant ultimately decided the offending employee would keep his employment with defendant and plaintiff should be the one to leave. *See id.* at 416-17, 473 S.E.2d at 43.

This case is entirely distinguishable from both *Denning-Boyles* and *Brown*. *Contrast Denning-Boyles*, 123 N.C. App. 409, 473 S.E.2d 38; *Brown*, 93 N.C. App. 431, 378 S.E.2d 232. Here, plaintiff contacted Ms. Bostwick the day after the incident, met with her within two days of the incident, and Ms. Bostwick took immediate action to investigate the claim against defendant Ziekle, which resulted in Ziekle's termination within the month.

In order to prove ratification, plaintiff must first show that defendant Sara Lee "had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, show[ed] an intention to ratify the act." *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42. There was only one act alleged here, the 24 August 2005 groping by defendant Ziekle, and not a continuing course of conduct, as in *Denning-Boyles* and *Brown*. *Contrast Denning-Boyles*, 123 N.C. App. 409, 473 S.E.2d 38; *Brown*, 93 N.C. App. 431, 378 S.E.2d 232. Even taking the evidence in the light most favorable to plaintiff, and assuming that plaintiff described "all material facts and circumstances" to Ms. Yates on the phone, *Denning-Boyles*, 123 N.C. App. at 415, 473 S.E.2d at 42, the only time period during which defendant Sara Lee could possibly be considered as "ratifying" defendant Ziekles's conduct would be from the time of the phone call until Plaintiff met with Ms. Bostwick within two working days of the incident. Whatever Ms. Yates told plaintiff on the phone, plaintiff reported the incident to the proper personnel of defendant Sara Lee, and defendant Sara Lee immediately initiated the investigation, which was, as a practical matter, the first opportunity that defendant Sara Lee had to address the incident.

Furthermore, plaintiff has not demonstrated "any course of conduct on the part of [defendant Sara Lee] which reasonably tends to show an

intention on [its] part to ratify [defendant Ziekle]'s unauthorized acts. Such course of conduct may involve an omission to act." *Id.* Defendant Sara Lee immediately initiated an investigation, which was completed quickly and resulted in Ziekle's termination.

In fact, we are not sure how defendant Sara Lee could have acted much more quickly and decisively in its investigation of plaintiff's claims. Instead of ratifying, or even briefly tolerating, defendant Ziekle's conduct, defendant Sara Lee took action to protect plaintiff from further wrongful conduct on his part. As plaintiff failed to forecast sufficient evidence that defendant Sara Lee ratified defendant Ziekle's conduct or any other basis for *respondent superior* liability, we conclude that the trial court properly granted defendant Sara Lee's motion for summary judgment.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges McGEE and BRYANT concur.

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IN THE MATTER OF L.R.S.

No. COA14-323

Filed 21 October 2014

**Termination of Parental Rights—grounds—dependency—extended incarceration of parent—no alternative child care arrangement**

The trial court did not err by terminating respondent mother's parental rights based on dependency. Respondent's extended incarceration constituted a condition that rendered her unable or unavailable to parent the minor child. Further, respondent had not proposed an alternative child care arrangement. The Court of Appeals did not address respondent's arguments that grounds also existed to terminate parental rights under N.C.G.S. § 7B-1111(a)(1) since one ground was already found to be sufficient.

Appeal by respondent mother from order entered 16 December 2013 by Judge David V. Byrd in Surry County District Court. Heard in the Court of Appeals 30 September 2014.

*Susan Curtis Campbell for petitioner-appellee Surry County Department of Social Services.*

*Mercedes O. Chut for respondent-appellant mother.*

*Administrative Office of the Courts, by Appellate Counsel Tawanda N. Foster, for guardian ad litem.*

McCULLOUGH, Judge.

Respondent mother appeals from an order entered 16 December 2013, which terminated her parental rights to her minor child, L.R.S. ("Lilly")[1]. Because the trial court's conclusion that the ground of dependency existed to terminate respondent's parental rights is supported by its findings of fact and record evidence, we affirm.

The Surry County Department of Social Services ("DSS") became involved with respondent and Lilly in January of 2012 when it obtained non-secure custody of Lilly and filed a petition alleging she was a neglected and dependent juvenile. At the time of the filing of the petition, Lilly was just two months old, respondent had been arrested and jailed on criminal charges, and Lilly's father was incarcerated with the North Carolina Department of Public Safety. After a hearing on 8 March 2012, the trial court entered adjudication and disposition orders on 4 April 2012, concluding Lilly was a neglected and dependent juvenile and continuing custody of Lilly with DSS. At the time of the entry of the court's orders, respondent lived in a residential facility in Wake County pursuant to a pre-trial release order for pending federal criminal charges.

Over the next several months, respondent resided in residential facilities awaiting disposition of her federal criminal charges. Respondent regularly visited with Lilly until 18 December 2012, when she was expelled from the residential facility for not complying with its rules. In January 2013, respondent was convicted of her federal criminal charges and sentenced to a term of 38 months imprisonment. Respondent was subsequently transported to a federal correctional institution in Danbury, Connecticut to serve her sentence. In a permanency planning order entered 11 March 2013, the trial court relieved DSS of further reunification efforts with both parents, set the permanent plan for Lilly as adoption, and directed DSS to initiate an action to terminate parental rights.

1. Pseudonyms are used to protect the child's identity and for ease of reading.

On 18 March 2013, DSS filed a motion for the termination of parental rights to Lilly. After a hearing on 28 August 2013, the trial court entered an order terminating the parental rights of both respondent and Lilly's father. The court concluded grounds existed to terminate respondent's parental rights based on neglect and dependency, *see* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2013), and that it was in Lilly's best interests to terminate her parental rights.[2] Respondent appeals.

On appeal from an order terminating parental rights, this Court reviews the order for "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (citations and quotation marks omitted), *disc. review denied sub nom.*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary." *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009). The trial court's findings of fact which an appellant does not specifically dispute on appeal "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd. per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

We first address respondent's argument that the trial court erred in concluding grounds existed to terminate her parental rights based on dependency. A trial court may terminate parental rights if it concludes:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

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2. The trial court also terminated the parental rights of Lilly's father on the grounds of neglect, dependency, and abandonment. N.C. Gen. Stat. § 7B-1111(a)(1), (6), (7). Lilly's father also appealed from the trial court's order, but was permitted to withdraw his appeal by order of this Court entered 6 May 2014.

N.C. Gen. Stat. § 7B-1111(a)(6) (2013). A dependent juvenile is defined as one who is "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). Thus, the trial court's findings regarding this ground "must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Respondent first asserts that the ground of dependency is only properly found where the evidence shows that the incapability will continue throughout the child's minority. Respondent cites to this Court's opinion in *In re Guynn*, 113 N.C. App. 114, 437 S.E.2d 532 (1993), for support for this assertion. However, in *Guynn*, this Court reviewed an order terminating parental rights using a prior statutory version of the ground of dependency. The dependency ground at issue in *Guynn* required the trial court to find:

> That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child.

*Id.* at 119, 437 S.E.2d at 535-36; *see also* N.C. Gen. Stat. § 7A-289.32(7) (1991). Here, the trial court applied the current standard and was not required to find that there was a reasonable probability that such incapability will continue throughout the minority of the child. Rather, the trial court properly found that there is a reasonable probability that such incapability will continue for the foreseeable future.

Respondent also argues that the trial court erred in concluding that the ground of dependency existed where DSS presented no evidence of mental illness or disability that would render her incapable of parenting in the foreseeable future. In support of her argument, respondent cites *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012), which relies on *In re Clark*, 151 N.C. App. 286, 565 S.E.2d 245, *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

In *Clark*, this Court reversed a trial court's order terminating parental rights on the ground of dependency where there was "no evidence

at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for [the juvenile], nor did the trial court make any findings of fact regarding such a condition[,]" and where "there was no clear and convincing evidence to suggest that respondent was incapable of arranging for appropriate supervision for the child." *In re Clark*, 151 N.C. App. at 289, 565 S.E.2d at 247-48. Relying on *Clark*, in *J.K.C.*, this Court then affirmed the dismissal of a termination petition on the ground that, although the respondent was incarcerated, "the trial court did not find respondent was incapable of providing care and supervision." *In re J.K.C.*, 218 N.C. App. at 41, 721 S.E.2d at 277. In *J.K.C.*, this Court further noted that "[s]imilar to the facts in *Clark*, the guardian ad litem . . . did not present any evidence that respondent's incapability of providing care and supervision was due to one of the specific conditions or any other similar cause or condition." *Id.*

In *Clark*, however, this Court again applied a prior version of the statute setting forth the ground of dependency, which stated that a trial court could terminate parental rights where it found:

> That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other *similar* cause or condition.

*In re Clark*, 151 N.C. App. at 288, 565 S.E.2d at 247 (emphasis added); *see also* N.C. Gen. Stat. § 7B-1111(a)(6) (2001). As this Court recently discussed in an instructive unpublished opinion, *see In re G.L.K.*, COA 13-92, 2013 WL 3379750 (N.C. App. July 2, 2013), effective 1 December 2003, the North Carolina General Assembly modified the ground of dependency by removing the requirement that "other" causes or conditions resulting in dependency be "similar" to substance abuse, mental retardation, mental illness, or organic brain syndrome. 2003 N.C. Sess. Laws ch. 140, §§ 3, 11. The statute now permits dependency to be based on "substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile . . . ." N.C. Gen. Stat. § 7B-1111(a)(6).

In contrast to *J.K.C.*, in the present case, the trial court found that due to her extended incarceration, respondent would be unable to parent Lilly, and that this inability would continue for the foreseeable future. The court found that in January 2013, respondent was sentenced to an active term of 38 months imprisonment, and that her projected release date was 13 September 2014. Thus, at the time of the hearing in August 2013 respondent was not scheduled to be released from federal custody for at least 13 additional months, and potentially faced up to 30 additional months imprisonment. Respondent's extended incarceration is clearly sufficient to constitute a condition that rendered her unable or unavailable to parent Lilly.

Respondent further contends the trial court erred in finding that she had not proposed an appropriate alternative child care arrangement for Lilly. Respondent argues that she repeatedly offered a married couple (the "Martins"), who had previously adopted another of respondent's children, as appropriate alternative caregivers. Respondent's argument is misplaced.

Respondent first indicated to the trial court that the Martins were willing to accept placement of Lilly and were interested in adopting her at the 11 January 2013 permanency planning hearing. Mrs. Martin testified at that hearing that she and her husband were willing to care for Lilly, however, she also acknowledged that they had previously declined placement of Lilly in April 2012. At the termination hearing, a DSS social worker testified that although respondent had repeatedly recommended placement of Lilly with the Martins, DSS did not recommend the placement. Moreover, no evidence was presented at the termination hearing that the Martins continued to agree to be considered a placement option for Lilly. Given the Martins' prior decision to decline the placement and lack of evidence at the termination hearing that they were willing and able to care for Lilly, we cannot say the trial court erred in finding that respondent had not proposed an alternative child care arrangement for her child. Accordingly, we hold the trial court's findings of fact support its conclusion that grounds to terminate respondent's parental rights existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

Because the evidence and findings of fact support the conclusion that grounds existed to terminate respondent's parental rights on the basis of dependency, we need not address respondent's arguments regarding the court's conclusion that grounds also existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Respondent has not challenged the dispositional ruling that termination of her parental rights was in Lilly's best interests, and we thus affirm the trial court's order terminating respondent's parental rights.

Affirmed.

Judges CALABRIA and STEELMAN concur.

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STATE OF NORTH CAROLINA
v.
ANTOINETTE NICOLE DAVIS

No. COA14-258

Filed 21 October 2014

**1. Appeal and Error—writ of certiorari—notice**

A defendant's petition for writ of certiorari to reach the merits of her appeal was granted in the discretion of the Court of Appeals even though defendant did not give notice during plea negotiations of her intent to appeal the denial of her motion to suppress and even though the notice of appeal failed to identify the specific court to which the appeal was taken.

**2. Confessions and Incriminating Statements—interrogation—not custodial**

The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding that defendant was not subject to custodial interrogation under the totality of the circumstances where a reasonable person in defendant's position would not have believed that she was formally arrested or restrained at the time she gave incriminating statements. There was no indication that the trial court utilized a subjective rather than objective test, the trial court did not operate under a misapprehension of law, and competent evidence supported the trial court's factual findings that defendant was neither threatened nor restrained during a fourth interview.

**3. Confessions and Incriminating Statements—statement not coerced—officer's false promise**

The trial court did not err in a prosecution arising from the sexual abuse and murder of defendant's daughter by concluding

that defendant's statements were freely and voluntarily given. An officer's promise that defendant would "walk out" regardless of her statements did not render defendant's confession involuntary.

Appeal by defendant from judgment entered 18 October 2013 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 27 August 2014.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.*

*Amanda S. Zimmer for defendant-appellant.*

HUNTER, Robert C., Judge.

Antoinette Nicole Davis ("defendant") appeals from judgment entered pursuant to her *Alford* plea to two counts of felonious child abuse and one count each of second degree murder, human trafficking, conspiracy to commit sexual offense of a child by an adult offender, first degree kidnapping, first degree sexual offense, sexual servitude, and taking indecent liberties with a minor. On appeal, defendant challenges the trial court's denial of her motion to suppress incriminating statements made to law enforcement personnel during interviews conducted in November 2009. Specifically, defendant argues that the trial court erred by concluding that: (1) defendant was not subject to custodial interrogation during these interviews, and (2) her confession was voluntarily and understandingly made.

After careful review, we affirm the trial court's denial of defendant's motion to suppress.

## Background

From 10 November 2009 through 14 November 2009, defendant was interviewed four times by law enforcement personnel at the Fayetteville City Police Department. She went to the police department voluntarily for each of the four interviews, with the stated purpose of helping the officers find her missing five-year-old daughter, S.D.[1]

### A. The First Interview

On 10 November 2009, defendant called 911 to report that S.D. was missing. She went to the police station and spoke with Detective Tracey

1. To protect the privacy of the minor victim, we will refer to her using her initials.

Bowman ("Detective Bowman"). The first interview began at 8:54 a.m. and lasted approximately six hours and nine minutes. Defendant was left alone in the interview room for long periods of time, with the door closed but unlocked. Detective Bowman told defendant that she was keeping the door closed as a safety precaution because criminal suspects were inside the building. Defendant was allowed to take bathroom and cigarette breaks, but was accompanied by Detective Bowman during each. Detective Bowman explained that a Police Department safety code required that she escort defendant. Defendant was offered beverages several times throughout the interview and was given food to eat.

In the first interview, defendant told Detective Bowman that she did not know what happened to S.D. or who could have taken her. At the time, defendant and S.D. were living in a trailer with defendant's sister, Brenda. Defendant claimed to have put S.D. to sleep in S.D.'s brother's bedroom at around 5:00 a.m. that morning, and that at around 6:00 a.m., S.D.'s brother told defendant that S.D. was no longer in the bed with him. When defendant discovered that no one in the trailer had seen S.D., she searched the front part of her neighborhood then called the police.

Towards the end of the interview, defendant expressed frustration at being at the police station for so long, because she wanted to be out looking for S.D. Detective Bowman told her she could leave if she really wanted to, but defendant declined. Defendant left the station approximately six hours after arriving.

**B. The Second Interview**

The second interview began at 5:25 p.m. on 11 November 2009 and lasted approximately thirty minutes. During this interview, defendant told Detective Bowman that her boyfriend, Clarance Coe ("Coe"), had taken S.D. She claimed that he hit S.D. twice in the face in the early morning hours of 10 November 2009 after having an intense argument with defendant. Although defendant claimed that she tried to stop him, Coe "took off" in a car with S.D. Defendant told Detective Bowman that she believed S.D. to be somewhere around the Murchison Road area. After taking defendant's statement, Detective Bowman checked to see if there were any new developments in the case. Soon thereafter, defendant left the station.

**C. The Third Interview**

The third interview began at 8:38 p.m. on 12 November 2009 and lasted approximately forty-six minutes. Detective Bowman initiated the interview by telling defendant that she knew defendant had been lying

about what happened to S.D. Detective Bowman yelled and cursed at defendant, repeatedly accusing her of lying. Defendant began to cry. Detective Bowman showed defendant a photograph of S.D. with Mario McNeil, also known as "Mono," and asked defendant what she thought Mono would say when he was caught. Defendant then admitted that she had lied the previous day and that Coe had nothing to do with S.D.'s disappearance. Detective Bowman told defendant that her false statements lead to Coe's arrest and incarceration and that lying to a federal agent is a federal offense punishable by up to five years in prison.

During the interview, Detective Bowman left the room and closed the door as a safety precaution due to other prisoners being in the building. Defendant asked for and received a glass of water, at which time Detective Bowman told defendant that they needed to work together to get S.D. back safely. Defendant told Detective Bowman that Mono had a relationship with defendant's sister, Brenda. Defendant was then allowed to take a bathroom break and was left alone in the interview room. Before defendant left the police station, Detective Bowman told her that she did not know what would happen as a result of defendant's lies, and that "[a]ll we care about right now is finding your daughter." Defendant thanked Detective Bowman and left the police station.

**D. The Fourth Interview**

The fourth and final interview began at 11:53 a.m. on 14 November 2009 and lasted approximately five hours and thirty minutes. Rather than speaking with Detective Bowman, defendant was interviewed by Detective Carolyn Pollard ("Detective Pollard") and Sergeant Chris Corcione ("Sgt. Corcione"). Defendant was seated in the back corner of the interview room, with Detective Pollard and Sgt. Corcione between her chair and the door. After approximately two hours of discussing defendant's personal background, defendant indicated that her stomach hurt. She told the officers that she was pregnant. Detective Pollard suggested that defendant go to the Health Department for an examination, but defendant refused and said "[m]y next step is to finish trying to find my daughter."

Defendant then began recounting the events surrounding S.D.'s disappearance. She awoke on the morning of 10 November 2009 to find S.D. gone. Defendant asked her sister's boyfriend if anyone had been in the house, and he replied "Mono." However, defendant claimed that she did not see or hear anyone in the house and reiterated that she had nothing to do with S.D.'s disappearance. Defendant admitted to Detective Pollard and Sgt. Corcione that she lied in previous interviews and "put

it all on [Coe]." However, defendant said that she lied because Detective Bowman scared her and "tried to make her know something she didn't know." Detective Pollard asked defendant if she was scaring her, and defendant said that she was not. Defendant then said that she wanted to tell the truth after she learned that Coe had been arrested because of her previous lies.

Sgt. Corcione told defendant that he wanted her to tell the truth, because Mono was in jail and had already informed the police that defendant knew what happened to S.D. The officers told defendant that they already knew what happened but that they needed to hear it from her; they repeatedly asked defendant to stay on the "right track" by telling the truth. Defendant told the officers that Mono came to the trailer because he wanted to have sex with her. Sgt. Corcione advised defendant to stay on the right track, and said that no matter what she said she would "walk out of here."

Eventually, defendant said that she owed Mono $200.00, and that he wanted either the money that was owed or sex to repay the debt. Sgt. Corcione told defendant that Mono was going to tell the truth to save himself, so she needed to be entirely truthful about what happened next. He told defendant "I got to hear it from you so we can put that monster away." Defendant emotionally confessed to the officers that Mono took S.D. to a motel room with defendant's consent with the understanding that "[a]ll he was supposed to do was have sex with her." She said that this arrangement would settle her $200.00 debt. Defendant then claimed that the plan was for Mono to take S.D. to a motel for another individual to have sex with her, but she did not know whom the third party was. After giving these statements to the officers, defendant requested and was allowed to take a cigarette break.

When she returned, defendant was asked for details regarding the arrangement she had with Mono. Defendant denied knowing the specifics of Mono's plan for S.D. Defendant was then left in the interview room alone. She asked Sgt. Corcione how much longer she was going to be there, to which he responded "[n]ot too much longer." Defendant took another bathroom and cigarette break and asked Detective Pollard to join her outside. After returning, defendant took one more bathroom break, then was left alone in the interview room for approximately thirty minutes. Detective Bowman then entered the room and advised defendant that she was under arrest and was no longer free to leave.

On 16 November 2009, S.D.'s body was found on the side of Walker Road outside of Fayetteville. Medical examiners concluded that S.D.'s

cause of death was asphyxiation. Blood was found on anal and vaginal swabs, indicating sexual trauma.

Defendant was charged with human trafficking, felonious child abuse, felony conspiracy, first degree kidnapping, first degree murder, rape of a child by an adult offender, sexual servitude, and taking indecent liberties with a child. She filed a motion to suppress the incriminating statements made to Detective Pollard and Sgt. Corcione during the fourth interview, but did not move to suppress any statements made in the other three interviews. After hearing the parties on defendant's motion to suppress, the trial court entered an order denying the motion.

In exchange for dismissal of the rape charge and a reduction from first to second degree murder, defendant entered an *Alford* plea on 18 October 2013. Pursuant to the plea agreement, she was sentenced to 210 to 261 months imprisonment.

**[1]** Defendant timely appealed from judgment, but failed to give notice during plea negotiations as to her intent to appeal the denial of her motion to suppress. *See* N.C. Gen. Stat. § 15A-979 (2013). Furthermore, defendant's notice of appeal failed to identify the specific court to which the appeal was taken, in violation of Rule 4 of the North Carolina Rules of Appellate Procedure. In our discretion, we grant defendant's petition for writ of certiorari to reach the merits of her appeal. *See* N.C. R. App. P. 21(a)(1) (2013); *State v. Franklin*, __ N.C. App. __, __, 736 S.E.2d 218, 220 (2012).

## Discussion

### I. Custodial Interrogation

**[2]** Defendant first argues that the trial court failed to address whether a reasonable person in defendant's position would have believed she was under arrest or restrained to a significant degree, and therefore erred by concluding that defendant was not subject to custodial interrogation during the fourth interview. We disagree.

We review the trial court's legal conclusions in an order denying a motion to suppress *de novo*. *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000). We also review the legal conclusions for whether they are supported by the trial court's findings of fact. *State v. Waring*, 364 N.C. 443, 467, 701 S.E.2d 615, 631 (2010). "[A] trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* at 469, 701 S.E.2d at 632 (citation omitted). Unchallenged findings of fact are deemed supported by competent

evidence and are binding on appeal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

The Fifth Amendment to the United States Constitution guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amemd. V. The United States Supreme Court has held that the Fifth Amendment bars statements resulting from custodial interrogation from being used against a defendant unless the defendant was administered certain procedural safeguards before responding, specifically being advised of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney[.]" *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706-07 (1966).

However, the Court has emphasized that

> Police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."

*Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam).

The "definitive inquiry" in determining whether a person is "in custody" for *Miranda* purposes is whether, based on the totality of the circumstances, there was a "formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997) (citing *Stansbury v. California*, 511 U.S. 318, 128 L.Ed.2d 293 (1994) (per curiam)). This determination involves "an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Hall*, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998) (quotation marks omitted). While "no single factor controls the determination of whether an individual is 'in custody' for purposes of *Miranda*[,]" *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004), our appellate courts have "considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect," *State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010) (internal citations omitted).

Defendant argues that the trial court's conclusion of law that she was not subject to custodial interrogation during the fourth interview is erroneous for two reasons: (1) the trial court used a subjective rather than objective test, in contravention of long-standing precedent, and (2) the trial court's findings of fact are unsupported by competent evidence, and those findings in turn do not support the conclusion that a reasonable person in defendant's position would not have felt constrained to the same degree as with a formal arrest. We disagree with both contentions.

First, there is no indication that the trial court utilized a subjective rather than objective test in its conclusions of law regarding whether defendant was subject to custodial interrogation. The trial court concluded that:

> The Defendant was not subjected to custodial interrogation during the interviews of November 10, 2009, November 11, 2009, November 12, 2009 and November 14, 2009 until about 5:25 p.m. on November 14, 2009 when Det. Bowman told her that she was under arrest. *The Defendant was not in custody until that point in time because the Defendant had not been formally arrested or otherwise deprived of her freedom of movement of the degree associated with a formal arrest until that moment.*

(Emphasis added.) This conclusion of law tracks verbatim language found in applicable opinions issued by this Court and our Supreme Court regarding the test for whether an individual was subject to custodial interrogation. *See State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) ("[T]he appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' ") Although the trial court did find as fact that defendant believed she was free to leave at various points of the interview, it also entered numerous findings of fact detailing the objective circumstances of the interview. There is no indication that the trial court supported its conclusion that defendant was not subject to custodial interrogation with the finding of fact that she subjectively felt free to leave; that finding of fact could have properly been considered in the trial court's conclusion regarding the voluntariness of her confession.

Thus, because the trial court's conclusion that defendant was not subject to custodial interrogation makes no reference to defendant's subjective state of mind, but does determine the "appropriate inquiry"

as set out in *Buchanan*, we conclude that the trial court did not operate under a misapprehension of law. Defendant's argument is overruled.

Additionally, we hold that the trial court's findings of fact are supported by competent evidence, and those findings support its conclusion of law that defendant was not subject to custodial interrogation.

First, the trial court's finding of fact that defendant was not threatened is supported by competent evidence. Although defendant was told by Detective Bowman in the third interview that lying to a federal officer was punishable by up to five years in prison, neither Detective Pollard nor Sgt. Corcione threatened her with arrest or imprisonment during the fourth interview. Rather, Detective Pollard and Sgt. Corcione told defendant that they were unconcerned with the potential consequences of her previous lies and wanted to get to the truth of what happened so that they could find S.D. Because the only interview subject to defendant's motion to dismiss was the fourth interview, Detective Bowman's prior statements to defendant do not render the trial court's finding of fact that defendant was not threatened erroneous.

Second, competent evidence supports the trial court's finding of fact that defendant was not restrained during the fourth interview. Defendant concedes that she was not handcuffed or physically restrained in any way. However, defendant contends that her freedom of movement was restricted to the degree associated with a formal arrest because she was seated in the corner of the interview room and was "crowded" by Detective Pollard and Sgt. Corcione, who were seated on either side of defendant, between her and the door. Although we do not dispute defendant's characterization of the seating arrangement inside the interview room, we do not find that these circumstances amounted to a "restraint" on her mobility. Defendant requested and was allowed to take multiple bathroom and cigarette breaks throughout each of the four interviews. Although she was escorted by an officer for each of these breaks, our Supreme Court has noted that it is "unlikely that any civilian would be allowed to stray through a police station," indicating an unwillingness to consider a police escort for a bathroom break as weighing in favor of a contention that a defendant was in custody. *Waring*, 364 N.C. at 472, 701 S.E.2d at 634. During the fourth interview, Detective Pollard even suggested that defendant leave and go to a medical center when defendant indicated that she felt pain and stomach illness due to her pregnancy. Defendant declined to leave; she elected to continue speaking to the officers with the hope that they would help her find S.D. Thus, because the record demonstrates that defendant could have left the fourth interview had she desired to do so and generally had the freedom to take

breaks whenever she requested them, competent evidence supports the trial court's finding of fact that defendant's freedom of movement was not restrained.

Given that competent evidence supports the trial court's factual findings that defendant was neither threatened nor restrained during the fourth interview, we find no error in its legal conclusion that defendant was not in custody for the purposes of *Miranda*. In addition to the above, we find competent evidence to support the trial court's findings of fact that: (1) defendant voluntarily went to the police station for each of the four interviews; (2) she was allowed to leave at the end of the first three interviews; (3) the interview room door was closed but unlocked; (4) defendant was allowed to take multiple bathroom and cigarette breaks; (5) defendant was given food and drink; and (6) defendant was offered the opportunity to leave the fourth interview but refused. Our Courts have consistently held that similar circumstances do not amount to the level of custodial interrogation. *See*, *e.g.*, *State v. Gaines*, 345 N.C. 647, 658-63, 483 S.E.2d 396, 402-06 (1997) (holding that a defendant was not in custody where he voluntarily went to the police station, was not told that he was under arrest, was interviewed in a room at the police station but was not handcuffed, was offered food, and the officer did not answer him when he asked if he could leave); *State v. Deese*, 136 N.C. App. 413, 417-18, 524 S.E.2d 381, 384-85 (2000) (holding that a defendant was not in custody where he was permitted to arrange the interview at a time convenient to him, was told that he was free to leave, was not physically threatened or restrained, and was left alone in the interview room for periods of time); *State v. Waring*, 364 N.C. 443, 471, 701 S.E.2d 615, 633-34 (2010) (holding that the defendant was not in custody where officers told him he was not under arrest, he voluntarily went with officers to the police station, was never restrained, was given bathroom breaks, was left alone in an unlocked interview room, and was not deceived, misled, or threatened).

We conclude that under the totality of the circumstances, a reasonable person in defendant's position would not have believed that she was formally arrested or restrained to the degree associated with a formal arrest at the time defendant gave incriminating statements during the fourth interview. Therefore, we affirm the trial court's conclusion that defendant was not subject to custodial interrogation.

## II. Voluntariness of Confession

**[3]** Defendant next argues that the trial court erred by concluding that her statements made in the fourth interview were freely and voluntarily given, when in fact they were coerced by fear and hope. We disagree.

The Fourteenth Amendment to the United States Constitution requires that a defendant's confession be voluntary for it to be admissible. *State v. Thompson*, 149 N.C. App. 276, 281, 560 S.E.2d 568, 572 (2002). "If, looking to the totality of the circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, then he has willed to confess and it may be used against him; where, however, his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quotations and brackets omitted). Our Supreme Court has identified a number of relevant factors to consider in this analysis, such as:

> whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

*Id.* However, "[t]he presence or absence of any one or more of these factors is not determinative." *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002).

Here, defendant argues that she was coerced into confessing because: (1) Sgt. Corcione promised her that she would "walk out" of the fourth interview regardless of what she said,; (2) the officers lied to her about what information Mono had given them; and (3) she was mentally unstable and unfit to give a voluntary confession due to the stress of having a missing child, being pregnant, and being implicated in S.D.'s disappearance.

First, we do not believe that Sgt. Corcione's promise that defendant would "walk out" regardless of her statements rendered defendant's confession involuntary. This argument was previously addressed in *Thompson*, where the defendant argued that his confession was involuntary where the interviewing officer promised him that he would not be arrested regardless of what he said. *Thompson*, 149 N.C. App. at 282, 560 S.E.2d at 572. This Court held that the officer's promise did not make the confession involuntary because it could not have led the defendant "to believe that the criminal justice system would treat him more favorably if he confessed to the robbery." *Id.* at 282, 560 S.E.2d at 573. In so holding, the Court contrasted previous cases where officers' promises

of assistance or leniency in future prosecutions were held to be unduly coercive. *See*, *e.g.*, *State v. Fox*, 274 N.C. 277, 293, 163 S.E.2d 492, 503 (1968) (holding that a suggestion that the defendant might be charged with accessory to murder rather than murder if he confessed rendered the confession involuntary). Sgt. Corcione's statements are almost identical to those made in *Thompson*. Thus, in accordance with *Thompson*, we hold that Sgt. Corcione's promise that defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, Sgt. Corcione's statements could not have led defendant to believe that she would be treated more favorably by the criminal justice system if she confessed to her involvement in S.D.'s disappearance and subsequent death.

Second, there is no indication that the officers lied about what information Mono provided. No evidence was presented at the suppression hearing regarding what Mono told law enforcement, and there is nothing to support defendant's claim that Detective Pollard and Sgt. Corcione lied to defendant about the information Mono provided. However, even assuming that the officers were untruthful, the longstanding rule in this state is that "[t]he use of trickery by police officers in dealing with defendants is not illegal as a matter of law." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983). Specifically, our Supreme Court has held that "[f]alse statements by officers concerning evidence, as contrasted with threats and promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession." *Id.* Thus, because there is no indication that Sgt. Corcione or Detective Pollard lied to defendant regarding the information Mono provided law enforcement, we find her argument unpersuasive. Even assuming that they did lie, this interrogation tactic would not "affect the reliability of the confession," *id.*, and therefore would still be insufficient to support a conclusion that the confession was coerced or involuntary.

Finally, we do not believe that defendant's mental state rendered her confession involuntary and coerced. Although defendant did tell Detective Pollard and Sgt. Corcione that she had not slept in five days due to the stress of S.D. being missing, the trial court found as an uncontested finding of fact that defendant "appeared to be coherent, did not appear to be impaired in any way, . . . appeared to understand what was being said during the interview[,]" and "the majority of her answers were reasonable and were being taken in relationship to the question." Detective Pollard offered defendant the opportunity to stop the interview and go to the Health Department, but defendant declined, indicating that her "next step" would be to help the officers find S.D.

In sum, nearly all of the relevant factors identified by the *Hardy* Court weigh in favor of the State. As discussed above, defendant was not in custody when she made incriminating statements to Detective Pollard and Sgt. Corcione, and therefore, her *Miranda* rights were not implicated. *See Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827. Furthermore, competent evidence supports the trial court's findings of fact that defendant was neither threatened with prosecution for lying nor physically restrained during the fourth interview. She was not held incommunicado, as demonstrated by the fact that she was able to access her cell phone multiple times during the fourth interview. She was offered water and food in addition to being allowed to take bathroom or cigarette breaks whenever she requested them. There were no threats of force or shows of violence used against her. She was a competent, literate, twenty-five-year-old woman who clearly understood the English language and responded clearly and reasonably to the questions asked. When given the opportunity to leave the fourth interview, she chose to stay in an effort to help the officers find her missing daughter.

Given the totality of these circumstances, we hold that defendant's confession was "the product of an essentially free and unconstrained choice by its maker," *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608, and we affirm the trial court's conclusion of law that defendant's statements "were not the product of hope or induced by fear."

**Conclusion**

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
THOMAS EVERETTE, JR., DEFENDANT

No. COA14-426

Filed 21 October 2014

**1. Appeal and Error—preservation of issues—motion to dismiss—different grounds argued at trial—discretionary review**

An argument concerning the denial of defendant's motion to dismiss a charge of obtaining property by false pretenses for a fatal variance was not properly preserved for appeal where defendant at trial based his motion solely on insufficient evidence. However, the issue was reviewed in the exercise of the Court of Appeals' discretion.

**2. Indictment and Information—no fatal variance—obtaining property by false pretenses—forged deed**

There was no fatal variance between the indictment and the evidence in a prosecution for obtaining property by false pretense where defendant contended that the indictment alleged that he had filed a forged and false deed. However, the indictment did not allege that the false pretense was forging the deed, nor was forgery an essential element of obtaining property by false pretenses.

**3. Appeal and Error—preservation of issues—discretionary review denied**

The Court of Appeals, in its discretion, did not review an improperly preserved issue concerning the sufficiency of the evidence in a prosecution for obtaining property by false pretenses. Nothing in the record or briefs demonstrated circumstances sufficient to justify suspending or varying the rules in order to prevent manifest injustice to defendant.

**4. Sentencing—calculation of prior record points—clerical error—no change in sentence—jurisdiction**

Defendant's prior record level points were incorrectly calculated where two of the misdemeanors listed on the worksheet had the same date of conviction and only one should have been counted. A new sentencing hearing was not necessary because the sentence imposed would not be affected by a recalculation of defendant's prior record points and the matter was treated as a clerical error and remanded to the trial court for correction. Whether the trial court

would have had jurisdiction to amend defendant's prior record level points was inapposite because the trial court did not attempt to correct its own error while the case was on appeal.

Judge ERVIN concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 19 October 2013 by Judge Orlando F. Hudson in Wake County Superior Court. Heard in the Court of Appeals 8 September 2014.

*Roy Cooper*, *Attorney General*, *by Harriet F. Worley*, *Special Deputy Attorney General*, *for the State.*

*Staples Hughes*, *Appellate Defender*, *by Jillian C. Katz*, *Assistant Appellate Defender*, *for defendant-appellant.*

BELL, Judge.

Thomas Everette, Jr. ("Defendant") appeals from his conviction for obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred by (1) denying his motion to dismiss because there was a fatal variance between the false pretense alleged in the indictment and the State's evidence at trial; (2) denying his motion to dismiss because there was no causal relationship between the false representation alleged and the value obtained; and (3) miscalculating Defendant's prior record points. After careful review, we conclude that Defendant received a fair trial free from prejudicial error, but remand for correction of a clerical error on Defendant's prior record level worksheet.

Factual Background

The State presented evidence tending to show the following facts: In 2010, a home located at 2401 Victoria Park Lane in Raleigh, North Carolina was vacant after a foreclosure. Veneta Ford ("Ms. Ford"), a realtor in Raleigh, was contacted by Bank of America, the new owner of the property, to prepare the home for re-sale. Ms. Ford put the utilities in her name and had the house re-keyed. She placed the house on the market on 12 July 2010.

Ms. Ford visited the house several times to clean and perform maintenance on the property. On one visit, she discovered that the for-sale sign she had placed on the property had been removed. Additionally, the house had been re-keyed so that her key did not work. On another occasion, Ms. Ford went to the property and discovered that the lockbox

attached to the front door containing the keys to the house had been cut off. In January 2011, Ms. Ford noticed a professional-looking sign warning against trespassing on the property. Neighbors informed Ms. Ford that someone had moved into the home. She also discovered that someone had taken the utilities out of her name and put them in his own name. Ms. Ford contacted the Raleigh Police Department about this incident.

On 23 August 2011, Raleigh Police Department Sergeant Timothy Halterman ("Sergeant Halterman") responded to a call for service at 2401 Victoria Park Lane after receiving a complaint from Ms. Ford that an unauthorized person was living on the property. Sergeant Halterman asked Defendant for documentation showing he was authorized to live in the home. Defendant retrieved a lease agreement from his safety deposit box and presented it to Sergeant Halterman. He informed Sergeant Halterman that the lease was from a company in Greenville, North Carolina and that he had been living in the house for months. After this encounter, Sergeant Halterman contacted his superior officer at the time, who advised him to contact Detective Terry Embler ("Detective Embler"), a Raleigh Police Department financial crimes investigator, to request that he further investigate the true ownership of 2401 Victoria Park Lane.

Ms. Ford eventually spoke with Defendant after leaving her card on the door of the house with a note requesting that someone call her. Defendant contacted her to tell her that he had bought the property and had a deed. Ms. Ford checked the Wake County public records and found that a general warranty deed had been recorded transferring title to the property from International Fidelity Trust ("IFT") to itself, with Defendant listed as the trustee.

During this time, Detective Embler was investigating whether Defendant was validly living at the Victoria Park Lane property. He discovered that on 13 July 2011, a special warranty deed had been recorded at the Wake County Register of Deeds Office transferring title to the property at 2401 Victoria Park Lane from Bank of New York Mellon to IFT. This deed was signed by Keith Chapman as attorney-in-fact for the bank and had been notarized by Carolyn Evans ("Ms. Evans").

Detective Embler testified that he was not able to find any information about IFT on the North Carolina Secretary of State's website, at the South Carolina Secretary of State's office, or through an Internet search. He discovered that the address given for the business corresponded to a P.O. Box at a UPS store in Greenville, North Carolina. Detective Embler

learned that P.O. Box 250, the address listed as IFT's address on the general warranty deed, actually belonged to Defendant, and that Defendant had recorded a vast number of deeds and other paperwork with the Edgecombe County Register of Deeds Office using P.O. Box 250 as his address. In particular, Detective Embler testified that Defendant had recorded a special warranty deed with the Edgecombe County Register of Deeds Office that looked remarkably similar to the special warranty deed for the property at 2401 Victoria Park Lane that had been recorded in Wake County.

After collecting this information, Detective Embler contacted Secret Service Agent Michael Southern ("Special Agent Southern") to assist in the investigation. On 24 August 2011, Detective Embler and Special Agent Southern went to the Victoria Park Lane property with an arrest warrant for Defendant. Defendant was arrested and charged with breaking and entering and obtaining property by false pretenses. The next day Defendant was also charged with forgery of deeds.

On 28 November 2011 a grand jury indicted Defendant for breaking and entering, obtaining property by false pretenses, and forgery of a deed. A jury trial commenced on 14 October 2013 in Wake County Superior Court.

At trial, Defendant testified on his own behalf and presented the following account of the events leading up to his arrest: Defendant was facing potential foreclosure on his house which was under construction in Edgecombe County. In an effort to prevent his house from being foreclosed on, Defendant contacted a company he found on Craigslist called International Fidelity Trust and spoke with someone named John Kenny about using IFT's services to improve his credit score.

Defendant also testified that IFT told him that it owned several properties in Wake County at which he could live in exchange for performing work on the property. According to Defendant, he chose to live at 2401 Victoria Park Lane, a property purportedly owned by IFT. In December 2010, at IFT's direction, Defendant recorded several documents, including a common law lien and a general warranty deed, related to the Victoria Park Lane property as "trustee" for IFT. However, Defendant testified that he did not remember recording the general warranty deed specifically, because it was allegedly part of a package that contained the common law lien and other documents.

According to Defendant, on 15 December 2010, IFT had the property rekeyed and he began performing maintenance on the property. In May 2011, Defendant entered into a lease agreement with IFT for the

Victoria Park Lane property set to begin on 31 May 2011. Defendant and his family moved into the house on 10 June 2011. Around that time, he also applied for utility services in his name at 2401 Victoria Park Lane. Defendant testified that he was paying taxes on the property by making payments to IFT in monthly installments.

At trial, the State introduced a copy of the special warranty deed recorded with the Wake County Register of Deeds Office. Detective Embler testified that he discovered another deed similar to this special warranty deed through which Defendant and his wife had received title to a home in Edgecombe County in 2006. Both deeds contained the same formatting, were signed by the same individual as attorney-in-fact for the lender that had foreclosed on each of the properties despite the fact that the lenders transferring title on the two deeds were different, and the same out-of-state law firm was purported to have prepared both deeds. Defendant denied having recorded the special warranty deed with the Wake County Register of Deeds Office.

Ms. Evans, the notary public who had purportedly notarized the special warranty deed for 2401 Victoria Park Lane, testified at trial that she was a licensed notary in South Carolina, not North Carolina. She testified that she did not notarize the special warranty deed and that the signature on the document was not hers. She further stated that the notary stamp on the special warranty deed was the stamp she used when she worked at Wells Fargo, but that she was not working for Wells Fargo or any other lender at the time this deed was notarized. She also observed that the special warranty deed was not properly notarized because the signature was not hand-dated, and a notary is required to hand-date her signature.

Dawn Hurley ("Ms. Hurley"), a Bank of America banking officer, testified that Bank of America acquired the home at 2401 Victoria Park Lane in February 2010 through a foreclosure sale. Ms. Hurley also testified that the title to the property was legally in the name of Bank of America, not Bank of New York Mellon, as indicated on the special warranty deed.

Veronica Gearon ("Ms. Gearon"), Wake County Register of Deeds recording supervisor, testified that by virtue of the recording of the special warranty deed, ownership of the property was transferred from Bank of New York Mellon to IFT. Ms. Gearon stated that she was unsure whether the recording of the earlier warranty deed in December 2010 that Defendant admitted he had prepared and signed as trustee for IFT would have transferred ownership of the property because the grantor and grantee were listed as the same entity — IFT — on that deed.

On 19 October 2013, the jury returned a verdict finding Defendant guilty of obtaining property by false pretenses, but deadlocked with respect to the breaking and entering and forgery of deeds charges. As a result, the trial court declared a mistrial with respect to these two charges. That same day, the trial court sentenced Defendant to a term of 110 to 141 months imprisonment. Defendant gave notice of appeal in open court.

## Analysis

### I. Fatal Variance

**[1]** Defendant first argues that the trial court erred by denying his motion to dismiss the charge of obtaining property by false pretenses because there was a fatal variance between the indictment and the State's evidence. Specifically, Defendant contends that the indictment alleged that he had "filed a forged and false Special Warranty Deed," but that the State did not present sufficient evidence at trial to establish that he forged or was involved in forging the special warranty deed. We find Defendant's contentions to be without merit.

To preserve a fatal variance argument for appellate review, a defendant must state at trial that an allegedly fatal variance is the basis for his motion to dismiss. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137, *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). At trial, Defendant based his motion to dismiss solely on the grounds of insufficient evidence. Therefore, Defendant did not properly preserve for appellate review his argument that there was a fatal variance between the indictment and the evidence presented for appellate review. *See State v. Pickens*, 346 N.C. 628, 645, 488 S.E.2d 162, 172 (1997) ("Regarding the alleged variance between the indictment and the evidence at trial, defendant based his motions at trial solely on the ground of insufficient evidence and thus has failed to preserve this argument for appellate review.") (citation omitted). However, Defendant asks this Court to review his argument in our discretion pursuant to Rule 2 of the Rules of Appellate Procedure. *See* N.C.R. App. P. 2. We elect to do so and conclude that Defendant has not shown a variance between the indictment and the evidence presented.

**[2]** "In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citations omitted). The elements of obtaining property by false pretenses are

> (1) [a] false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.

*State v. Saunders*, 126 N.C. App. 524, 528, 485 S.E.2d 853, 856 (1997) (citation omitted); *see* N.C. Gen. Stat. § 14-100(a)(2013).

Here, Defendant contends that the State's evidence at trial was insufficient to establish that he forged the special warranty deed or took part in preparing this document. However, the indictment states, in pertinent part, as follows:

> 2. And the jurors for the State upon their oath present that on or about July 13, 2011, in Wake County, the Defendant named above unlawfully, willfully, and feloniously did knowingly and designedly with the intent to cheat and defraud obtain and attempt to obtain the house and real property located at 2401 Victoria Park Lane, Raleigh, North Carolina from Bank of New York Mellon Corporation . . . by means of a false pretense which was calculated to deceive and did deceive.
>
> The false pretense consisted of the following: the Defendant *presented and filed* a forged and false Special Warranty Deed in the Wake County Register of Deeds office purporting to transfer ownership of this foreclosed property from the mortgage holding bank to an apparent false trust in which the Defendant is the trustee.

(Emphasis added).

The indictment does not allege that the false pretense at issue is that Defendant forged the special warranty deed, nor is forgery an essential element of the offense of obtaining property by false pretenses. Defendant has shown no fatal variance between the indictment and the evidence presented. At trial, the State presented ample evidence that Defendant presented and recorded a forged deed — the precise representation that was charged. As such, Defendant's argument on this issue is without merit.

## II. Causal Relationship Between False Representation Alleged and the Value Obtained

**[3]** Defendant next contends that the trial court erred by denying his motion to dismiss the charge of obtaining property by false pretenses for

insufficient evidence because the State failed to show that the alleged false pretense — the forgery of the special warranty deed — caused Defendant to obtain the house at 2401 Victoria Park Lane.

Defendant acknowledges that his trial counsel failed to specifically preserve this argument at trial. However, Defendant again asks this Court to invoke Rule 2 to reach the merits of his argument. Under Rule 2, this Court may suspend the rules of appellate procedure in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C.R. App. P. 2 (2013).

"Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted). "[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted).

Nothing in the record or briefs demonstrates "exceptional circumstances" sufficient to justify suspending or varying the rules in order to prevent "manifest injustice" to Defendant. *Id.* at 315, 644 S.E.2d at 205. The State presented evidence at trial that the special warranty deed was a forgery and that Defendant was the one who filed the forged deed. The natural consequence of filing the forged deed was that Defendant secured possession of the house, thereby implying causation. *State v. Dale*, 218 N.C. 625, 641, 12 S.E.2d 556, 565 (1945) ("The facts alleged in the indictment here, relating to the misrepresentation . . . are such as to imply causation, since they are obviously calculated to produce the result."). In the exercise of our discretionary authority, we decline to invoke Rule 2. Therefore, this argument is dismissed.

III. Miscalculation of Defendant's Prior Record Level Points

**[4]** Defendant's final argument on appeal is that the trial court incorrectly calculated his prior record level points. Defendant acknowledges that a recalculation of his prior record points will not alter his sentence, but asks that a new prior record level worksheet be completed to accurately reflect his record. We agree.

Defendant contends that he should only have 10 prior record level points, rather than 11, because two of the misdemeanors listed on the worksheet and used in calculating Defendant's prior record level

had the same date of conviction. As such, only one may be counted for purposes of determining prior record points. N.C. Gen. Stat. §15A-1340.14(d) (2013).

Because the sentence imposed will not be affected by a recalculation of Defendant's prior record points, it is not necessary that there be a new sentencing hearing. Rather, we treat this as a clerical error and remand this matter to the trial court for its correction. *State v. Dobbs*, 208 N.C. App. 272, 274, 702 S.E.2d 349, 350-51 (2010) (finding judgment erroneously designating defendant's offense as Class G felony rather than Class H felony to be clerical error and remanding to trial court for correction where sentence unaffected by error).

The dissent relies on *State v. Jarman* for the proposition that while a trial court may "amend its records to correct clerical mistakes or supply defects or omissions therein", it lacks the authority, "under the guise of an amendment of its records, to correct a judicial error." 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting *State v. Davis*, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996). We note, however, that *Jarman* and *Davis* can be distinguished from the present case. In both *Jarman* and *Davis*, the distinction between clerical and judicial errors was of importance because it was the *trial court* that, upon its own initiative (through a hearing or motion), sought to correct an error.

In *Davis*, we held that the trial court "impermissibly corrected a judicial error," and thus "was without jurisdiction to amend the judgments in the course of settling the record on appeal" where the trial court entered an amended judgment after conducting a hearing to settle the record on appeal. 123 N.C. App. 240 at 242-43, 472 S.E.2d 392 at 393-94. On the other hand, in *Jarman*, we held that the trial court's correction of an order resulting from inaccurate information inadvertently provided by the deputy clerk was a clerical error, and therefore proper, because "the trial judge did not exercise any judicial discretion or undertake any judicial reasoning" when signing an order providing credit against service of sentence that the deputy clerk prepared. 140 N.C. App. at 203, 535 S.E.2d at 879.

In the case at bar, the trial court's error was brought to this Court by Defendant on appeal. "Where there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted to err on the side of caution and resolve the discrepancy in the defendant's favor." *Jarman* at 203, 535 S.E.2d at 879 (citation and internal quotation marks omitted). In *Jarman*, we stated that "the judge's action in signing the order giving defendant credit to which he believed she was legally entitled was

a mechanical and routine, though mistaken, application of a statutory mandate." *Id.* Here, the assistant district attorney prepared Defendant's prior record level worksheet for the trial judge's signature by filling in the blanks on a standard AOC form and presenting it to the trial judge. As in *Jarman*, the record in the case *sub judice* "demonstrates that the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing" the prior record level worksheet. *Id.*

Further, because the trial court did not attempt to correct its own error while the case was on appeal, whether the trial court *would* have had jurisdiction to amend Defendant's prior record level points is inapposite. Therefore, we find it proper to treat Defendant's miscalculation of prior record level points as a clerical error and remand to the trial court for correction. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.") (citation and internal quotation marks omitted).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error, but remand for correction of the clerical error found in his prior record level worksheet.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judge McCULLOUGH concurs.

ERVIN, Judge, concurring in part and dissenting in part.

Although I concur in my colleagues' conclusion that Defendant received a fair trial that was free from prejudicial error and that his convictions should remain undisturbed, I am unable to agree with the Court's determination that the trial court's apparent miscalculation of Defendant's prior record level points for sentencing purposes constitutes a clerical error that should be corrected on remand. On the contrary, I believe that this miscalculation constitutes judicial error and conclude, given the fact that this error had no impact on the calculation of Defendant's prior record level, that there is no need for us to remand this case to the trial court for the correction of Defendant's prior record worksheet. As a result, I concur in the Court's opinion in part and dissent from the Court's opinion in part.

According to N.C. Gen. Stat. § 15A-1340.14(a), a defendant's prior record level is determined "by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." In addition, N.C. Gen. Stat. § 15A-1340.14(d) provides that:

> For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

In the present case, the trial court calculated Defendant's prior record level by assigning a single point each for six of Defendant's seven prior eligible misdemeanor convictions, two of which occurred in the Edgecombe County District Court on 10 February 2005 and one of which stemmed from a charge that appears to have been voluntarily dismissed after the defendant noted an appeal to the Edgecombe County Superior Court. As a result of the fact that two of Defendant's seven eligible misdemeanor convictions appear to have occurred during a single session of court and the fact that one of Defendant's seven eligible misdemeanor convictions appears to have been overturned on appeal to the Superior Court, I agree with Defendant's contention, which my colleagues have accepted, that the trial court erred by calculating Defendant's prior record level using six, rather than five, misdemeanor convictions. However, as Defendant has candidly acknowledged, the erroneous inclusion of an additional prior record point based upon Defendant's convictions for committing misdemeanor offenses had no impact upon the calculation of Defendant's prior record level given that Defendant would still have been subject to being sentenced as a Level IV offender even after the removal of the erroneously assigned prior record point.

Although my colleagues acknowledge that the trial court's apparent error had no effect upon the calculation of Defendant's prior record level, they have concluded that the trial court should be required to correct Defendant's prior record level worksheet to eliminate any trace of this error from the court records on the basis of our authority to order the correction of clerical errors. According to well-established North Carolina law, "a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein," *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation

omitted), with a "clerical error" being defined as "[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." *Id.* (quoting Black's Law Dictionary 563 (7th ed. 1999)). However, a trial court lacks the authority, "under the guise of an amendment of its records, [to] correct a judicial error." Id. (citation omitted).[1]

In *State v. Smith*, 188 N.C. App. 842, 844-45, 656 S.E.2d 695, 696 (2008), this Court found that a clerical error had occurred in an instance in which, after correctly identifying the aggravating factors to be utilized for the purpose of sentencing Defendant, the trial court misread the form used for the purpose of determining the aggravating and mitigating factors utilized in sentencing convicted impaired drivers and checked the wrong box on that form. In the present case, by contrast, the record contains no indication that the trial court did anything other than make a legally erroneous decision concerning the number of prior record points that Defendant had accumulated. In other words, instead of making an inadvertent clerical error, the trial court made an erroneous judicial determination concerning the number of prior record points that Defendant had accumulated for felony sentencing purposes.[2] As a

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1. As my colleagues correctly note, the decision in *Jarman* refers to the power of the trial court, rather than an appellate court, to correct clerical errors. The distinction upon which my colleagues rely strikes me as of little importance given that the decisions remanding cases to the trial courts for the correction of clerical errors do not appear to assert a separate, and superior, authority possessed by appellate courts to require the correction of clerical errors. Instead, those decisions appear to me to reflect instructions delivered by the appellate courts to the trial courts to exercise their authority to correct clerical errors in particular circumstances. As a result, the fact that the error correction authority referenced in *Jarman* and similar cases is possessed by the trial courts does not mean that appellate courts have the authority to order the trial courts to correct errors that trial courts lack the authority to correct on their own.

2. The Court appears to suggest that the miscalculation of Defendant's prior record level constituted a clerical, rather than a judicial, error by asserting that "the assistant district attorney prepared Defendant's prior record level worksheet for the trial court's signature by filling in the blanks on a standard AOC form and presenting it to the trial judge" and arguing that, "[a]s in *Jarman*, the record in the case *sub judice* 'demonstrates that the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing' the prior record level worksheet." I am unable to accept the notion that the trial court is engaged in the merely ministerial act of signing off on a prior record level determination made by the prosecutor during the sentencing process given the clear command of N.C. Gen. Stat. § 15A-1340.14 that the trial court, rather than the prosecutor, be responsible for correctly calculating a convicted criminal defendant's prior record level and the numerous decisions of the Supreme Court and this Court evaluating the extent to which particular trial judges carried out that responsibility in accordance with the applicable law. As a result, the determination at issue here is a far cry from the relatively ministerial calculation of the amount of credit for time served in pretrial confinement at issue in

result, given that no clerical error, as compared to an erroneous judicial determination, appears to have been made and given Defendant's concession, which is clearly correct, that rectification of the trial court's error in calculating the number of prior record points that Defendant had accumulated for felony sentencing purposes would not result in a reduction in Defendant's sentence,[3] I am unable to agree with my colleagues' determination that this case should be remanded to the trial court for the correction of Defendant's prior record level worksheet and respectfully dissent from my colleagues' determination to the contrary.[4] I do, however, concur in the remainder of the Court's opinion.

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*Jarman*. *State v. Mason*, 295 N.C. 584, 594, 248 S.E.2d 241, 248 (1978), *cert. denied*, 440 U.S. 984, 99 S. Ct. 1797, 60 L. Ed. 2d 246 (1979) (describing the determination of the amount of credit for pretrial confinement to which a convicted criminal defendant is entitled as "a matter for administrative action").

3. Although my colleagues correctly note our prior statement in *Jarman* to the effect that, "[w]here there has been uncertainty in whether an error was 'clerical,' the appellate courts have opted 'to err on the side of caution and resolve [the discrepancy] in the defendant's favor,'" *Jarman*, 140 N.C. App. at 203, 535 S.E.2d at 879 (alteration in original) (quoting *State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994)), they overlook the context in which that statement was made. Aside from the fact that the error at issue here is clearly judicial rather than clerical in nature, the manner in which the court resolved the matter at issue in the decision from which the *Jarman* court derived the language on which my colleagues rely, which was whether the trial court found the existence of one or multiple aggravating factors for sentencing purposes, was critical to a determination of whether or not the defendant had to be resentenced. As a result, since the manner in which the present dispute is resolved will have no practical impact on Defendant, I question whether the principle upon which my colleagues rely has any relevance in the present case.

4. I concede that the decision that the Court has reached in this case will have little immediate practical impact, when considered in the narrow context in which it has been made. However, the effect of substantially broadening the extent to which litigants are able to obtain appellate decisions requiring the correction of non-clerical errors on remand will, over time, add to the burdens that are already faced by our trial courts and trial court staffs without adding anything of substance to the quality of justice provided in the General Court of Justice.

STATE OF NORTH CAROLINA
v.
RONALD MICHAEL McCRARY, DEFENDANT

No. COA13-1059

Filed 21 October 2014

**1. Search and Seizure—motion to suppress evidence—warrantless blood test—exigent circumstances—additional findings of fact required**

The trial court erred in a driving while impaired and communicating threats case by denying defendant's motion to suppress the evidence that resulted from a warrantless blood test. The case was remanded to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed.

**2. Motor Vehicles—driving while impaired—motion to dismiss—sufficiency of evidence—warrantless blood draw—suppression of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired. While defendant's motion asserted that the warrantless blood draw was a flagrant violation of his constitutional rights, his motion in no way detailed how there was irreparable damage to the preparation of his case. The only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as the proper remedy if a constitutional violation was found.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered on or about 21 March 2013 by Judge W. Osmond Smith in Chatham County Superior Court. Heard in the Court of Appeals 20 February 2014.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Catherine F. Jordan, for the State.*

*Wait Law, P.L.L.C., by John L. Wait for defendant-appellant.*

STROUD, Judge.

Ronald Michael McCrary ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of driving while impaired ("DWI") and communicating threats. Defendant argues that the trial court erred by (1) denying his motion to suppress the evidence that resulted from a warrantless blood test; and (2) denying his motion to dismiss. We affirm the trial court's order denying defendant's motion to dismiss, but, as to defendant's motion to suppress, we remand for additional findings of fact.

## I. Background

We will summarize the relevant facts based upon the trial court's findings of fact, which are not challenged by defendant. At 6:34 p.m. on 28 December 2010, Deputy Justin Fyle of the Chatham County Sheriff's Office responded to a report of suspicious activity at the home of Marshall Lindsey. Upon his arrival at 7:01 p.m., Deputy Fyle observed a red Isuzu Trooper parked in a driveway near Lindsey's garage.

Deputy Fyle approached the vehicle and discovered defendant seated in the driver's seat. The vehicle's engine was not operating, and defendant appeared to be asleep. Deputy Fyle attempted to get defendant's attention, but defendant did not respond. Shortly thereafter, defendant began looking at his cell phone, which was upside down, but he continued to ignore Deputy Fyle.

Deputy Fyle then opened the vehicle's door to investigate further. When he opened the door, Deputy Fyle detected a strong odor of alcohol and noticed that defendant's eyes were red and glassy. There was a nearly empty vodka bottle in the vehicle. Deputy Fyle administered an Alcosensor test, and the results were "so high that Deputy Fyle determined that there may be a need for medical attention for the defendant."

Deputy Fyle also spoke to Lindsey, who stated that he had witnessed defendant make multiple attempts to turn into his driveway from the road. When defendant finally was able to enter the driveway, he ran over one of Lindsey's potted plants and a landscape light. Deputy Fyle observed tracks in the snow at the end of Lindsey's driveway that were consistent with Lindsey's statement.

Deputy Fyle returned to defendant and attempted to administer several field sobriety tests, but defendant was unable to stand up to perform them. Deputy Fyle arrested defendant for DWI at 7:34 p.m. Upon his arrest, defendant began complaining of chest pains and requested

to be taken to the hospital. Deputy Fyle contacted emergency medical services (EMS) personnel, who arrived at 7:39 p.m. While EMS personnel examined defendant, Deputy Fyle determined that he would bring defendant to the Sheriff's Office for processing after he was released by EMS personnel. However, Deputy Fyle also decided that if defendant needed to be taken to the hospital, he would obtain a blood sample without a warrant.

While the EMS personnel tried to evaluate defendant's medical condition, defendant was "continually yelling and uncooperative" and would not permit them to properly examine him. Instead, defendant requested transport to the hospital. At the direction of his sergeant, Deputy Fyle directed EMS personnel to comply with defendant's request. Deputy Barry Ryser, a police officer assisting Deputy Fyle, accompanied defendant inside the EMS vehicle, and Deputy Fyle followed them in his patrol car.

Defendant arrived at the hospital emergency room at 8:39 p.m. Deputy Fyle removed defendant's handcuffs so that he could be examined, but defendant refused to cooperate with the medical staff and did not consent to any medical treatment. He was "extremely belligerent, yelling at officers and medical personnel" and he insulted the officers as well as others. "The defendant's continued uncooperative conduct . . . led Deputy Fyle to conclude that the defendant was intentionally delaying the investigation." Prior to defendant's discharge from medical care, Deputy Fyle asked defendant to submit to a blood test and informed defendant of his rights regarding a blood test at 8:51 p.m. Defendant refused to consent to a blood test, and his "belligerent conduct accelerated." "He issued vile insults and threats to Deputy Fyle and others, including threatening to spit on Deputy Fyle and others." After emergency room personnel concluded their examination of defendant, he was discharged at 9:13 p.m. Therefore, Deputy Fyle decided to have defendant's blood drawn without a warrant.

Deputy Fyle requested that hospital personnel assist him with obtaining defendant's blood sample. Deputy Fyle required the assistance of the other officers and used restraints to protect both the officers and hospital staff from defendant while his blood was drawn at 9:16 p.m., almost 3 hours after Lindsey's call. Deputy Fyle and defendant subsequently left the hospital at 9:29 p.m. and arrived at the magistrate's office for further processing at 9:43 p.m.

Defendant was charged with DWI, possession of an open container, assault on a government official, communicating threats, resisting

a public officer, and injury to personal property. After a bench trial in Chatham County District Court, defendant was found not guilty of possession of an open container and injury to personal property and guilty of all other charges. Defendant appealed to the Chatham County Superior Court for a trial *de novo*.

On 12 September 2012, defendant filed a motion to dismiss the charges against him, contending that the warrantless blood draw was flagrantly unconstitutional. At a hearing in which the trial court treated defendant's motion as both a motion to dismiss and a motion to suppress, Deputy Fyle testified that he called Magistrate Tyson at 7:15 p.m., before he arrested defendant, to seek his opinion about the situation. Deputy Fyle also testified that he called the magistrate after defendant's blood draw. Deputy Fyle further testified that he waited at the magistrate's office less than thirty minutes before meeting with the magistrate. Deputy Fyle finally testified that, at the time, he determined that it would be unreasonable to seek a warrant before conducting a blood draw given the circumstances. The trial court denied defendant's motion to dismiss. Beginning 18 March 2013, defendant was tried by a jury in superior court.

On 21 March 2013, the jury returned verdicts finding defendant guilty of DWI and communicating threats and not guilty of all other charges. For the DWI offense, the trial court sentenced defendant to an active term of six months. For the communicating threats offense, the trial court sentenced defendant to an active term of 120 days. The sentences were to be served consecutively in the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

II. Exigent Circumstances for a Warrantless Blood Test

**[1]** Defendant argues that the trial court erred by denying his motion to suppress the evidence that resulted from the warrantless blood test because, under *Missouri v. McNeely*, Deputy Fyle "had ample time and ability to secure a search warrant" while defendant was in custody. *See* ___ U.S. ___, 185 L.Ed. 2d 696, 702 (2013). We remand for additional findings of fact on this issue.

In ruling upon a motion to suppress evidence, "the [trial court] must set forth in the record [its] findings of fact and conclusions of law." N.C. Gen. Stat. § 15A–977(f) (2013). "[T]he general rule is that [the trial court] should make findings of fact to show the bases of [its] ruling." *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980); *see also State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012). "The standard of review in evaluating the denial of a motion to suppress is

whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878.

> Findings and conclusions are required in order that there may be a meaningful appellate review of the decision on a motion to suppress. . . . [W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court. Remand is necessary because it is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

*Salinas*, 366 N.C. at 124, 729 S.E.2d at 66-67 (citations and quotation marks omitted). Deputy Fyle performed a warrantless blood draw on defendant under the provisions of North Carolina General Statutes, section 20–139.1(d1), which provides that

> [i]f a person refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine.

N.C. Gen. Stat. § 20-139.1(d1) (2009). This statutory procedure is also subject to limitations on searches imposed by the state and federal constitutions. "Our courts have held that the taking of blood from a person constitutes a search under both" the United States and North Carolina Constitutions. *State v. Barkley*, 144 N.C. App. 514, 518, 551 S.E.2d 131, 134 (2001). Accordingly, "a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988). The issue in cases of this sort normally depends upon the findings and conclusions as to the existence of "exigent circumstances" as our case law has defined that term, considering the "totality of the circumstances" in each case. *State v. Dahlquist*,

___ N.C. App. ___, ___, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 755 S.E.2d 614 (2014).

In *State v. Fletcher*, this Court held that the trial court properly found that exigent circumstances existed for the arresting officer to obtain a blood sample from the defendant without a warrant, where the evidence showed that the defendant had "failed multiple field sobriety tests" and was unsuccessful in "producing a valid breath sample using the Intoximeter at the police station." 202 N.C. App. 107, 111, 688 S.E.2d 94, 97 (2010). The officer testified about "the distance between the police station and the magistrate's office, her belief that the magistrate's office would be busy late on a Saturday night, and her previous experience with both the magistrate's office and hospital on weekend nights[,]" all of which supported a "probability of significant delay" to obtain a warrant. *Id.* at 111, 688 S.E.2d at 97. This Court held in *Fletcher* that these circumstances supported a finding of exigent circumstances and affirmed the trial court's denial of the defendant's motion to suppress. *Id.* at 113, 688 S.E.2d at 98.

More recently, the United States Supreme Court has addressed the issue of obtaining warrantless blood tests from defendants suspected of impaired driving. In *Missouri v. McNeely*, the United States Supreme Court held that "the natural metabolization of alcohol in the bloodstream" does not create a "a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." ___ U.S. at ___, 185 L.Ed. 2d at 702. In *McNeely*, the Supreme Court noted, however, that "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.* at ___, 185 L.Ed. 2d at 707. Such circumstances "may arise in the regular course of law enforcement due to delays from the warrant application process." *Id.* at ___, 185 L.Ed. 2d at 709. The Supreme Court noted that

> while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber* [*v. California*, 384 U.S. 757, 16 L.Ed. 2d 908 (1966)], it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

*Id.* at ___, 185 L.Ed. 2d at 709. Thus, the circumstances that may make obtaining a warrant impractical may in some cases support the trial

court's finding of an exigent situation in which a warrantless blood draw is proper. *Id.* at ___, 185 L.Ed. 2d at 709. "Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Dahlquist*, ___ N.C. App. at ___, 752 S.E.2d at 667.

Defendant does not challenge the trial court's findings of fact but argues only that his case is similar to the situation presented in *Missouri v. McNeely*, which was decided by the United States Supreme Court just over a month after the trial court ruled upon his motion to suppress. Defendant focuses on the lack of findings of fact as to the time that it would have taken Deputy Fyle to obtain a search warrant for the blood test. Defendant argues that "Officer Fyle's testimony is strikingly similar to the testimony found insufficient in *McNeely.*" The Supreme Court noted that

> [i]n his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant.

___ U.S. at ___, 185 L.Ed. 2d at 714 (citations omitted).

But the factual circumstances presented by this case and *McNeely* are quite different. *McNeely* involved a DWI stop described as "unquestionably a routine DWI case" involving a cooperative defendant with no need for medical treatment and no need for "police to attend to a car accident." *Id.* at ___, 185 L.Ed. 2d at 714. As the unchallenged findings of fact in this case as noted above demonstrate, this case was not "a routine DWI case." From the moment that Deputy Fyle placed defendant into custody, at 7:34 p.m., defendant claimed to have chest pain and to require medical assistance, which he then refused and actively fought. He became increasingly belligerent and threatened Deputy Fyle and

others.[1] Ultimately Deputy Fyle determined that defendant was intentionally delaying his investigation. Also unlike the officer in *McNeely*, Deputy Fyle testified at the suppression hearing as to the time it would have taken to obtain a warrant, as follows:

> Considering that this is Chatham County and we don't have as many magistrates as other places on duty and all the time, a lot of times when you need a search warrant and somebody is placed in custody during nighttime hours, we have to actually call out the magistrate and at times wait for them to arrive and sometimes wait for other people to process prisoners before we can see them. So I was not aware of there being a magistrate in Siler City, which is where we were, because, like I said, during nighttime hours, they are not there. And I was unaware if in Pittsboro there was a magistrate on duty at the time. I felt that it was unreasonable for me to load him up, go back to Pittsboro, possibly wait for the magistrate to get there, draw up the search warrant, get the magistrate to sign it, load him back up, go back to Siler City, and then do the blood draw when we were losing evidence.

Defendant asks us to second-guess the officer's determinations about how long it might have taken to obtain a warrant and whether it would have been reasonable for him to take the increasingly belligerent defendant, "load him up, go back to Pittsboro, possibly wait for the magistrate to get there, draw up the search warrant, get the magistrate to sign it, load him back up, go back to Siler City, and then do the blood draw when [he was] losing evidence." Defendant claims that the dispositive question, under *McNeely* and *Schmerber*, is "Did Officer Fyle have the time and ability to seek out a warrant?" Defendant argues that he did, and that the trial court failed to address the availability of a magistrate or "whether Officer Fyle should have sought a warrant since Officer Ryser was accompanying [defendant] in the EMS vehicle." Yet all of these questions are squarely within the authority of the trial court to make the factual findings as to these issues and to make the appropriate legal conclusions upon those facts. It is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional

1. Defendant did not challenge on appeal his conviction of communicating threats.

violation of some kind has occurred." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982).

We find this case to be more similar to *State v. Granger* than to *McNeely*. *See* ___ N.C. App. ___, 761 S.E.2d 923 (2014). In *Granger*, this Court found that the trial court properly concluded that the totality of the circumstances showed exigent circumstances that justified the warrantless blood draw. *Id.* at ___, 761 S.E.2d at 928. There, the defendant was injured in a wreck and required medical care. *Id.* at ___, 761 S.E.2d at 924. The officer was investigating the case alone and would have had to wait for another officer to come to the hospital so that he could travel to the magistrate to obtain a warrant. *Id.* at ___, 761 S.E.2d at 928. The trial court also noted the officer's "knowledge of the approximate probable wait time" and travel time to the magistrate. *Id.* at ___, 761 S.E.2d at 928. In addition, the officer was concerned that medications could have been administered to the defendant as part of his treatment that could contaminate the blood sample. *Id.* at ___, 761 S.E.2d at 928.

Although the situation here is different from *Granger* in that the defendant here only feigned a need for medical care and in fact needed none, they are otherwise similar. Obtaining a warrant may have required an officer to either leave the defendant, which in this case may not have been a reasonable option even with more than one officer present, considering defendant's threats to Deputy Fyle and others, or take the defendant with him to Pittsboro and then back to Siler City. The evidence and uncontested findings of fact show that several officers were needed to control the defendant and ensure the safety of the hospital personnel.[2] In Conclusion of Law No. 6, the trial court concluded that

> [b]ased upon the time elapsed to that point and the additional time and uncertainties in how much additional time would be needed to obtain a search warrant or other court order for defendant's blood and all other attendant circumstances, the same gave rise to the existence of exigent circumstances and supported the officer's reasonable belief

2. The dissent would find that even taking into account defendant's belligerent behavior, the presence of so many officers would lead to the conclusion that there was no plausible justification for an exception to the warrant requirement under the totality of the circumstances. *See McNeely*, ___ U.S. at ___, 185 L.Ed. 2d at 708. We believe that this sort of determination is a factual determination that can be made only by the trial court that heard the evidence and observed all of the witnesses. An appellate court, far removed from the real physical dangers presented by a combative, highly intoxicated defendant, is in a poor position to make a finding of fact about how many officers are reasonably needed to protect themselves and others in that moment. That is the job of the trial judge.

> that the additional delay necessary to obtain a search warrant or court order under the circumstances would result in the dissipation of the percentage of alcohol in the defendant's blood.

Defendant is correct that the trial court did not make any specific findings addressing the availability of a magistrate at the time of the incident and the probable delay in seeking a warrant, although Deputy Fyle did testify about this matter, but it seems from the above conclusion of law that the trial court considered the time factor in mentioning the "additional time and uncertainties in how much additional time would be needed to obtain a search warrant." Without findings of fact on these details, however, we cannot properly review this conclusion. We must therefore remand this matter to the trial court for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed.

## III. Motion to Dismiss

**[2]** Defendant's motion before the trial court was styled as a motion to dismiss pursuant to N.C. Gen. Stat. § 15A-954(a)(4), which requires dismissal of criminal charges if "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2013). However, at the hearing on defendant's motion, both parties agreed to treat the motion as both a motion to dismiss and a motion to suppress. Both of these motions were subsequently denied by the trial court. On appeal, defendant requests that this Court reverse the trial court's order as to both motions.

In *State v. Wilson*, the trial court found that a warrantless blood draw had violated the defendant's constitutional rights and dismissed the charges against him. ___ N.C. App. ___, ___, 736 S.E.2d 614, 616 (2013). On appeal, this Court held that dismissal was an inappropriate remedy:

> In his motion to dismiss, defendant argued the officer's conduct flagrantly violated his constitutional rights "and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." While defendant's motion addresses the alleged flagrant violation of his constitutional rights, his motion in no way details how there was irreparable

> damage to the preparation of his case as a result. Indeed, the trial court made no such finding or conclusion, and defendant has made no such argument on appeal. Thus, we fail to see how the alleged constitutional violation at issue here irreparably prejudiced the preparation of defendant's case, and section four of the dismissal statute likewise does not apply to the present case.

*Id.* at ____, 736 S.E.2d at 617-18. Instead, "the appropriate argument by defendant was for suppression of the evidence, and the only appropriate action by the trial court under the circumstances of the present case was to consider suppression of the evidence as the proper remedy if a constitutional violation was found." *Id.* at ___, 736 S.E.2d at 618.

Likewise, in the instant case, while defendant's motion to dismiss asserts that the warrantless blood draw was a flagrant violation of his constitutional rights, "his motion in no way details how there was irreparable damage to the preparation of his case as a result" and "defendant has made no such argument on appeal." *See id.* Thus, pursuant to *Wilson*, "the only appropriate action by the trial court under the circumstances of the present case was to consider suppression of the evidence as the proper remedy if a constitutional violation was found." *See id.* Accordingly, we affirm the trial court's order denying defendant's motion to dismiss.

## IV. Conclusion

We affirm the trial court's order denying defendant's motion to dismiss. However, we remand to the trial court to make additional findings of fact addressing the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that bear upon the conclusion of law that exigent circumstances existed that justified the warrantless blood draw.

AFFIRMED, in part, and REMANDED.

Judge DAVIS concurs.

CALABRIA, Judge, dissenting.

Because I believe that, based upon the testimony presented below, remanding this case for further findings would be futile, I must respectfully dissent from the majority's opinion. I would reverse the trial court's denial of defendant's motion to suppress and remand for a new trial.

As an initial matter, I agree with the majority that defendant's self-styled "Motion to Dismiss" based upon the warrantless blood draw is most properly treated as a motion to suppress. *See State v. Wilson*, ___ N.C. App. ___, ___, 736 S.E.2d 614, 618 (2013). "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed *de novo*. *Id.* at 168, 712 S.E.2d at 878. For a properly filed motion to suppress, "the burden is upon the [S]tate to demonstrate the admissibility of the challenged evidence[.]" *State v. Cheek*, 307 N.C. 552, 557, 299 S.E.2d 633, 636 (1983).

"Our courts have held that the taking of blood from a person constitutes a search under both" the United States and North Carolina Constitutions. *State v. Barkley*, 144 N.C. App. 514, 518, 551 S.E.2d 131, 134 (2001). This is because the drawing of blood "involve[s] a compelled physical intrusion beneath [a suspect]'s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.' " *Missouri v. McNeely*, 569 U.S. ___, ___, 185 L. Ed. 2d 696, 704 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760, 84 L. Ed. 2d 662, 668 (1985)). Accordingly, our Supreme Court has specifically held that "a search warrant *must be issued* before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search." *State v. Carter*, 322 N.C. 709, 714, 370 S.E.2d 553, 556 (1988) (emphasis added).

The United States Supreme Court recently held that "the natural metabolization of alcohol in the bloodstream" does not create "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases[.]" *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 702. "Therefore, after the Supreme Court's decision in *McNeely*, the question for this Court remains whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *State v. Dahlquist*, ___ N.C. App. ___, ___, 752 S.E.2d 665, 667 (2013), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, 755 S.E.2d 614 (2014).

In *McNeely*, a Missouri law enforcement officer initiated a traffic stop of the defendant for speeding and crossing the centerline. 569 U.S. at ___, 185 L. Ed. 2d at 702. The defendant displayed obvious signs of impairment and failed various field-sobriety tests. *Id.* As a result, the

officer arrested the defendant and began to transport him to the station house. *Id.* While in transit, the defendant informed the officer he would not submit to a breath test. *Id.* Consequently, the officer took the defendant directly to a nearby hospital for a blood test. *Id.* The officer never attempted to obtain a warrant, but sought defendant's consent for the blood test, which defendant refused. *Id.* at ___, 185 L. Ed. 2d at 702-03. The United States Supreme Court concluded that the results of this blood test were required to be suppressed pursuant to the Fourth Amendment because "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at ___, 185 L. Ed. 2d at 715. In support of this conclusion, the Court provided the following example:

> Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement.

*Id.* at ___, 185 L. Ed. 2d at 708.

In the instant case, the trial court's unchallenged findings demonstrate that Deputy Fyle's actions fall squarely within the ambit of the example articulated by *McNeely*. The trial court found that Deputy Fyle had determined that he would seek to obtain a blood sample from defendant at 7:39 p.m. However, Deputy Fyle made no attempt to secure a warrant for this blood draw. Instead, Deputy Fyle followed defendant to the hospital, despite the fact that Deputy Ryser was already traveling with the handcuffed defendant in the ambulance. There is nothing in the court's order or in the transcript which provides any explanation for the reason Deputy Fyle followed defendant rather than using the time to seek a warrant. Pursuant to *McNeely*, "[i]n such a circumstance, there [is] no plausible justification for an exception to the warrant requirement." *Id.*; *cf. State v. Granger*, ___ N.C. App. ___, ___, 761 S.E.2d 923, 928 (2014) (upholding a warrantless blood draw in part because "unlike the example in *McNeely*, [569] U.S. at ___, 185 L. Ed. 2d at 708, Officer Lippert was investigating the matter by himself and would have had to call and wait for another officer to arrive before he could travel to the magistrate to obtain a search warrant.").

Nonetheless, the majority contends that Deputy Fyle's actions were appropriate under this Court's decision in *Granger*. In that case, a law enforcement officer responded to the report of an accident in which the defendant had rear-ended another vehicle. *Granger*, ___ N.C. App. at ___, 761 S.E.2d at 924. When the officer arrived at the scene, he observed that the defendant was in pain and emanated a moderate odor of alcohol. *Id.* The defendant was transported to the hospital before the officer could perform any sobriety tests. *Id.* Upon arrival, the defendant admitted to the officer that he had consumed alcohol and displayed clear signs of impairment. *Id.* The officer administered two portable breath tests, and both tests indicated the presence of alcohol on defendant's breath. *Id.* As a result, the officer obtained a warrantless blood sample from the defendant. *Id.* at ___, 761 S.E.2d at 925. This Court held that, under the totality of the circumstances, there was a sufficient exigency to support a warrantless blood draw. *Id.* at ___, 761 S.E.2d at 928. Specifically, the Court noted that (1) the officer was concerned about the dissipation of alcohol from the defendant's blood, because over an hour had elapsed since the accident occurred before the officer established sufficient probable cause to seek the blood draw; (2) the officer estimated that the time it would take to travel to the magistrate's office, obtain a warrant, and return to the hospital would be at least forty minutes; (3) the officer was investigating the matter alone, which would have required him to wait for another officer to arrive before he could travel to the magistrate's office to obtain a warrant; and (4) the officer was concerned that if he left the defendant unattended or waited any longer for a blood draw, the hospital might have administered pain medication to the defendant that could contaminate his blood sample. *Id.*

*Granger* is distinguishable from the instant case. First and foremost, unlike the officer in *Granger*, Deputy Fyle was not the sole officer who accompanied defendant to the hospital. Instead, Deputy Ryser accompanied defendant in the ambulance, while Deputy Fyle followed behind the ambulance in his patrol car, despite the fact that he had already determined that he would seek to draw defendant's blood. Moreover, unlike the officer in *Granger*, Deputy Fyle had already completed his investigation and placed defendant under arrest on suspicion of DWI prior to defendant's transportation to and arrival at the hospital. The circumstances which this Court found justified the warrantless blood draw in *Granger* are simply not present in this case.

The majority contends that the appropriate disposition for this case is to remand for additional findings of fact regarding the availability of a magistrate and the additional time and uncertainties in obtaining a

warrant. However, the trial court's conclusion of law reflects that the court considered these factors and applied the appropriate totality of the circumstances test required by *McNeely*:

> Based upon the time elapsed to that point and the additional time and uncertainties in how much additional time would be needed to obtain a search warrant or other court order for the defendant's blood and all other attendant circumstances, the same gave rise to the existence of exigent circumstances and supported the officer's reasonable belief that the additional delay necessary to obtain a search warrant or court order under the circumstances would result in the dissipation of the percentage of alcohol in the defendant's blood.

While the majority is correct that the trial court could have made more explicit findings from Deputy Fyle's testimony regarding the availability of a magistrate and the ease of obtaining a warrant, there is a fundamental flaw in the premise that these additional findings could support the trial court's denial of the motion to suppress. The trial court's findings clearly indicate that Deputy Fyle determined he would obtain a sample of defendant's blood at approximately 7:39 p.m. Accordingly, any determination of exigent circumstances must be based upon whether, under the facts that existed at that time, Deputy Fyle could have reasonably taken the appropriate steps to secure a warrant while defendant was transported to the hospital by Deputy Ryser.

However, there is no evidence on this question in the record, because Deputy Fyle's testimony unequivocally indicates that he only considered whether exigent circumstances existed *after defendant was discharged from the hospital and refused to consent to the blood draw*. At that time, approximately ninety minutes had already elapsed since Deputy Fyle had arrested defendant on suspicion of DWI and determined that he would seek to obtain a sample of defendant's blood. Despite the fact that Deputy Ryser was with defendant, who was restrained in handcuffs in the back of the ambulance, and the additional fact that at least two other deputies were dispatched to the hospital to assist with defendant when he arrived, there is nothing in the record to suggest that Deputy Fyle ever attempted, or even considered attempting, taking steps to obtain a warrant in the time between defendant's arrest and his discharge from the hospital.

The majority speculates that it may still have not been reasonable for Deputy Fyle to seek a warrant while Deputy Ryser transported him to

the hospital because "several officers were needed to control defendant and ensure the safety of the hospital personnel." This speculation into Deputy Fyle's motives at the time he followed defendant to the hospital is not supported by any evidence that was presented during the hearing. Deputy Fyle restrained defendant in handcuffs without any physical altercation, deemed it unnecessary to travel together in the ambulance with Deputy Ryser and defendant, and never indicated at any point during his testimony that he went directly to the hospital due to safety concerns. Moreover, it was not until Deputy Fyle ordered the warrantless "invasion of [defendant's] bodily integrity," *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 704, that defendant resisted sufficiently to require several officers to help control him.[1]

Ultimately, I conclude that the trial court's findings demonstrate that Deputy Fyle never considered whether a warrant was necessary during the ninety minutes after placing defendant in custody and determining that he would seek to draw defendant's blood. Therefore, "there [was] no plausible justification for an exception to the warrant requirement" under the totality of the circumstances. *McNeely*, 569 U.S. at ___, 185 L. Ed. 2d at 708. Deputy Fyle simply ignored our Supreme Court's long-established directive that "a search warrant must be issued before a blood sample can be obtained[.]" *Carter*, 322 N.C. at 714, 370 S.E.2d at 556. He then sought to impermissibly benefit from his failure to seek a warrant by asserting that an exigency existed at the moment the blood draw was to occur. At this point, it was far too late for Deputy Fyle to consider, for the first time, whether a warrant could reasonably be obtained.

Since neither the trial court's findings of fact nor any other evidence presented at the hearing support its conclusion of law that, based upon the totality of the circumstances, exigent circumstances existed to support defendant's warrantless blood draw, the trial court erred by denying defendant's motion to suppress the results of the blood test. The trial court's order should be reversed and remanded for the entry of an order suppressing this evidence. I respectfully dissent.

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1. Defendant's conviction for communicating threats was based upon his belligerent behavior during the blood draw.

STATE OF NORTH CAROLINA
v.
ELLIS EUGENE ROYSTER

No. COA14-100

Filed 21 October 2014

**1. Evidence—relevancy—ammunition in defendant's house**

The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning 9 millimeter ammunition during a search of defendant's house. The evidence concerning the ammunition was relevant because it tended to link defendant to the scene of the crime and its probative value was not outweighed by its prejudicial value.

**2. Evidence—testimony elicited by defendant—opened door**

The trial court did not err in a first-degree murder prosecution by allowing the admission of testimony concerning a 9 millimeter gun found during a search of defendant's house. He cannot challenge the admission of testimony that he first elicited.

**3. Appeal and Error—preservation of issues—mistrial not sought at trial—no plain error review**

Defendant did not preserve for appeal the issue of whether the trial court erred by failing to declare a mistrial after an outburst by the victim's father in the presence of the jury. Defendant did not seek a mistrial and plain error review is not available on this issue.

**4. Constitutional Law—right to confrontation—out-of-state witness—released from summons**

The trial court did not err or violate defendant's confrontation rights by releasing a witness from his summons after he testified as a witness for the State. Although defendant argued that the trial court forced the defense to elect whether to call him as a witness with only a few hours' notice, the witness was available at trial and defendant had the opportunity to conduct a cross-examination. Moreover, the subpoena served upon the witness during trial was invalid because the witness was in North Carolina pursuant to the State's summons.

**5. Criminal Law—third-party flight—instruction denied—not prejudicial error**

There was no prejudicial error where defendant argued that the trial court erred in refusing his request to instruct the jury

concerning third-party flight. The witness testified that he left the scene of the crime after the shooting because he was in possession of crack, the defense requested a special instruction concerning flight, and the trial court denied the request for the instruction but allowed the defense to argue the point, and the record was replete with evidence from which a jury could find defendant guilty of first-degree murder.

**6. Evidence—phone calls by witness—not hearsay—not cumulative**

The trial court did not abuse its discretion by admitting evidence of phone calls made by a witness for the State to his friends. The recordings were admissible for the non-hearsay purpose of corroborating the witness's testimony and were not a needless presentation of cumulative evidence. The statements in the recordings corroborated the witness's testimony, excluded him as a suspect, and established defendant as the perpetrator of the crime.

Appeal by defendant from judgment entered 29 May 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2014.

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

*Law Office of Margaret C. Lumsden PLLC, by Margaret C. Lumsden, for defendant-appellant.*

McCULLOUGH, Judge.

Defendant Ellis Eugene Royster appeals from a judgment entered based upon his conviction for first degree murder. For the following reasons, we find no error in part and no prejudicial error in part.

I. Background

On 1 November 2010, a Mecklenburg County Grand Jury indicted defendant on a charge of murdering Amias Bernard Robinson on 12 August 2010.

Defendant's case came on for trial during the 20 May 2013 Criminal Session of Mecklenburg County Superior Court, the Honorable W. Robert Bell, Judge presiding.

The State's evidence at trial tended to show the following: Alvin Alexander testified that at 4:00 p.m. on 12 August 2010, he met his friend Randall Henry (otherwise known as "Randy") at defendant's residence on Eastbrook Road in Charlotte, North Carolina. Defendant lived with his grandmother "Miss D" and grandfather "Mr. D." "Miss D" was known in the neighborhood as the "Candy Lady." Alvin went into defendant's bedroom where defendant and Randy played a video game while Alvin smoked marijuana. Sometime thereafter, Alvin, Randy, and defendant went outside to the end of defendant's driveway to smoke cigarettes. Shariff Baker, a resident of defendant's neighborhood, approached Alvin, Randy, and defendant and told them that "a couple guys took his money from him." Alvin testified that Shariff had stated that "[h]e was going to buy some weed from them, and they just pulled off with his money."

Shariff testified that on 12 August 2010, he tried to buy $10.00 worth of marijuana from Jadarius McCall, otherwise known as "J.D." Shariff was standing in front of a house on Eastbrook Road when J.D. drove by in a blue car. Three other people were in the car with him – a man by the name of Delehay, Tim, and an unidentified male. Shariff gave $10.00 to Delehay, the group told Shariff to get out of their way, and J.D. drove off without giving Shariff marijuana or returning his money. Shariff was upset and began walking towards defendant's residence. Once Shariff saw defendant, he told defendant that J.D., Delehay, and Tim had taken his money. Defendant told Shariff that he "would get it back for me."

Alvin testified that he knew Tim's stepfather, Chris, and that he told Shariff that he would talk with Chris. Alvin drove to Chris' house, "told Chris that his stepson had just took one of the guy's money out of the neighborhood. And [Chris] said he would take care of it." After their conversation, Alvin then drove back to defendant's residence. Several people from the neighborhood were standing outside. A group of three to four teenage girls, including the victim's cousins, were pushing a baby stroller holding the victim, Amias Robinson.

Alvin testified that while he was in the driveway of defendant's residence, he saw a blue Oldsmobile drive past them. Shariff also testified that "J.D.'s car came down the street." Randy pointed out the vehicle and stated, "[t]here he go right there." Shariff testified that Randy's comment meant, "[t]hat those are the people that took my money."

Defendant was standing at the end of the driveway when he pulled a gun from his rear waistband area. Alvin and Shariff witnessed defendant start firing shots "up the street" towards J.D.'s vehicle. Alvin heard approximately ten shots and then heard a girl scream "[y]ou shot my

cousin; you shot my cousin." Defendant repeatedly stated "I'm going to jail" and Randy asked defendant, "[w]hy did you start shooting[?]" Shariff testified that, after the shooting, defendant stated, "I f***ed up." Thereafter, defendant walked quickly down the street and returned within a couple of minutes without a gun. Alvin left the scene in his vehicle soon after the shooting.

Sergeant Michael Abbondanza with the Charlotte Mecklenburg Police Department ("CMPD") testified that, on 12 August 2010, he was dispatched in response to a call that a baby had been shot and was the first officer to arrive on the scene. Sergeant Abbondanza testified that, when he arrived at a residence on Eastbrook Road, there were fifteen to twenty people in the street. Thereafter, he found the victim lying on the front porch with what appeared to be a gunshot wound through his neck.

The victim of the stray bullet, Amias Robinson, was born on 8 July 2008. In August 2010, Amias' mother had made arrangements with her cousins to watch Amias in Charlotte, North Carolina. She received a phone call on 12 August 2010, urging her to go to the hospital because Amias had been shot after he had been taken to the "Candy Lady." Amias died on 16 August 2010 as the result of a gunshot wound to the neck.

Todd Norhoff, an expert in the field of firearms and tool mark analysis with the Charlotte-Mecklenburg Crime Laboratory, testified that he analyzed eleven (11) spent shell casings found at the scene of the crime. The casings were 9 millimeter Luger Remington Peters casings. All eleven casings were found to have been discharged from the same firearm.

Defendant testified on his own behalf. On 12 August 2010, defendant lived with his grandmother, the "Candy Lady," at 5826 Eastbrook Road. Defendant picked up Randy and Alvin and went to defendant's residence to play video games. Around 5:00 p.m. or 6:00 p.m., the three went outside and stood in the driveway, waiting on someone to bring them marijuana. The "weed man" came by defendant's residence, sold them $80.00 worth of marijuana, and left. Defendant testified that he gave Randy half of the marijuana and then went inside his house, leaving Randy and Alvin outside. Defendant was inside the house with his baby's mother, uncle, grandmother, and grandfather. Twenty-five minutes later, defendant testified that he heard 10 gunshots. He had not seen Randy or Alvin during this period of time. After he heard the gunshots, defendant, his baby's mother, uncle, grandmother, and grandfather met at the front door of the house. Defendant's grandmother saw the victim bleeding and started to perform CPR on the victim.

Defendant testified that earlier that day, he had had a conversation with Shariff. Shariff told defendant that he had been robbed by J.D. Defendant tried to call J.D. to get Shariff's money back but because J.D. did not answer his phone calls, defendant sent him a text message that read "Man, I ain't about to be blowing up your phone like a b****. Bring that n***** money back or stay out of my hood." Defendant denied shooting a gun at J.D., shooting a gun at J.D.'s vehicle, or shooting a gun "up in the air or down on the ground to scare J.D."

Testimony from the following witnesses demonstrated that they had initially implicated Alvin Alexander as the shooter: Shariff Baker; Porchia Glenn; Kyshonna Williams; and Kourtney Williams.

On 29 May 2013, the jury returned a verdict finding defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole.

Defendant gave notice of appeal in open court.

## II. Discussion

On appeal, defendant argues that the trial court erred by (A) allowing the admission of testimony about 9 millimeter ammunition and a gun found in defendant's grandmother's house; (B) not ordering a mistrial after a profane outburst from the victim's father in the presence of the jury; (C) releasing an out-of-state witness from his subpoena and forcing defense counsel to elect whether to call the witness with only a few hours' notice; (D) refusing defendant's request to instruct the jury concerning flight as an indication of the guilt of another person; and (E) allowing the admission of inadmissible hearsay and cumulative evidence consisting of a witness' self-serving statements implicating defendant.

### A. Weapon and Ammunition Testimony

**[1]** In his first argument on appeal, defendant contends that the trial court erred by allowing the admission of testimony concerning 9 millimeter ammunition and a gun found during the search of defendant's house. Specifically, defendant argues that the challenged evidence was not relevant, in violation of Rule 401 of the North Carolina Rules of Evidence. Defendant also asserts that, if the evidence was relevant, the prejudice to defendant outweighed the probative value of the evidence under Rule 403 of the North Carolina Rules of Evidence. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being

litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 401 (2013) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). Nevertheless, under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

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

*Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal quotations and citation omitted).

At trial, a hearing was held prior to admission of the challenged evidence. Detective Miguel Santiago, a witness for the State, found a 9 millimeter machine-gun style pistol during a search of defendant's home. The gun had nineteen (19) Winchester 9 millimeter bullets and fifteen (15) Remington 9 millimeter bullets. The State wanted to introduce evidence regarding the 9 millimeter ammunition that was found at defendant's house to show that defendant possessed the same caliber and brand of ammunition as the shell casings that had been found at the crime scene and were used to kill the victim. The State did not intend to introduce the 9 millimeter gun. Over defendant's objection, the trial court allowed the State to present the following evidence about the 9 millimeter ammunition found in the house:

> [State:] . . . Did you assist with executing a search warrant on [defendant's] home on October 27th, 2010?
>
> [Santiago:] Yes, I did.
>
> [State:] And yes or no, Detective, during that search, did you find any 9 millimeter ammunition?
>
> [Santiago:] Yes, I did.

In order to dispel any suggestion that defendant possessed the 9 millimeter gun used in the shooting, defendant elicited testimony that a 9 millimeter gun also found in his house, in which the 9 millimeter ammunition was found, was not the murder weapon. Thereafter, based on a trial court ruling that defendant had "opened the door", on re-direct the State introduced further evidence concerning the gun found in the house, including photographs. Defendant later testified that he only owned the 9 millimeter gun found during the search.

After thoughtful review, we hold that the evidence concerning the 9 millimeter ammunition that was found in defendant's home was relevant because it tended to link defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that defendant was the perpetrator of the crime. Because evidence of the 9 millimeter ammunition was probative of defendant's connection to the crime and the danger of unfair prejudice did not outweigh the probative value of the evidence, we hold that the trial court did not err by admitting this evidence.

**[2]** Next, we address the admission of evidence regarding the gun that was found pursuant to a search of defendant's home. We note that the trial court ruled that evidence of the gun found in defendant's home would not be admissible. However, defendant "opened the door" to the admission of this evidence. "The State has the right to introduce evidence to rebut or explain evidence elicited by defendant although the evidence would otherwise be incompetent or irrelevant." *State v. Johnston*, 344 N.C. 596, 605, 476 S.E.2d 289, 294 (1996) (citation omitted). "The law has long been that, even where [t]he type of testimony is not allowed[,] . . . when a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the subject raised." *State v. Wilson*, 151 N.C. App. 219, 226, 565 S.E.2d 223, 228 (2002) (citations and quotation marks omitted). Since he first introduced evidence about the gun found in his residence, defendant cannot now challenge the admission of testimony that he first elicited. Defendant's arguments are overruled.

B. Mistrial

**[3]** In his second argument on appeal, defendant contends that the trial court erred by failing to declare a mistrial after an outburst by the victim's father in the presence of the jury.

During the testimony of Sergeant Abbondanza of the CMPD describing the victim's injuries, the victim's father, stated "[m]otherf***** -- my baby. You shot my mother f***** baby – (unintelligible)." Shortly thereafter, as the court concluded for the day, the trial judge addressed the jury concerning the outburst:

> Finally, I can't let go -- or can't let it go without saying something about the outburst of the gentleman a moment ago. If you'll recall before we started, I said, you know, this is when we start; this is when we end; that these trials take on a life of their own. We're dealing with -- this is not television. These are the real facts and real tragedies. He clearly was emotional. But it's your responsibility as a juror and as a finder of fact to base your decision on the law and on the evidence and not on emotion. I don't know whether this gentleman will be back. I can promise you if he is back, he will not act like that again in this courtroom.

The following morning, the trial judge again addressed the issue with the jury at the request of the defense.

> We're going to start in just a moment with the cross-examination of this witness by the defendant. But I do have one final instruction for you concerning the incident that occurred yesterday afternoon. I'm not sure exactly what Mr. Robinson said. But regardless of what he said or what you may have thought he said or remember him to have said, that is not evidence and should not be considered by you as evidence and should have no bearing upon your deliberations.

Defendant concedes in his brief that "defense counsel failed to seek a mistrial" and thus contends that the proper standard of review is plain error. The North Carolina Supreme Court has restricted review for plain error to issues "involv[ing] either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997) (citation omitted). Because plain error review is not available to defendant, this issue is not properly preserved for appeal. *See State v. McCall*, 162 N.C.

App. 64, 70, 589 S.E.2d 896, 900 (2004) (where the defendant failed to move for a mistrial after individuals in the courtroom signaled to the victim during her testimony, plain error review was not available and the argument was waived).

C. Defendant's Sixth Amendment Rights

**[4]** Defendant next argues that the trial court erred by releasing an out-of-state witness, Shariff Baker, from his subpoena, forcing the defense to elect whether to call him as a witness with only a few hours' notice. Specifically, defendant argues that the trial court violated his confrontation rights as secured by the Sixth Amendment of the United States Constitution and Article I Section 23 of the North Carolina Constitution. We find defendant's arguments meritless.

Defendant relies on *State v. Barlowe*, 157 N.C. App. 249, 578 S.E.2d 660 (2003) to support his argument. Our Court in *Barlowe* stated the following:

> The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. As noted by the United States Supreme Court . . . [t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. In addition, the right to face one's accusers and witnesses with other testimony is guaranteed by the sixth amendment to the federal constitution, applicable to the states through the fourteenth amendment, and by Article I, sections 19 and 23 of the North Carolina Constitution.

*Id.* at 253, 578 S.E.2d at 663 (citations and quotation marks omitted).

"The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007) and N.C. Gen. Stat. § 15A-1443(b)).

In the case *sub judice*, the State, pursuant to N.C. Gen. Stat. § 15A-811 et seq., summoned Shariff Baker from New York to testify at the trial. On 22 - 23 May 2013, Baker testified and defendant had an opportunity to cross-examine him. After Baker stepped down from the witness stand,

the State informed the trial court judge that the defense had attempted to serve a subpoena on Baker the day before. The State argued that the subpoena was invalid. Baker refused to speak with the defense out-of-court and the trial court required the defense to decide whether to call Baker as a witness before 2:00 p.m. that day. When the defense indicated it had not yet decided whether it would be calling Baker as a witness at 2:00 p.m., the trial court judge released Baker from the summons.

After reviewing the record, we are unable to agree with defendant that his confrontation rights regarding the State's witness, Shariff Baker, were violated. Baker was available at trial and defendant had the opportunity to conduct a cross-examination of Baker. Moreover, we note that Baker was summoned as an out-of-state witness by the State. Pursuant to N.C. Gen. Stat. § 15A-814,

> [i]f a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

N.C. Gen. Stat. § 15A-814 (2013). Thus, the subpoena served upon Baker during trial was invalid because Baker was in North Carolina pursuant to the State's summons. As such, we hold that the trial court did not err by releasing Baker from his summons after he testified as a witness for the State. Based on the foregoing reasons, we reject defendant's contentions.

D. Jury Instruction Concerning Flight

**[5]** In the fourth issue raised by defendant on appeal, defendant argues that the trial court erred in refusing his request to instruct the jury concerning flight as an indication of Alvin Alexander's guilt. Defendant contends that the failure of the trial court to deliver the requested instruction concerning flight was a violation of his constitutional rights pursuant to the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 18, 19, 24, and 27 of the North Carolina Constitution.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citation omitted).

In the present case, Alvin testified that he left the scene of the crime after the shooting because he "didn't want to be around when

the police showed up" since he was in possession of "crack." The defense requested a special instruction concerning the flight of Alvin from the crime scene. The trial court denied the request for the instruction, but allowed the defense to argue the point.

Defendant now argues that the trial court should have delivered an instruction concerning the flight of Alvin as an indication of his guilt. Defendant contends that the evidence at trial suggested that Alvin "might have been the shooter" and that his flight from the scene of the crime "in fear of the police is particularly incriminating."

It is well established that "[e]vidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996) (citation omitted).

Assuming *arguendo* that it was error for the trial court to refuse to instruct the jury that it would consider Alvin's flight as evidence that he, rather than defendant, was the perpetrator of the crime, we do not believe that this decision amounted to prejudicial error. According to N.C. Gen. Stat. § 15A-1443(a), "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013).[1] Here, the record is replete with evidence from which a jury could find defendant guilty of first degree murder. At trial, several witnesses testified that defendant fired the shots that resulted in the victim's death. Witnesses also testified that defendant made highly incriminating statements after the shooting. On the other hand, although several witnesses initially told officers that Alvin fired the shots that killed the victim, the testimony at trial was devoid of any direct evidence tending to show that Alvin was the perpetrator of the crime. In addition, despite the fact that Alvin testified that he left the scene of the crime after the shooting because he had drugs on his person, he testified that he returned after

1. Although defendant argues in his brief that his constitutional rights were violated, he failed to advance any constitutionally based arguments in support of his request for the delivery of a third party flight instruction before the trial court. Because our Court does not consider constitutional issues raised for the first time on appeal, *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (stating that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal"), we apply the applicable prejudice standard applicable to non-constitutional errors to defendant's claim.

learning that officers were searching for him. Based on the foregoing, we are unable to hold that there is a reasonable possibility that a different result would have been reached at trial had the trial court delivered defendant's requested third party flight instruction. Therefore, we find no prejudicial error.

E. Admission of Alvin Alexander's Testimony

**[6]** In the final issue that he has raised on appeal, defendant argues that the trial court erred by admitting evidence of phone calls made by Alvin Alexander to his friends which were "self-serving statements implicating defendant." Defendant argues that this evidence amounted to hearsay and was cumulative. We disagree.

"Hearsay" is defined 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). Hearsay is not admissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2013). The trial court's determination about whether an out-of-court statement constitutes hearsay is reviewed *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552 (2009). The trial court's determination concerning whether there is a "needless presentation of cumulative evidence" pursuant to Rule 403 of the North Carolina Rules of Civil Procedure is reviewed for an abuse of discretion. *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010).

The challenged evidence, which consisted of recordings of phone calls made by Alvin while he was in jail, was admitted during Alvin's testimony. The substance of the recordings indicated that Alvin did not shoot at the vehicle and that defendant was the shooter on 12 August 2010.

Defendant argues that Alvin's credibility was a key issue at trial and that allowing the tapes to bolster his testimony was prejudicial to defendant. Without the repeated statements by Alvin, defendant argues that the jury could have reached a different result.

After conducting *de novo* review of the challenged evidence, we hold that the recordings of Alvin's conversations did not amount to hearsay. In order to constitute hearsay, it must be "[a]n assertion of one other than the presently testifying witness" and must be offered for the truth of the matter asserted. *State v. Sibley*, 140 N.C. App. 584, 587-88, 537 S.E.2d 835, 838 (2000) (citation omitted). In the case *sub judice*, the recordings were admissible for the non-hearsay purpose of corroborating Alvin's testimony, which means that they were not used for the truth

of the matter asserted. In addition, the recordings were not a needless presentation of cumulative evidence because the statements Alvin made in the recordings corroborated his testimony, excluded him as a suspect, and established defendant as the perpetrator of the crime. For these reasons, we are unable to hold that the trial court abused its discretion by admitting the challenged testimony as a needless presentation of cumulative evidence.

III. Conclusion

Based on the reasons discussed above, we find no error in part and no prejudicial error in part.

Judges ERVIN and DILLON concur.

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STATE OF NORTH CAROLINA
v.
MATTHEW HAGERT SALENTINE

No. COA14-63

Filed 21 October 2014

**1. Jury—misconduct—denial of mistrial not arbitrary—inquiry sufficient**

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's motion for a mistrial based on juror misconduct and refusing defendant's request to make further inquiry into the misconduct. The trial court's decision to credit the testimony of a live witness over vague, partially substantiated hearsay was not so arbitrary that it could not have been the result of a reasoned decision. Furthermore, it was well within the trial court's discretion to end its inquiry and proceed with sentencing based upon the juror's responses and the court's own observations.

**2. Criminal Law—prosecutor's closing argument—supported by evidence—proper purpose**

The trial court did not err in a first-degree murder case by improperly overruling defendant's objections to three portions of the State's closing argument. The full context of the prosecutor's closing argument demonstrated that the challenged remarks were supported by the evidence and had a proper purpose.

**STATE v. SALENTINE**

[237 N.C. App. 76 (2014)]

Appeal by Defendant from judgment entered 25 October 2012 by Judge William R. Bell in Johnston County Superior Court. Heard in the Court of Appeals 10 September 2014.

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

*David L. Neal for Defendant.*

STEPHENS, Judge.

Defendant Matthew Hagert Salentine was convicted in Johnston County Superior Court of first-degree murder, first-degree burglary, and robbery with a dangerous weapon, and was sentenced to life imprisonment without parole for the first-degree murder conviction, with judgment arrested on the other two charges. Defendant appeals from the trial court's order denying his motion for a mistrial based on allegations of juror misconduct, contending that the trial court erred in failing to conduct a further inquiry after removing the juror in question, and in overruling Defendant's objections to the State's closing argument. After careful review, we hold that the trial court did not abuse its discretion in denying Defendant's motion for a mistrial, limiting the scope of its juror misconduct inquiry, or overruling Defendant's objections to the State's closing argument.

*Facts and Procedural History*

The evidence at trial showed that early on the morning of 23 June 2010, Defendant broke into the home of 74-year-old Smithfield resident Patricia Warren Stevens. Defendant later admitted that he intended to steal money and valuables in order to purchase crack cocaine, and that his neighbor, Mrs. Stevens, seemed like an "easy" target because he knew she had been living alone since her dog died several months previously. Contrary to Defendant's expectations, Mrs. Stevens put up a fight and began screaming when she caught him rummaging through her purse. Frightened by the prospect of being recognized, Defendant struck Mrs. Stevens at least thirty-three times with a tire iron, including at least eight blows to her head. When he realized Mrs. Stevens was dead, Defendant attempted to conceal her body by rolling it up in a carpet and moving furniture around. He then continued to search the home for additional items to steal, ultimately leaving with Mrs. Stevens's Visa credit card, several boxes of her checks, and a pillowcase stuffed with jewelry. Defendant was arrested two days later on 25 June 2010 as he sat

in his truck after attempting to deposit into his bank account over $2,000 in checks made payable to him and purportedly signed by Mrs. Stevens. Defendant confessed to the killing later that afternoon during an interview with SBI agents. Subsequent DNA testing revealed that blood found on checkbooks and flip-flops seized from Defendant's vehicle and a tire iron found near the back door of his apartment matched Mrs. Stevens's DNA profile.

Defendant was tried capitally and pled not guilty, arguing diminished capacity and voluntary intoxication as his defense to the charge of premeditated and deliberate first-degree murder. Although he admitted killing Mrs. Stevens after breaking into her house, Defendant contended that he could not have formed the requisite intent to commit the offense due to a combination of crack cocaine addiction, alcohol abuse, and bipolar disorder. During his SBI interview, Defendant claimed he "fell off the wagon" after nearly five years of being sober and admitted to consuming nearly $10,000 worth of crack cocaine in the weeks preceding Mrs. Stevens's murder, financing his binge with an inheritance from the estate of his grandmother. In addition to being strung-out on crack cocaine, Defendant also consumed a fifth of vodka and some beers shortly before breaking into Mrs. Stevens's home. At trial, mental health experts for the State and the defense diagnosed Defendant with cocaine dependence. Defendant's experts testified that he also suffered from bipolar disorder, that his substance abuse represented a misguided attempt to self-medicate his depression, and that it would be impossible for a person to think or act rationally after consuming so much crack cocaine and alcohol. The State's expert testified that although cocaine can affect one's judgment, it does not completely overwhelm the capacity to reason. He pointed to Defendant's decision to break into Mrs. Stevens's home to obtain money to get more crack and Defendant's actions designed to avoid detection in support of his conclusion that at the time of the offense, Defendant was able to perform intentional acts and make rational decisions. Moreover, the State's expert disputed the bipolar diagnosis, noting that although prolonged cocaine use can cause what appear to be symptoms of mental disorder, Defendant exhibited a clear pattern of functional, stable behavior when not using drugs, thus making a personality disorder with antisocial features the more appropriate diagnosis. Nonetheless, in light of Defendant's diminished capacity defense, the trial court included an instruction on second-degree murder as a lesser-included offense in its charge to the jury.

On 25 October 2012, after deliberating eleven hours over the course of three days, the jury found Defendant guilty of first-degree murder

based on theories of malice, premeditation and deliberation, and felony murder. On 2 November 2012, prior to the conclusion of Defendant's capital sentencing hearing, the trial court received a letter from Jeffrey Saunders, a Florida attorney whose brother-in-law, Brian Scott Lloyd, was a forty-eight-year-old long-haul truck driver who served on Defendant's jury. In his letter, Mr. Saunders informed the court:

> During deliberations, [Lloyd] contacted my wife complaining about one of the female jurors, because she would not agree to find the Defendant guilty. He further informed my wife that the same juror failed to disclose during voir dire that her brother was addicted to drugs. He also stated to my wife that he went online and found out certain information about the Defendant. I informed my wife to tell her brother that he was prohibited from speaking to her or anyone else regarding the case, and he must comply with the Court's instructions. Thereafter, he called my wife on another day and told her that he and the other jurors did not know what the term "malice" meant and asked her to ask me to explain the same. I refused to provide any information to my wife and I never spoke to her brother about the case.

Upon learning of these allegations of juror misconduct, the trial court informed both parties that it intended to remove Lloyd from the jury and that it was going to make an inquiry of him. Defendant's counsel noted that Lloyd had been seen smoking cigarettes during breaks with two other jurors and stated that inquiry of them also seemed appropriate. Defendant also moved for a mistrial, which the trial court denied, explaining that even if a juror had violated the court's rules, the ultimate inquiry was whether that violation was prejudicial to Defendant.

During the inquiry that followed, Lloyd confirmed that he had spoken to his sister after the jury retired to its deliberations, but could not recall the precise date of their conversation. Lloyd initially denied discussing any details about the case with his sister, but eventually acknowledged he had shared with her his frustrations with another juror, explaining, "I told her I had a rough day, we was [sic] deliberating the case. It was getting heated in there basically. That's all I said. No details." When the trial court confronted Lloyd with the Saunders letter, he eventually confirmed that he had told his sister the jury had been at an 11-to-1 standoff, and that the hold-out juror was a female whose brother was addicted to drugs and was "having a little trouble, crying a lot." Early in the inquiry,

the trial court expressed frustration with Lloyd's initial reluctance to answer questions candidly, stating:

> THE COURT: Why do I feel like I'm having to drag this out of you?
>
> [Lloyd]: You're not.
>
> THE COURT: I started out by asking you if you'd talked to anybody about this and you said no and then I'm asking you particular things that were disclosed in this letter –
>
> [Lloyd]: I was thinking around here.
>
> THE COURT: Let me finish. And that as I started asking you about specific things, you then remembered them.

However, as the inquiry continued, Lloyd repeatedly denied the remaining allegations contained in the Saunders letter. Lloyd denied conducting any online research about Defendant or the case, and claimed that he did not know how to use a computer. Lloyd also denied having asked his sister about "malice," and stated instead that he had been having trouble with the word "mitigating" but never specifically asked her to ask Mr. Saunders for assistance. Lloyd further denied having spoken to any other member of the jury, including the two men he had been seen smoking with, about any of these issues.

Following the inquiry, the trial court removed Lloyd from the jury and replaced him with an alternate. Defendant again moved for a mistrial and, alternatively, requested that the trial court make further inquiries of the other jurors. The court denied Defendant's motion for a mistrial and explained that, based on Lloyd's answers, it did not believe there was any need to conduct any further inquiry. Defendant's sentencing hearing resumed shortly thereafter, and the jury ultimately recommended a sentence of life imprisonment without parole, which the trial court imposed on 2 November 2012.

*Juror Misconduct*

**[1]** Defendant first argues that the trial court abused its discretion by denying his motion for a mistrial based on juror misconduct and refusing Defendant's request to make further inquiry into whether other jurors received prejudicial outside information from Lloyd. We disagree.

A mistrial must be declared "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the

defendant's case." N.C. Gen. Stat. § 15A–1061 (2013). In examining a trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct, we review for abuse of discretion. *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). An abuse of discretion occurs "only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996).

When juror misconduct is alleged, it is the trial court's responsibility "to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant." *State v. Aldridge*, 139 N.C. App. 706, 712, 534 S.E.2d 629, 634, *appeal dismissed and disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000). "Misconduct is determined by the facts and circumstances in each case," *State v. Drake*, 31 N.C. App. 187, 190, 229 S.E.2d 51, 54 (1976), and this Court has held that "[n]ot every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial." *State v. Wood*, 168 N.C. App. 581, 584, 608 S.E.2d 368, 370 (citation omitted), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 923 (2005). The trial court is vested with the "discretion to determine the procedure and scope of the inquiry." *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996). On appeal, we give great weight to its determinations whether juror misconduct has occurred and, if so, whether to declare a mistrial. *State v. Boyd*, 207 N.C. App. 632, 640, 701 S.E.2d 255, 260 (2010). Its decision "should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *State v. Gurkin*, __ N.C. App. __, __, 758 S.E.2d 450, 454 (2014)(quoting *Bonney*, 329 N.C. at 73, 405 S.E.2d at 152).

In the present case, Defendant contends that the combination of the Saunders letter, Lloyd's initial reluctance to testify candidly, and the possibility of a hold-out juror provides substantial reason to believe that prejudicial outside information was brought into the jury's deliberations. This means that, according to Defendant's interpretation of our Supreme Court's decision in *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991), the trial court was required to either declare a mistrial or continue its inquiry by questioning the entire jury to determine whether the other jurors were exposed to outside prejudicial information. Therefore, Defendant argues, the trial court abused its discretion by accepting "at face value" Lloyd's denials of Mr. Saunders's allegations that he

conducted online research and asked for clarification about the meaning of "malice." As a result, Defendant claims his fundamental constitutional right to an impartial jury was denied.

At the outset, we note it is well established that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988) (citation omitted), *overruled in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). Thus, because Defendant did not raise his constitutional arguments at trial, we lack jurisdiction to consider them now as they have not been preserved for appellate review.

Defendant's argument that the trial court abused its discretion in denying his motion for a mistrial and declining to conduct further inquiry essentially revolves around questioning the credibility of Lloyd's testimony. This argument ignores the broad deference we are compelled to apply when reviewing the trial court's credibility determinations. As this Court has repeatedly recognized in the context of juror misconduct inquiries, "[t]he trial judge is in a better position to investigate any allegations of misconduct, question witnesses and observe their demeanor, and make appropriate findings." *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001) (quoting *Drake*, 31 N.C. App. at 190, 229 S.E.2d at 54).

Furthermore, a careful review of the record does not support Defendant's assertion that the trial court simply accepted Lloyd's testimony "at face value." In order to cast doubt on Lloyd's testimony and, by extension, the trial court's decision to believe it, Defendant emphasizes Lloyd's initial reluctance to admit that he had discussed the case with his sister, and selectively highlights a quote from the bench expressing frustration with having to "drag" the truth out of Lloyd. But viewed in its full context, the trial court's frustration with Lloyd actually shows that it engaged in a searching, skeptical inquiry. Rather than blindly accepting Lloyd's answers, the trial court pushed back repeatedly to demand further clarification. Nevertheless, Lloyd did not waver in denying that he conducted online research, asked about "malice," and discussed outside information with other jurors, and the trial court was ultimately satisfied that no prejudice resulted from his misconduct.

Apart from the Saunders letter, there was no evidence that Lloyd obtained any outside information about the case. Moreover, this Court's prior decisions indicate that, even if taken as true, the allegations in the Saunders letter would not amount to prejudicial misconduct. On the one

hand, the Saunders letter does not allege that either Mr. Saunders or his wife provided Lloyd with any information about "malice," whereas Lloyd testified that he actually asked about the definition of "mitigating," but denied finding any outside information about either term. In any event, this Court has previously held that the definitions of legal terms do not constitute outside prejudicial information. *See State v. Patino*, 207 N.C. App. 322, 329–30, 699 S.E.2d 678, 684 (2010). On the other hand, the vague allegation that Lloyd "conducted online research about Defendant" is not sufficient to support a claim that prejudicial juror misconduct occurred. In *Aldridge*, this Court held that the trial court did not abuse its discretion in failing to hold an inquiry into allegations of juror misconduct based solely on hearsay from an anonymous telephone call. 139 N.C. App. at 713, 534 S.E.2d at 635. In *State v. Rollins*, we held that the trial court did not abuse its discretion when it declined to hold an inquiry based on allegations that a juror had been exposed to prejudicial outside information by watching an unidentified television newscast. __ N.C. App. __, 734 S.E.2d 634 (2012), *affirmed per curiam*, 367 N.C. 114, 748 S.E.2d 146 (2013).

In the present case, the Saunders letter is itself hearsay, given that it describes what Mr. Saunders said his wife said Lloyd told her, and is similarly vague insofar as it does not identify any specific source for Defendant's online research. Lloyd repeatedly denied conducting any online research about Defendant, and testified that he did not know how to use a computer. Although Defendant complains this is simply unbelievable four decades after the advent of the personal computer, we give the trial court's determinations great deference on appeal and, based on the record before us, we do not believe its decision to credit the testimony of a live witness over vague, partially substantiated hearsay was "so arbitrary that it could not have been the result of a reasoned decision." *See Dial*, 122 N.C. App. at 308, 470 S.E.2d at 91. We therefore hold that the trial court did not abuse its discretion when it denied Defendant's motion for a mistrial.

Defendant also puts great emphasis on Lloyd's testimony that there had been a hold-out juror, and contends the trial court abused its discretion in failing to question the other jurors as to whether they were exposed to prejudicial outside information. In support of this argument, Defendant relies on *Black*, where our Supreme Court held that, "[w]hen there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." 328 N.C. at 196, 400 S.E.2d at 401 (citation

omitted). Thus, in the present case, Defendant argues the trial court violated an absolute duty to conduct a further inquiry.

However, Defendant's reliance on *Black* is misplaced. First, it ignores the fact that, in *Black*, our Supreme Court upheld the trial court despite the court's failure to conduct any sort of inquiry into the allegations of juror misconduct before it, explaining that the trial court has "broad discretion to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion." *Id.* (citation and internal quotation marks omitted). Moreover, Defendant's argument appears to be based on a common misunderstanding that this Court recently addressed in *Gurkin*. As in the present case, the defendant in *Gurkin* selectively cited our prior holdings to argue that any allegation of juror misconduct creates an absolute duty for the trial court to investigate. However, as we explained, "there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation." __ N.C. App. at __, 758 S.E.2d at 454 (quoting *Harris*, 145 N.C. App. at 576–77, 551 S.E.2d at 503). While affirming the trial court's duty to conduct an inquiry where there is substantial reason to fear prejudicial misconduct, *Gurkin* made clear that "[a]n examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous." *Id.* (quoting *Harris*, 145 N.C. App. at 577, 551 S.E.2d at 503). As this Court previously explained,

> [t]he circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely [a] matter of suspicion, it is purely a matter in the discretion of the presiding judge.

*Aldridge*, 139 N.C. App. at 713, 534 S.E.2d at 634. In the present case, the trial court did not issue written findings. This Court has held, however, that "[a] denial of motions made because of alleged juror misconduct is equivalent to a finding that no prejudicial misconduct has been shown." *Id.* Furthermore, the record supports such a finding. There was no evidence that Lloyd ever discussed outside information with other jurors: Lloyd testified that he did not, and the Saunders letter does not allege otherwise. If the trial court was satisfied, based upon Lloyd's responses and its own observations, that there was no substantial reason to fear that the jury was exposed to prejudicial outside information, then it was well within the trial court's discretion to end its inquiry and proceed to sentencing. *See Burke*, 343 N.C. at 149, 469 S.E.2d at 910. Thus, Defendant's argument fails.

Finally, Defendant urges this Court to consider the harm that juror misconduct threatens to the judicial system as a whole, citing as support our decision in *Drake*. While it is true that, in *Drake*, we recognized that "[b]asic principles of proper juror conduct should not be ignored by the trial court" and that "[r]eversible error may include not only error prejudicial to a party but also error harmful to the judicial system," the present case is easily distinguishable. 31 N.C. App. at 192–93, 229 S.E.2d at 55. In *Drake*, we held that the trial court abused its discretion where it neither questioned the juror who allegedly engaged in misconduct, nor made any other investigation into the claim of juror misconduct. Here, by contrast, the trial court conducted an investigation and determined after questioning Lloyd that there was no danger of prejudicial misconduct to Defendant. As we do not believe the trial court abused its discretion in reaching this determination, we do not agree that Lloyd's misconduct harmed the judicial system as a whole. Defendant's arguments based upon juror misconduct are overruled.

*Closing Argument*

**[2]** Defendant next argues that the trial court improperly overruled his objections to three portions of the State's closing argument, which he contends were prejudicial.

The standard of review for assessing an alleged improper closing argument where opposing counsel lodged a timely objection is whether the trial court abused its discretion by failing to sustain the objection. *State v. Murrell*, 362 N.C. 375, 392, 665 S.E.2d 61, 73 (2008), *cert. denied*, 556 U.S. 1190, 173 L. Ed. 2d 1099 (2009). When applying the abuse of discretion standard in this context, we determine first whether the challenged remarks were improper, and, if so, whether they were "of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *State v. Peterson*, 361 N.C. 587, 607, 652 S.E.2d 216, 229 (2007), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008).

Here, Defendant argues that the trial court abused its discretion by allowing the prosecutor to repeatedly emphasize the crime's brutality and characterize it as one of the most "brutal" and "gruesome" murder cases in the history of the community. Defendant's first objection came near the beginning of the State's closing argument. After insisting that the case was about the decisions and choices Defendant made, the prosecutor argued:

> [Defendant's] acts and his decisions resulted in the murder of Patricia Stevens, 74-year[-] old woman of dignity and

> grace who was absolutely vulnerable and his acts caused one of the most gruesome and violent murders this community has ever seen.

After the trial court overruled Defendant's objection, the prosecutor reiterated that this case was about the decisions and choices Defendant made. Defendant objected again as the prosecutor was arguing that the facts showed Defendant acted with premeditation and deliberation. Specifically, regarding Defendant's use of grossly excessive force and the infliction of wounds even after the victim was felled, the prosecutor argued:

> Use of grossly excessive force. Let's just stop on that one for a second and think about it. I want that to sink in — use of grossly excessive force. Infliction of lethal wound after the victim is felled. Think about that. These are the circumstances that you can infer premeditation and deliberation specifically.
>
> You heard what — even he said that he got on top of her and beat her in the back of the head with that tire iron until she stopped. He crushed her skull. Brutal or vicious circumstances of the killing. This is one of the most brutal murders this community has seen.

Defendant objected but was once again overruled. Taken together, Defendant claims, these challenged remarks amounted to an improper infusion of the prosecutor's personal opinion, driven by reference to matters outside the record to appeal to the jury's passion and prejudice. This, Defendant contends, is reversible error in light of *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), where our Supreme Court recognized it was improper for a prosecutor to describe the crime as "a first degree murder of one of the most heinous kind I have ever come into contact with." *Id.* at 186, 400 S.E.2d at 419. While acknowledging that the *Small* Court ultimately concluded that the statement at issue was not so grossly improper as to require a new trial, Defendant contends that a different result is warranted here because, unlike the defendant in *Small*, he timely objected to these remarks at trial and thus the more rigorous *ex mero motu* standard applied in *Small* is inapplicable.

Defendant is correct that the *ex mero motu* standard does not apply here. Nevertheless, this does not automatically mean that the trial court's ruling "could not have been the result of a reasoned decision." *See Dial*, 122 N.C. App. at 308, 470 S.E.2d at 91. In the present case,

based on the record before us and in light of our prior decisions, we do not believe that the trial court abused its discretion when it overruled Defendant's objections.

First, as our Supreme Court has recognized, "prosecutors are given wide latitude in the scope of their argument" and may "argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citation and internal quotation marks omitted), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Furthermore, "[s]tatements or remarks in closing argument must be viewed in context and in light of the overall factual circumstances to which they refer." *Id.* (citation and internal quotation marks omitted). Our Supreme Court has also held that "hyperbolic language is acceptable in jury argument so long as it is not inflammatory or grossly improper." *State v. Lloyd*, 354 N.C. 76, 115, 552 S.E.2d 596, 623 (2001) (citation omitted).

Here, the full context of the prosecutor's closing argument demonstrates that the challenged remarks were supported by the evidence and had a proper purpose. Indeed, the evidence introduced at trial supported the prosecutor's assertion that this murder of a 74-year-old woman by tire iron was, in fact, brutal. *See Small*, 328 N.C. at 186, 400 S.E.2d at 419 (ruling that prosecutor's description of the murder as "a first degree murder of one of the most heinous kind I have ever come into contact with" was not so grossly improper as to require a new trial, in part because the evidence in the record supported the characterization of the murder as "heinous"). Further, these challenged remarks related to the State's theory of the case — that Defendant acted intentionally and with premeditation and deliberation — which Defendant put directly at issue by claiming he lacked capacity. As our Supreme Court has recognized, the brutality of the crime and the infliction of blows after the victim was felled are both circumstances to consider regarding issues of premeditation and deliberation. *See State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003). Thus, we hold the trial court acted within its discretion in overruling Defendant's first two objections.

Finally, Defendant argues the trial court abused its discretion by overruling his objection during the State's closing argument when the prosecutor argued:

> At a minimum, 30 blows to Patricia Stevens and he's aiming for her head and she's trying to fend him off. And then at least eight blows to the head, and you saw the pictures, he was on top of her and he crushed her skull in. And he

> wants to come in and say, "I'm sorry, I didn't mean it, it was an accident"? That's an insult to the law, it's an insult to these family members, it's an insult to your intelligence.

On appeal, Defendant argues that this remark improperly commented on his decision not to testify and, by using the word "accident," attributes to him a defense he did not raise. We note first that while it is indeed improper for a prosecutor to comment on a defendant's decision not to testify, it is difficult to discern how this remark could be construed as such. Further, our prior decisions make clear that, as a general matter, "a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction to the jury." *Goss*, 361 N.C. at 626, 651 S.E.2d at 877. However, we need not reach the merits of Defendant's claims because this issue has not been properly preserved for appellate review. The record shows that at trial, Defendant's counsel explained that the basis for his objection to this remark was the reference to the "insult to the family." Since "[t]he theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions," Defendant cannot now change the basis of his objection and assert a new theory for the first time on appeal. *Benson*, 323 N.C. at 322, 372 S.E.2d at 535. Defendant's challenges based upon the prosecutor's closing argument are overruled.

We hold that Defendant received a fair trial free from reversible error.

NO ERROR.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA
v.
MALIK JAQUEZ WALTON, DEFENDANT

No. COA14-402

Filed 21 October 2014

**1. Evidence—expert testimony—sexual assault—physical evidence consistent with**

The trial court did not commit plain error in a sexual offense case by allowing two medical witnesses to testify that the victim's history was consistent with sexual assault. The expert witnesses testified that the physical evidence they observed was consistent with the victim's allegations of abuse; the witnesses did not state that the victim's allegations were credible.

**2. Sexual Offense—jury instruction—use of the term victim**

The trial court did not commit plain error in a sexual offense case by referring to the complainant as the victim. The physical evidence of the victim's injuries corroborated her testimony and the jury would not reasonably have reached a different verdict if the reference to "victim" in the jury instructions had not occurred.

Appeal by defendant from judgments entered 10 July 2013 and 30 July 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 9 September 2014.

*Attorney General Roy A. Cooper, III, by Special Deputy Attorney General William V. Conley, for the State.*

*Mark Montgomery, for defendant-appellant.*

STROUD, Judge.

Defendant appeals judgments convicting him of first degree sexual offense and second degree kidnapping. For the following reasons, we find no error.

## I. Background

The State's evidence tended to show that in May of 2011, Stacy[1] was in a bedroom with defendant and her fifteen-month old son.

1. A pseudonym will be used to protect the identity of those involved.

Defendant was the father of Stacy's son. Defendant slapped Stacy and began repeatedly choking her and threatened to kill her as he held a knife to her neck. Defendant then put both his fingers and his penis in Stacy's vagina and her anus. Defendant was indicted for second degree rape, first degree kidnapping, and first degree sexual offense. Defendant was tried by a jury, and the jury found him guilty of second degree kidnapping and first degree sexual offense. The trial court entered judgments accordingly. Defendant appeals.

II. Medical History Testimony

**[1]** Defendant first contends that "the trial court committed plain error in allowing two medical witnesses to testify that [Stacy]'s history was consistent with sexual assault." (Original in all caps.) Defendant argues that "Emergency Room Nurse Tonia Nowak testified that [Stacy]'s injuries were consistent with her history. . . . Emergency Room Physician Dr. Brendan Berry testified that [Stacy]'s demeanor, history and examination, was 'consistent with the sexual assault that she described.' . . . This was reversible error." As defendant did not object to the testimony, he now asks that we review his contentions for plain error. *See State v. Harding*, 110 N.C. App. 155, 161, 429 S.E.2d 416, 420 (1993) ("Due to defendant's failure to object at trial, we must review this objection under the plain error rule.")

> 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) (citations, quotation marks, and brackets omitted). Furthermore, our Supreme Court has established that "[a] prerequisite to our engaging in a plain error analysis is the determination that the instruction complained of constitutes error at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, (quotation marks omitted), *cert. denied*, 479 U.S. 836, 93 L.Ed. 2d 77 (1986).

Here, both Nurse Nowak and Dr. Berry testified as expert witnesses. "An expert witness may not testify as to the credibility of a witness. Nonetheless, an expert witness may testify, upon a proper foundation,

as to . . . whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Khouri*, 214 N.C. App. 389, 401, 716 S.E.2d 1, 9-10 (2011) (citations and quotation marks omitted), *disc. review denied*, 365 N.C. 546, 742 S.E.2d 176 (2012). Here, even by defendant's own summary in his brief, the expert witnesses testified that the *physical evidence* they observed was consistent with Stacy's allegations of abuse; the witnesses did not state that Stacy's allegations were credible. Defendant directs this Court to *State v. Frady*, but in that case the testifying witness had not examined the individual alleging sexual abuse, but here both Dr. Brown and Nurse Nowak examined Stacy and testified regarding the examination; accordingly, *Frady* is not applicable. *See State v. Frady*, ___ N.C. App. ___, ___, 747 S.E.2d 164, 167 ("It is well settled that expert opinion testimony is not admissible to establish the credibility of the victim as a witness. However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness. With respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved, upon a proper foundation, the admission of expert testimony with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics. In order for an expert medical witness to render an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse." (citations, quotation marks, and brackets omitted)), *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). This argument is overruled.

III. Trial Court's Instructions

**[2]** Defendant next contends that "the trial court erred or committed plain error in identifying . . . [Stacy] as a 'victim.' " (Original in all caps.) Defendant did not object to the jury instructions, so we review for plain error. *See Harding*, 110 N.C. App. at 161, 429 S.E.2d at 420. This Court has previously determined that use of the word 'victim' by the trial court is generally not plain error, *see State v. Surratt*, 218 N.C. App. 308, 309-10, 721 S.E.2d 255, 256, *disc. review denied*, 365 N.C. 559, 722 S.E.2d 600 (2012). We agree that in a case where there is a jury question as to whether an act is actually a criminal offense or as to whether the alleged act actually happened to the complaining witness, there is technically a question of whether there was a "victim." *See State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 727 (2013) ("The issue of whether sexual offenses occurred and whether E.C. and J.C. were 'victims' were issues

of fact for the jury to decide."), *disc. review denied*, 367 N.C. 290, 753 S.E.2d 666 (2014). Black's Law Dictionary defines "victim" as "[a] person harmed by a crime, tort, or other wrong." Black's Law Dictionary 1703 (9th ed. 2009). So use of the word "victim," both in denotation and connotation, means that the complaining witness was "harmed by a crime, tort, or other wrong." *Id.*

But in this case, defendant did not object to use of the term "victim." Stacy testified that defendant choked her, threatened to kill her as he held a knife to her neck, and then inserted both his fingers and penis into her vagina and anus. In addition, the physical evidence of Stacy's injuries corroborated her testimony. We cannot determine that the jury might reasonably have reached a different verdict if the reference to "victim" in the jury instructions had not occurred, so we do not find plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

## IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges McGEE and BRYANT concur.

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WHITEHURST INVESTMENT PROPERTIES, LLC, Plaintiff
v.
NEWBRIDGE BANK and HENRY PROPERTIES, LLC, Defendants

No. COA14-257

Filed 21 October 2014

**Appeal and Error—interlocutory orders and appeals—denial of motion to dismiss—no substantial right**

Although defendant NewBridge Bank appealed from the trial court's order denying its motion to dismiss plaintiff's claims for breach of contract, unjust enrichment, and declaratory judgment on res judicata and collateral estoppel grounds, the appeal was from an interlocutory order and thus dismissed. Defendant failed to demonstrate how a substantial right would be lost absent immediate review.

Appeal by defendant NewBridge Bank from order entered 22 October 2013 by Judge James M. Webb in Guilford County Superior Court. Heard in the Court of Appeals 27 August 2014.

*James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for plaintiff-appellee.*

*Carruthers & Roth, P.A., by Rachel S. Decker and J. Patrick Haywood, for defendant-appellant NewBridge Bank.*

HUNTER, Robert C., Judge.

Whitehurst Investment Properties, LLC ("plaintiff" or "Whitehurst") filed this action against NewBridge Bank ("NewBridge") and Henry Properties, LLC ("HP") (collectively "defendants"), asserting claims for breach of contract, unjust enrichment, and declaratory judgment. NewBridge appeals from the trial court's order denying defendants' motion to dismiss.[1] On appeal, NewBridge argues that the trial court erred in denying the motion to dismiss because the doctrines of *res judicata* and collateral estoppel bar plaintiff's claims.

After careful review, we dismiss this appeal from the trial court's interlocutory order.

**Background**

On 5 December 2001, Starmount Company ("Starmount") and Henry James Bar-Be-Que, Inc. ("HJBBQ") executed a Ground Lease Agreement ("Ground Lease"). Under the Ground Lease, Starmount assumed a landlord position, leasing to HJBBQ a 2.28 acre property (the "property") in Greensboro, North Carolina. The Ground Lease also provided that if the tenant decided to sublease the property, the Landlord (Starmount) would be entitled to any excess rent payments. HJBBQ contracted with NewBridge's predecessor in interest to finance construction of a building on the property, which was required under the Ground Lease. HJBBQ and NewBridge entered into a Leasehold Deed of Trust ("the Deed of Trust") as security for the loans made to HJBBQ. However, the Deed of Trust provided that NewBridge was entitled to any excess rents that may be produced by sublease. NewBridge entered into a Landlord's Consent agreement with Starmount, in which Starmount consented to this amendment to the Ground Lease.

1. HP did not appeal from the trial court's order.

Starmount sold the property to Whitehurst in December 2007, making Whitehurst the successor to all of Starmount's interests as landlord under the Ground Lease. In October and November 2008, Whitehurst forwarded notices of lease default to NewBridge. In August 2009, NewBridge created HP as its wholly owned subsidiary. HJBBQ then assigned its interest in the Ground Lease to HP through an Assignment in Lieu of Foreclosure, through which HP assumed every obligation as tenant under the Ground Lease.

HP was obligated to pay plaintiff $4,965.84 per month under the terms of the Ground Lease. On 20 August 2009, HP executed a sublease to another restaurant, REFS, LLC. Pursuant to the sublease, REFS agreed to pay HP rent in the amount of $9,500 per month from 20 December 2009 to 19 April 2010, later increasing to $14,000 per month from 20 April 2010 to 19 November 2010. The parties disputed who was entitled to the rent payments in excess of the $4,965.84 set forth in the Ground Lease.

On 31 August 2009, NewBridge and HP sued Whitehurst alleging, among other claims, breach of contract ("the First Action"). On 31 December 2009, Whitehurst counterclaimed for a declaratory judgment asserting its right to the excess rent payment. Following dismissal of all other claims, Whitehurst's declaratory judgment counterclaim was the only matter still before the trial court.

On 14 March 2011, the Honorable John O. Craig entered judgment in favor of NewBridge and HP. This Court reversed on appeal, holding that the Deed of Trust executed by HJBBQ and NewBridge was cancelled in exchange for the Assignment in Lieu of Foreclosure. *See NewBridge Bank v. Kotis Holdings, LLC*, No. COA11-1016, 2012 WL 3570377 (Aug. 21, 2012) ("*NewBridge I*"). Therefore, the Ground Lease became the controlling contract, which awarded any excess rent payment to Starmount, and therefore Whitehurst, by its plain language. On remand, the trial court granted summary judgment in favor of Whitehurst as ordered by this Court.

Whitehurst thereafter demanded payment of excess rent, which HP refused to pay. Whitehurst commenced the current action against NewBridge and HP on 11 July 2013 for breach of contract, unjust enrichment, and declaratory judgment. In its complaint, Whitehurst alleged that HP was the legal alter ego of NewBridge, and therefore, NewBridge was liable for the excess rents paid to HP. On 14 August 2013, defendants moved to dismiss plaintiff's claims on *res judicata* and collateral estoppel grounds, which was denied on 22 October 2013. NewBridge filed timely notice of appeal from the trial court's order.

## Discussion

### I. Grounds for Appellate Review

NewBridge first contends that the trial court's interlocutory order is immediately appealable because a substantial right would be deprived without immediate review. We disagree.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review. *See N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995); N.C. Gen. Stat. § 1-277(a) (2013).

NewBridge argues that immediate review is appropriate because the trial court's order affects a substantial right. However, at no point in NewBridge's brief does it attempt to identify this right or explain how it would be deprived without immediate review of the trial court's order. Rather, it provides a conclusory statement that the denial of a motion to dismiss based on the defenses of *res judicata* or collateral estoppel "is immediately appealable as affecting a substantial right."

This Court has held that denial of a motion to dismiss premised on *res judicata* and collateral estoppel does not *automatically* affect a substantial right; the burden is on the party seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review. *See Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) ("[W]e hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." (emphasis added)); *see also Williams v. City of Jacksonville Police Dept.*, 165 N.C. App. 587, 589–90, 599 S.E.2d 422, 426 (2004) (stating that "the denial of a motion for summary judgment based on the defense of collateral estoppel *may* affect a substantial right[.]" (emphasis added)). As this Court has previously noted:

> We acknowledge the existence of an apparent conflict in this Court as to whether the denial of a motion for summary judgment based on res judicata affects a substantial right and is immediately appealable. However, our Supreme Court has addressed this issue in *Bockweg*, and, like the panel in [*Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999)], "we do not read Bockweg as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*. The opinion pointedly states reliance upon *res judicata* '*may* affect a substantial right.' "

*Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, __ N.C. App. __, __, n.2, 727 S.E.2d 311, 314, n.2 (2012). Thus, to meet its burden of showing how a substantial right would be lost without immediate review, the appealing party must show that "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at __, 727 S.E.2d at 314 (quotation marks omitted).

First, we overrule NewBridge's argument that the trial court exposed defendants to the possibility of inconsistent verdicts when it rejected their argument that plaintiff's cause of action is barred by *res judicata*. *Res judicata* prevents litigation of the same legal claims, not the same legal issues. *Foreman v. Foreman*, 144 N.C. App. 582, 587, 550 S.E.2d 792, 796, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 38 (2001); *see also State ex. rel. Tucker v. Frinzi*, 344 N.C. 411, 413-14, 474 S.E.2d 127, 128 (1996) ("For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits [and] *that the same cause of action is involved*[.]" (emphasis added)). In the First Action, the sole claim before the trial court was a request for a declaratory judgment to determine which party was entitled to excess rent payments. Here, Whitehurst is suing NewBridge and HP in order to collect those payments after declaratory judgment in the First Action was entered in its favor. Thus, because the claims asserted here are distinct from those litigated in the First Action, NewBridge has failed to demonstrate the existence of the risk of an inconsistent verdict and consequently fails to show how a substantial right would be deprived without immediate appellate review of the trial court's order.

Additionally, NewBridge argues that Whitehurst is collaterally estopped from arguing that NewBridge and HP are the same legal entity. Collateral estoppel is a companion doctrine of *res judicata* and serves

to promote judicial efficiency and to protect litigants from having to relitigate issues that were previously decided. *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161. For purposes of collateral estoppel, "the prior judgment serves as a bar *only as to issues actually litigated* and determined in the original action." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (quotation marks omitted) (emphasis in original), *disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009).

In support of its argument, NewBridge points to this Court's opinion in *NewBridge I*, where the Court noted that "[HJBBQ] never transferred its leasehold interest to [NewBridge]; rather, the leasehold interest was transferred to HP, a limited liability company owned wholly by [NewBridge.]" *NewBridge I* at *4. However, the basis of the Court's holding in *NewBridge I* was not the legal relationship between HP and NewBridge, but the language of the contracts involved in the case. As the Court noted, the Assignment in Lieu of Foreclosure read: "WHEREAS, in order to avoid foreclosure under the Deed of Trust, [HJBBQ] has agreed to assign, grant, convey and transfer to [HP], as the designee of the Bank, all right, title and interest in and to the Lease and the Property in exchange for, among other things, *the cancellation of the Deed of Trust[.]*" *Id.* (emphasis in original). The Court concluded that "[t]he language of the assignment is clear and unambiguous" and "in partial consideration of the assignment, it was agreed the Deed of Trust was to be cancelled." *Id.* Therefore, "with a cancelled Deed of Trust and a voided amendment," the Court determined that "the [Ground Lease] again became the controlling contract." The Court ultimately held that the Ground Lease, "in clear and unambiguous language, plainly provides that the excess rents were payable to Starmount in the event that the property was subleased." *Id.* at *5. Because Whitehurst was the successor to Starmount's interests in the Ground Lease, the Court reversed the trial court's order and remanded for entry of judgment in favor of Whitehurst. *Id.*

Therefore, the issue of whether HP and NewBridge were the same legal entity was not necessary to the Court's determination in the First Action. NewBridge contends that "[t]he fact that [NewBridge] and HP were separate entities prevented HP from asserting [NewBridge's] rights under the Ground Lease to any excess payments from the Sublease Agreement, effectively eliminating [NewBridge's] ability to be repaid the loan to [HJBBQ]." We do not find this argument persuasive. The *NewBridge I* Court explicitly held that the Ground Lease, "in clear and unambiguous language, plainly provides that the excess rents were payable to Starmount in the event that the property was subleased." *Id.* at

*5. Thus, the legal relationship between HP and NewBridge was irrelevant to the Court's decision. The result would have been the same regardless of whether HP could have asserted NewBridge's rights under the Ground Lease, because under that document's "clear and unambiguous language," the excess rents were payable to Starmount.

Accordingly, NewBridge has failed to carry its burden of demonstrating that the possibility of inconsistent verdicts exists on the issue of whether HP and NewBridge are the same legal entity. *See Heritage Operating, L.P.*, __ N.C. App. at __, 727 S.E.2d at 314. Thus, because NewBridge cannot show how a substantial right would be affected without immediate appellate review, we dismiss its appeal from the trial court's interlocutory order. *See id.* at __, 727 S.E.2d at 316 ("Although the verdicts may be different, there is no possibility of a verdict in the instant case being inconsistent with any previous judicial determinations. Accordingly, we conclude this appeal does not affect a substantial right and dismiss it as interlocutory.").

**Conclusion**

Because NewBridge has failed to demonstrate how a substantial right would be lost without immediate review of the trial court's interlocutory order, we dismiss the appeal.

DISMISSED.

Judges DILLON and DAVIS concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 OCTOBER 2014)

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| BOYKIN v. SELCO CONSTR., INC.<br>No. 14-405 | Johnston<br>(13CVS531) | Dismissed |
| BRANCH BANKING & TR. v. KEESEE<br>No. 14-328 | New Hanover<br>(13CVS966) | Affirmed |
| CASHION v. LEXINGTON MEM'L HOSP., INC.<br>No. 14-120 | Davidson<br>(11CVS3202) | Reversed and Remanded |
| CHAPPELL v. WYNGATE HOMEOWNERS ASS'N, INC.<br>No. 14-285 | Wake<br>(12CVS11260) | Affirmed |
| CUMBERLAND CNTY. HOSP. SYS., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS.<br>No. 14-161 | N.C. Dept. of Health & Human Servs.<br>(12DHR12090) | Affirmed |
| DIGH v. DIGH<br>No. 14-241 | Burke<br>(98CVD89) | Affirmed |
| IN RE J.K.<br>No. 14-381 | Lee<br>(13JA15-16) | Affirmed |
| IN RE J.K.U.<br>No. 14-511 | Guilford<br>(12JT168) | Affirmed |
| ROOKS v. BLAKE<br>No. 14-486 | Pender<br>(12CVS142) | Dismissed |
| STATE v. BASS<br>No. 14-492 | Wake<br>(12CRS222166)<br>(13CRS181) | No Error |
| STATE v. DAVIS<br>No. 14-392 | Buncombe<br>(12CRS64142-43) | No plain error |
| STATE v. GEORGE<br>No. 14-497 | Surry<br>(12CRS53852) | No Error |
| STATE v. GRAHAM<br>No. 14-423 | Richmond<br>(10CRS52627) | No Error |
| STATE v. JETER<br>No. 14-337 | Mecklenburg<br>(11CRS242221-22)<br>(11CRS242224) | No Error |

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| STATE v. McGEE<br>No. 14-339 | Davie<br>(11CRS50117) | Affirmed, in part, no prejudicial error, in part |
| STATE v. PAGE<br>No. 14-16 | New Hanover<br>(10CRS55472-74)<br>(11CRS10750) | No Error |
| STATE v. PEOPLES<br>No. 14-416 | Mecklenburg<br>(12CRS54391)<br>(12CRS54395) | No Error |
| STATE v. REMBERT<br>No. 14-522 | Iredell<br>(11CRS53453) | Reversed |
| STATE v. ROBINSON<br>No. 14-391 | Mecklenburg<br>(11CRS203106) | No Error |
| STATE v. SANDERS<br>No. 14-532 | Gaston<br>(09CRS57022-23)<br>(10CRS2984)<br>(10CRS8273) | No Error |
| STATE v. SAUNDERS<br>No. 14-400 | Johnston<br>(12CRS3322)<br>(12CRS54989) | No prejudicial error |
| STATE v. SCOTT<br>No. 14-450 | Vance<br>(13CRS1308) | Affirmed |
| STATE v. SELLAS<br>No. 14-489 | Buncombe<br>(12CRS50309) | No Error |
| STATE v. VANDYKE<br>No. 14-414 | Rutherford<br>(04CRS55985)<br>(04CRS55989-91) | No Prejudicial Error |
| STATE v. VAUGHN<br>No. 14-364 | Wilson<br>(11CRS55061) | Affirmed in part; vacated and remanded in part. |
| STATE v. RAZO<br>No. 13-1435 | Guilford<br>(13CRS071104)<br>(13CRS071106) | No Error in Part; New Trial in Part; and Remanded for Resentencing |
| TESTER v. DELIA<br>No. 13-1130 | Watauga<br>(12CVS232) | Affirmed |

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