237 N.C. App.—No. 3 Pages 184-401

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 1, 2016

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

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[1] Retired 30 June 2015.

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[2] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 18 NOVEMBER 2014

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Jury instruction—recent possession—Although defendant contended that the trial court erred in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by instructing the jury on the doctrine of recent possession with respect to the Breese offenses, the trial court actually submitted the instruction in connection with the Johnson offenses. Defendant did not challenge the application of the doctrine to the Johnson offenses. **State v. Larkin, 335.**

Motion to dismiss—sufficiency of evidence—shoeprint evidence—The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to dismiss the charges for the Breese offenses. The State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, was sufficient to support defendant's convictions. **State v. Larkin, 335.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Motion to suppress—non-custodial interview—child sex offense investigation—voluntariness—improper promises by law enforcement—totality of circumstances—The trial court erred by granting defendant's motion to suppress his incriminating statements during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. Although an agent made improper promises to defendant which appeared to have encouraged defendant to make incriminating statements, under the totality of circumstances defendant's statements were not rendered involuntary by law enforcement as a matter of law. Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer. **State v. Flood, 287.**

CONSPIRACY

Motion to dismiss—sufficiency of evidence—no agreement—The trial court erred by denying defendant's motion to dismiss the conspiracy charge. The State did not present sufficient evidence of an agreement. **State v. McClaude, 350.**

CONSTITUTIONAL LAW

Effective assistance of counsel—failure to move to suppress evidence—could not be resolved on appellate record—dismissed—Defendant's argument that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a motion to suppress the evidence seized was dismissed without prejudice to its being asserted in a motion for appropriate relief.. The IAC claim could not be resolved based on the record before the Court. **State v. Carter, 274.**

Effective assistance of counsel—failure to object to jury instruction—no prejudice—Defendant did not receive ineffective assistance of counsel in a prosecution for possession of cocaine with intent to sell or deliver by his attorney's failure to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Even assuming arguendo that defendant's attorney was deficient in failing to object to the trial court's jury instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error. **State v. Turner, 388.**

EVIDENCE—Continued

Findings of fact—sufficiency of evidence—use of word "recommend"—The trial court did not err in a child sex offense case by making finding of fact number 32. The trial court's finding that an agent implicitly acknowledged that her use of the word "recommend" could have been misconstrued by defendant was supported by competent evidence. **State v. Flood, 287.**

Photographic identification cards—failure to redact information—not prejudicial—Even assuming that the trial court erred in a drug possession case by allowing into evidence defendant's ID card photo and a DOC ID card without redacting the words "FELON" and "INMATE," any error was harmless, given defendant's testimony that he had been previously convicted of drug trafficking. There was no reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the challenged evidence. **State v. Carter, 274.**

Reliability—insufficient indicia of reliability—field tests—presence of cocaine—The trial court abused its discretion by allowing into evidence testimony of an investigator regarding field tests (NIKs) he conducted to detect the presence of cocaine. The State failed to demonstrate the reliability of the NIKs pursuant to any of the indices of reliability under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004) or any alternative indicia of reliability. However, the admission of the evidence amounted to harmless error where there was overwhelming evidence of defendant's guilt. **State v. Carter, 274.**

GAMBLING

Operating electronic sweepstakes—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendants' motion to dismiss charges for operating an electronic sweepstakes in violation of N.C.G.S. § 14-306.4. The jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize. **State v. Spruill, 383.**

IMMUNITY

Governmental—declaratory judgment action—The trial court did not lack subject matter jurisdiction in an action concerning a county's authority to inspect certain wastewater treatment systems after they had been inspected by the State based on plaintiffs' failure to allege waiver of governmental immunity. This was a declaratory judgment rather than a negligence action. **Phillips v. Orange Cnty. Health Dep't, 249.**

INDICTMENT AND INFORMATION

No variance with evidence—plural and singular usage—The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a public officer due to fatal variances between the indictment and the evidence. Defendant's motion was based on the indictment's statement that defendant refused to drop what was in his "hands," while the evidence was that he refused to drop what was in his right "hand." Not every variance that involves an essential element of the offense charged is necessarily material. **State v. Henry, 311.**

permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act was dismissed. Any error stemming from the trial court's instructions was invited by defendant. **State v. Spence, 367.**

First-degree rape—prosecuting witness—referred to as victim—The trial court did not commit plain error in a first-degree rape case by referring to the prosecuting witness as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to her as "the victim" in its final jury instructions. The use of the words "the victim" did not have a probable impact on the jury's finding of guilt in this case. **State v. Spence, 367.**

ROBBERY

Attempted—two counts—two people in residence—separate rooms—There was sufficient evidence to support defendant's two separate attempted robbery convictions where defendant argued that the evidence showed that he robbed a single residence in the presence of two people, but, when the robbery occurred, the two victims were in different rooms. **State v. Jastrow, 325.**

Attempted—two counts—unexpected person in house—The trial court did not err by denying defendant's motion to dismiss a conviction for attempted robbery with a dangerous weapon where defendant argued that he only participated in the plan to rob one of the two residents of the house. If two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime, and is also guilty of any other crime committed by the other in pursuance of the common purpose. Viewed in the light most favorable to the State, the facts were sufficient to show that the robbery of the unexpected person was pursuant to the group's common purpose. **State v. Jastrow, 325.**

SEARCH AND SEIZURE

Frisk—reasonable suspicion—Although a defendant in a prosecution for cocaine possession and resisting a public officer did not preserve for appeal the argument that the officer lacked reasonable suspicion for a frisk, the officer had reasonable suspicion to conduct a frisk for weapons to ensure his safety. Moreover, his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights. **State v. Henry, 311.**

Motion to suppress—illegal drugs—drug paraphernalia—anonymous tip—unlawful search of curtilage—The trial court did not err by granting defendant's motion to suppress illegal drugs and drug paraphernalia seized as the result of an unlawful search. When the detectives smelled the odor of marijuana, their purported general inquiry about the information received from an anonymous tip was a trespassory invasion of defendant's curtilage. **State v. Gentile, 304.**

Motion to suppress—vehicle search—inevitable discovery—The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to suppress evidence that resulted from a search of his vehicle. The State proved inevitable discovery based on the information contained in the search warrant and the detective's testimony that he would have searched for defendant's vehicle, no matter the location. **State v. Larkin, 335.**

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.

BARNES v. SCULL

[237 N.C. App. 184 (2014)]

CARSON D. BARNES AND WIFE, ROMELDA E. BARNES, PLAINTIFFS-APPELLANTS
v.
JUDITH SCULL AND HUSBAND, DAVID SCULL; BENJAMIN E. THOMPSON, JR. AND WIFE, SANDRA P. THOMPSON; ROGER THOMPSON BASS AND WIFE, PHYLLIS KELLAR BASS; MARY LYNN THOMPSON WHITLEY AND HUSBAND, WILLIAM G. WHITLEY, III; ROBIN BESS PRIDGEN MERCER, UNMARRIED; JONATHAN PRIDGEN AND WIFE, SHARON PRIDGEN; AND ANY UNKNOWN HEIRS OF W. ROBIN PRIDGEN, DECEASED, DEFENDANTS-APPELLEES

No. COA14-264

Filed 18 November 2014

Wills—plain language of statute—rules of testamentary construction—class determined upon testator's death

The trial court did not err in a wills case by granting summary judgment in favor of defendants. According to the plain language of the instrument and prevailing rules of testamentary construction, the class of testator's "heirs" as referenced in the portion of the third codicil as issue was determined upon testator's death.

Appeal by Plaintiffs from judgment entered 17 October 2013 by Judge Walter H. Godwin, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 26 August 2014.

Narron & Holford, P.A., by I. Joe Ivey, for Plaintiffs-Appellants.

Broughton Wilkins Sugg & Thompson, PLLC, by Benjamin E. Thompson, III and Blair K. Beddow, for Defendants-Appellees Scull, Thompson, Bass and Whitley.

Farris & Farris, P.A., by Robert A. Farris, Jr. and Rhyan A. Breen; and King & King, LLP, by W. Lewis King, for Defendants-Appellees Mercer and Pridgen.

McGEE, Chief Judge.

John S. Thompson ("Testator") executed his will in 1944. Testator also executed codicils that replaced certain terms of his will. The only codicil relevant to this appeal is the third codicil that was executed in 1955 (along with Testator's will, "the will"). Pursuant to the will, Testator devised to his wife, Maude Thompson ("Maude"), a life estate in real property consisting of 146 acres ("the property"). Upon the death of Maude or Testator, whichever death occurred last, the property was to

be placed in a trust ("the trust"). The proceeds of the trust were to provide support to one of Testator's sons, Hubert E. Thompson ("Hubert"), for Hubert's life. According to the will, upon Hubert's death, the property would go to Hubert's lineal descendants, if any. If Hubert died without lineal descendants, the property was to "revert to [Testator's] heirs."

Testator died in 1960, and was survived by Maude and six children: Hubert, W.C. Thompson ("W.C."), Annie T. Weigel ("Annie"), B.E. Thompson ("B.E."), J.W. Thompson ("J.W."), and James G. Thompson ("James"). Maude died in 1969, at which time the trust went into effect, with the property as the corpus, for the benefit of Hubert. Testator's descendants relevant to the resolution of this appeal are Hubert and the descendants of James.

James died in 1972. James was survived by his son, James G. Thompson, Jr. ("James Jr.") and his daughter, Marjorie T. Pridgen ("Marjorie"). James died testate, and left whatever interest he had in the property to Marjorie and her husband, W. Robin Pridgen ("Robin"), a one-half interest to each. James did not leave any interest he had in the property to James Jr. James Jr. died on 24 April 1980, approximately three months before Hubert, who died on 26 July 1980. James Jr. was survived by three sons: John S. Thompson ("John"), James Guy Thompson, III ("James III"), and Gregory A. Thompson ("Gregory"). James III purported to convey his interest in the property to Gregory by deed executed 30 January 1998. John purported to convey his interest in the property to Carson B. Barnes (together with his wife, Romelda E. Barnes, "Plaintiffs") by deed executed 2 May 2000. Gregory purported to convey his interest in the property to Carson B. Barnes by deed executed 10 May 2000.

Plaintiffs initiated this action by complaint filed 26 June 2012, and requested a declaratory judgment establishing the legitimacy of their purported interest in the property. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen filed their answer on 27 August 2012, contending that Plaintiffs had "received deeds from persons who had no interest in the property, [have] no claim whatsoever to any of the property and [have] no standing to bring this action." They requested that the trial court "declare the ownership of the subject property" to reflect the validity of that portion of James' will that conveyed ten percent interest in the property to Marjorie and ten percent interest to Robin, with no interest in the property having gone to James Jr.[1]

1. James Jr.'s will is not included in the record, but the 17 October 2013 judgment indicates this division. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and

Defendants Judith Scull, David Scull, Benjamin E. Thompson Jr., Sandra P. Thompson, Roger Thompson Bass and Phyllis Kellar Bass (together with Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen, "Defendants") answered Plaintiffs' complaint on 10 September 2012. These Defendants also contended that the purported deeds from John and Gregory conveyed nothing to Plaintiffs, and requested that Plaintiffs "have and recover nothing of these answering [D]efendants[.]"

Plaintiffs moved for summary judgment on 16 September 2013. Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen moved for summary judgment on 19 September 2013. The trial court heard this matter 30 September 2013, and ruled that Plaintiffs had no ownership interest in and to the subject property, denied Plaintiffs' motion for summary judgment, and granted the motion for summary judgment of Defendants Robin Bess Pridgen Mercer, Jonathan Pridgen and Sharon Pridgen. Plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting summary judgment in favor of Defendants. We disagree.

The contested part of the will is a portion of the third codicil to the will, executed by Testator on 23 September 1955. There is no dispute concerning the validity of the third codicil itself. The relevant portion states:

> At the death of my wife, I give and devise the above tract of land, containing 146 acres, more or less, to my sons, B.E. Thompson and W.C. Thompson, Trustees, not for their own use and benefit however but in trust to rent out the same or cause the same to be farmed in a husband-like manner, collect the rents, pay the taxes, keep the buildings in reasonable repair and pay the balance annually to my son, Hubert E. Thompson, for and during the term of his natural life and no longer, said trust to terminate upon the death of said Hubert E. Thompson.
>
> At the death of my said son, Hubert E. Thompson, I give and devise the said tract of land to his lineal child or children, in fee simple, representatives of lineal deceased children to stand in the place of and take the share their parent would have taken if living. In the event that my said son shall die without leaving any lineal child

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Sharon Pridgen state in their brief that the property was not mentioned specifically in James Jr.'s will, but passed through the residuary clause of that will.

> or representatives of a lineal deceased child, then the said tract of land shall *revert to my heirs*. (Emphasis added).

Plaintiffs agree with the trial court that this language created a contingent remainder interest in Testator's children, excluding Hubert, with the contingencies being the death of Maude, and Hubert's death, without Hubert having surviving lineal descendants.

> "A vested remainder is an estate which is deprived of the right of immediate possession by the existence of another estate created by the same instrument."
>
> . . . .
>
> "A contingent remainder is merely the possibility or prospect of an estate which exists when what would otherwise be a vested remainder is subject to a condition precedent or as created in favor of an uncertain person or persons."

Mercer v. Downs, 191 N.C. 203, 205, 131 S.E. 575, 576 (1926) (citations omitted). Because Maude died in 1969 and Hubert died without lineal descendants in 1980, the contingencies were satisfied and, pursuant to the will, the property "reverted" to Testator's "heirs" upon Hubert's death.

The dispositive issue on appeal is at what time the class of Testator's "heirs" as referenced in the above portion of the third codicil was determined — upon Testator's death or upon Hubert's death. If the class was set upon Testator's death, James was in possession of a contingent remainder at his death in 1972, which contingent remainder he devised to his daughter Marjorie and her husband Robin, to the exclusion of his son, James Jr. Assuming the validity of this scenario, upon Hubert's death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.'s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.'s death, and Gregory and John III had no interest to convey to Plaintiffs in 2000.

However, if the class was not determined until Hubert's death, Gregory, James III, and John would have acquired a shared ten percent interest in the property immediately upon Hubert's death, because their father, James Jr., predeceased Hubert. Marjorie would have acquired the other ten percent of the original twenty percent interest apportioned to the James line of Testator's descendants. Assuming the validity of this scenario, Gregory, James III, and John each possessed one-third of a ten percent fee simple absolute interest in the property following Hubert's death, and were free to convey their shares to Plaintiffs.

Our Supreme Court has addressed the issue before us on multiple occasions.

> "It is undoubtedly the general rule of testamentary construction that, in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, an estate limited by way of remainder to a class described as the testator's 'heirs,' 'lawful heirs,' or by similar words descriptive of those persons who would take his estate under the canons of descent, had he died intestate, vests immediately upon the death of the testator, and at which time the members of said class are to be ascertained and determined."

Mercer, 191 N.C. at 205, 131 S.E. at 576 (citation omitted).

> However, this rule is subject to the controlling rule of interpretation that the intent of the testator is paramount, provided, of course, that it does not conflict with the settled rules of law. It will be observed that th[e] devise [in *Mercer*] provides that at the death of the life tenant the property should go to "our surviving children or their heirs." This raises the question as to whether or not the remaindermen are to be ascertained as of the death of the testator or as of the death of the life tenant[.]

Id. Our Supreme Court in *Mercer* held that, after examining the language of the will, "the remaindermen could not be ascertained with certainty until the termination of the life estate." *Id.* at 207, 131 S.E. at 577. However, in *Mercer* the language, "our *surviving children or their heirs*" weighed in favor of this determination, as it could not be determined whether any of "their heirs" would collect unless and until it was ascertained whether any of the testator's children predeceased the life tenant. In the present case, Testator simply stated that upon the appropriate conditions, the property would "revert to my heirs."

Testator's will was set up so that none of his children would likely inherit any real property in fee simple upon Testator's death. The entirety of Testator's real property was devised to his children and his wife as estates for life. At the end of the estate devised to each of Testator's children, the remainders of each of these estates were to go to testator's grandchildren, or their lineal descendants, in fee simple. Only upon one of Testator's children dying without lineal descendants would the real property constituting that child's estate "revert" to Testator's "heirs."

Testator appears to have structured the will to keep all of his property within his family for at least another generation.

Our Supreme Court has decided in different ways the issue of when a class of "heirs" is set. In *Lawson v. Lawson*, 267 N.C. 643, 148 S.E.2d 546 (1966), relied upon by Plaintiffs, a testator devised to his daughter, Opal Lawson Long ("Opal"), certain of his real property "for and during the term of her natural life, and at her death to her children, if any, in fee simple; if none, to the whole brothers and sisters of my daughter, Opal Lawson Long, in fee simple." *Id.* at 643, 148 S.E.2d at 547. When the testator died, Opal had six whole (full-blooded) siblings. When Opal died, two of these siblings had pre-deceased her, but both had surviving children. *Id.* at 643-44, 148 S.E.2d at 547. The children of the deceased siblings argued that Opal's six whole siblings acquired a remainder in the real property at the testator's death and, therefore, the deceased siblings' remainder interest had passed to their children, who then received fee simple interests in the property upon the death of the life tenant. *Id.* at 644, 148 S.E.2d at 547. Our Supreme Court held:

> Clearly the interests of the whole brothers and sisters was contingent and could not vest before the death of the life tenant [Opal], for not until then could it be determined that she would leave no issue surviving. "Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted." Respondents' parents, having predeceased the life tenant, could not answer the roll call at her death.

Id. at 645, 148 S.E.2d at 548. Our Supreme Court affirmed the ruling of the trial court, which had ruled that the real property passed at Opal's death only to those "whole brothers and sisters" then living, and that nothing passed to the children or descendants of the whole siblings who pre-deceased Opal. *Id.*

"A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will." N.C. Gen. Stat. § 41-6 (2013); *see also Ellis v. Barnes*, 231 N.C. 543, 57 S.E.2d. 772 (1950). In the case before us, if we interpret Testator's use of the word "heirs" to mean his children, and strictly apply the logic in *Lawson*, then only those children of Testator who survived Hubert acquired fee simple interests in the property. James' and B.E.'s contingent remainders would

have terminated when they pre-deceased Hubert. This would mean no descendant nor devisee of either James or B.E. would have any interest in the property. Plaintiffs and several named Defendants would own no portion of the property.

Defendants cite *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976), as supportive of their position. The relevant testamentary language in *White* is as follows:

> "I [Harriet M. Stokes] . . . devise . . . to my son, Samuel Stokes . . . land owned by me . . . to be his to use and enjoy during his lifetime, and if he shall die without heirs of his body, then . . . I hereby direct that at the death of my son, without heirs, if his wife, Emma Stokes, shall be living that she shall use and enjoy the said land during her widowhood, and at her death or remarriage, the same shall go to my heirs."

Id. at 76, 224 S.E.2d at 618. The testatrix died in 1925. She was survived by her son, Sam and his wife, Emma, and her two daughters, Hattie and Cora. Sam died without issue in 1970, Hattie died testate in 1961, and Cora died intestate in 1971, a few months before the death of Emma, also in 1971. *Id.* at 76, 224 S.E.2d at 619. Our Supreme Court held

> that when testatrix devised the contingent remainder "to my heirs" she intended to refer to all who at her death would be her legal heirs in the technical sense with the exception of her son, Sam, for whom and for whose family she had made other provisions [by giving him and Emma life estates]. Thus when [testatrix] died the contingent remainder passed in equal shares to her two daughters, Hattie and Cora. At Hattie White's death her one-half interest was devised to her three children, Sam, Mary and Everette. Everette's share at his death was inherited by his widow, Iva White. . . . . Cora Lynch's one-half interest was inherited at her death by her two children, George Lynch and Lucille Lynch Thompson, the other plaintiffs herein, who are each entitled to a one-fourth undivided interest in the land. The other defendant, Billy Roy Alexander, the only heir of Sam Stokes' widow, Emma, is not entitled to any interest in the land.

Id. at 85-86, 224 S.E.2d at 624.

In the present case, if we follow *White*, the roll call of "heirs" was set at Testator's death. *Id.* at 78-79, 224 S.E.2d at 620; *see also Rawls v. Rideout*, 74 N.C. App. 368, 375, 328 S.E.2d 783, 788 (1985) ("The class of the testatrix['s] heirs can be ascertained at her death. Thus, we need not take the *Bass* Court's approach and postpone the class closing until the life tenant's death."). In addition, the contingent remainders acquired in the property by Testator's children were "assignable and transmissible." *White*, 290 N.C. at, 78, 224 S.E.2d at 620 (citation omitted). In the present case, pursuant to the rule stated in *White*, all Testator's children, other than Hubert, including James and B.E., obtained a contingent remainder in twenty percent of the property at Testator's death. James' contingent remainder passed through his will to Marjorie and her husband Robin, to the exclusion of James' son James Jr. Upon Hubert's death in 1980, Marjorie and Robin acquired twenty percent of the property in fee simple absolute, and James Jr. acquired nothing. Therefore, James Jr.'s children, Gregory, James III, and John, did not take any interest in the property upon James Jr.'s death, and Gregory and John had no interest to convey to Plaintiffs in 2000.

We hold that *White* controls in this instance and, to the extent, if any, that *White* and *Lawson* are irreconcilable, *White*, as the latest pronouncement by our Supreme Court, controls. However: "This rule of construction is to be followed 'in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances.' " *White*, 290 N.C. at 79, 224 S.E.2d at 620 (citation omitted). Therefore, if the will contains sufficient evidence that it was Testator's intent that the class should be determined at Hubert's death, Testator's intent would control. Though there is some evidence in the will that would support an argument that Testator intended for the class to be set upon Hubert's death and not Testator's own, namely Testator's apparent desire to maintain family ownership of the property for as long as possible, we do not find this evidence strong enough to overcome the plain language of the instrument and the prevailing rules of testamentary construction. For these reasons we affirm.

Affirmed.

Judges BRYANT and STROUD concur.

AARON BYRD AND ERIC COOMBS, PETITIONERS
v.
FRANKLIN COUNTY, NORTH CAROLINA, RESPONDENT

No. COA13-1457

Filed 18 November 2014

1. Appeal and Error—appealability—jurisdiction—timeliness of appeal—waiver

The Court of Appeals had jurisdiction in an appeal from a determination that petitioners could not operate a shooting range on their property without a special use permit based on petitioners' timely appeal from the County's December letters. Further, where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not waive this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer's interpretation of the law.

2. Zoning—unified development ordinance—shooting range

The superior court did not err by affirming the County's order that petitioners cease and desist from operating a shooting range on their property. Although the superior court erred in its interpretation of the Unified Development Ordinance (UDO) by concluding that the shooting range fell within the Open Air Games category on the Table, the Table did in fact prohibit shooting ranges anywhere in the County by providing that uses not specifically listed in the Table were prohibited. Thus, the portion of the trial court's order determining that the UDO required petitioners to obtain a special use permit to operate their shooting range was reversed, even though the ultimate result reached by the trial court was affirmed on different grounds.

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

Appeal by Petitioners from order entered 24 September 2013 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 13 August 2014.

Currin & Currin, by Robin T. Currin, George B. Currin, and Catherine A. Hofmann, for petitioners-appellants.

Davis Sturges and Tomlinson, by Aubrey S. Tomlinson, Jr., for respondent-appellee.

DILLON, Judge.

Aaron Byrd and Eric Coombs ("Petitioners") appeal from a superior court's order affirming a decision by Franklin County, made by its Board of Adjustment, determining that Petitioners could not operate a shooting range on their property without a special use permit, requiring approval by the County's Board of Commissioners. For the foregoing reasons, we affirm, in part, and reverse, in part, the superior court's order.

I. Background

This appeal involves the application of the Franklin County Unified Development Ordinance ("UDO") to a shooting range. Pursuant to the UDO, property in the County is divided into zoning districts. The UDO contains a Table of Permitted Uses (the "Table") and identifies in which zoning districts each use set out in the list may be allowed. For each use listed, the Table provides (1) in which zoning districts said use is allowed as a matter of right, without any further approval by the County; (2) in which zoning districts said use is a "conditional" use, requiring approval by the County Board of Adjustment; (3) in which zoning districts said use is a "special" use, requiring approval by the County Board of Commissioners; and (4) in which zoning districts said use is not allowed at all. The UDO further provides that any "[u]ses not specifically listed in the Table [] are prohibited." The Table does not specifically list shooting ranges or gun ranges.

Petitioners desire to operate a shooting range on a tract of land they own in Franklin County (the "Property"). In the Spring of 2012, Petitioners contacted County officials to determine whether the UDO regulated their proposed shooting range.

Initially, the County Planning Director verbally informed Petitioners that the UDO did not allow a shooting range to operate in the County since this use was not listed in the UDO Table. The Planning Director recommended that Petitioners make a request to the County Board of Commissioners to amend the UDO to include shooting ranges as a use in the Table.

Subsequently, however, sometime prior to November 2012, the Planning Director had another conversation with Petitioners in which he informed them that their proposed shooting range *did* fall within a

use category listed in the Table, namely the category entitled "Grounds and Facilities for Open Air Games and Sporting Events" (hereinafter "Open Air Games"). He informed Petitioners that an Open Air Game was considered a special use in the Property's zoning district, and, therefore, Petitioners would need to apply to the Board of Commissioners for a special use permit to operate a shooting range on the Property.

Based on this subsequent conversation, Petitioners applied for a special use permit; however, on 3 December 2012, Petitioners' application was denied by the Board of Commissioners.[1]

Also, in December 2012, Petitioners received two written communications (the "December Letters") from a County code enforcement officer. The first communication, dated 9 December 2012, informed Petitioners that "in order to conduct the proposed shooting club a Special Use Permit must be obtained" and ordered Petitioners to "cease and desist any and all activity associated with a shooting range" on the Property. The second communication, dated 11 December 2012, stated that it was a "Final Notice of Violation" and ordered Petitioners to "halt all activities of the proposed shooting range immediately" or face "civil penalties," "legal action seeking injunction[,] and/or possible criminal action."

On 2 January 2013, Petitioners appealed from the December Letters to the Board of Adjustment. After conducting a hearing on the matter, the Board of Adjustment upheld the code enforcement officer's decisions in the December Letters, and ordered Petitioners to cease and desist all activities regarding the shooting range. The Board of Adjustment's order was affirmed by the Franklin County Superior Court by order entered on 24 September 2013. Petitioners filed written notice of appeal to this Court on 8 October 2013.

II. Jurisdiction

[1] As a preliminary matter, the County contends that this Court need not consider the merits of Petitioners' appeal, arguing that Petitioners failed to file their original appeal to the Board of Adjustment within the time allowed under the UDO. Section 24-1 of the UDO states that "[a]n appeal from any final order or decision of the administrator may be taken to the board of adjustment by any person aggrieved" but that the appeal "**must be taken within 30 days** after the date of the decision or order appealed from." (Emphasis added). The County also contends

1. Petitioners filed a separate appeal to this Court (COA13-1456) challenging the trial court's order affirming the Board of Commissioners' denial of their special use permit.

that Petitioners waived any challenge to the decision that a special use permit was required by actually applying for the permit.

In the present case, Petitioners appealed from the December Letters to the Board of Adjustment on 2 January 2013, within 30 days of receiving them. The County, however, argues that the appeal was not timely because the 30-day appeal clock commenced, not when Petitioners received the December Letters, but months earlier when the County Planning Director verbally informed Petitioners that they would need the special use permit.

Based on the facts of this case, we believe that the December Letters from the County represented "a final order or decision" from which Petitioners, as "aggrieved" parties, could appeal to the Board of Adjustment. Therefore, Petitioner's appeal was timely.

We also do not believe Petitioners waived their right to challenge the December Letters before the Board of Adjustment simply because they had previously been told by a County official that they would need a special use permit and Petitioners, out of an abundance of caution, followed this avenue before establishing a shooting range on the Property. Where a landowner can establish a use on its property as a matter of right without governmental approval, the landowner does not lose this right simply because the landowner applies for a special use permit at the direction of a governmental official rather than immediately challenging the officer's interpretation of the law. *See Graham Court Associates v. Town Council of Town on Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981) (a landowner was informed that he needed a special use permit; applied for a special use permit and was denied; then challenged whether the special use permit was required and this Court held that it was not). Accordingly, the County's contentions are overruled, and we turn to the merits of Petitioners' arguments on appeal.

III. Analysis

[2] In this appeal, Petitioners contend that the superior court erred in its interpretation of the UDO. Specifically, Petitioners argue that the UDO does not regulate shooting ranges and, therefore, they do not need any approval from the County to operate a shooting range on the Property. Petitioners also argue that the superior court erred by concluding that shooting ranges were regulated by the UDO as an Open Air Game. Petitioners primarily rely on this Court's holding in *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010).

Essentially, Petitioners challenge the interpretation of the UDO by the Board of Adjustment and superior court. "Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance." *Morris Communs. Corp. v. City of Bessemer*, 365 N.C. 152, 155, 712 S.E.2d 868, 871 (2011) (citations omitted). "Under de novo review a reviewing court considers the case anew and may freely substitute its own interpretation of an ordinance for a board of adjustment's conclusions of law." *Id.* at 156, 712 S.E.2d at 871 (citation omitted).

For the reasons stated below, we agree with Petitioners that the superior court erred in its interpretation of the UDO by concluding that the shooting range fell within the Open Air Games category in the Table. However, we disagree with Petitioners that the UDO does not regulate shooting ranges at all, but it does in fact prohibit shooting ranges anywhere in the County by providing that "[u]ses not specifically listed in the Table [] are prohibited." Accordingly, we hold that the superior court did not err in affirming the County's order that Petitioners cease and desist from operating a shooting range on the Property.

A. Shooting Ranges are not Open Air Games

Petitioners argue that the superior court erred in its interpretation of the UDO by concluding that shooting ranges fall within the Open Air Games category of the Table. Based on the superior court's interpretation, a shooting range would be allowed in the Property's zoning district with a special use permit approved by the Board of Commissioners. We agree with Petitioners that, applying this Court's holding in *Land*, *supra*, shooting ranges do not fall within the Open Air Games category.

In *Land*, this Court held that a shooting range did not fall within the use category "privately owned outdoor recreational facility" contained in the Union County Land Use Ordinance. 206 N.C. App. at 132, 697 S.E.2d at 464. In the present case, the category at issue in the UDO Table describes the use as property used for "Grounds and Facilities for Open Air Games and Sporting Events[.]" However, the Table further qualifies this category description as those uses which fall within the NAICS code 713940.[2] NAICS code 713904 is labeled "Fitness and Recreational Sports Centers" and is comprised of establishments "primarily engaged in operating fitness and recreational sports facilities featuring exercise

2. The North American Industry Classification System ("NAICS") is a number system used by businesses and governmental agencies throughout North America.

and other active physical fitness conditioning or recreational sports activities such as swimming, skating, or racquet sports." Shooting ranges, though, do not fall within NAICS code 713904, but rather under NAICS code 713990, labeled "All Other Amusement and Recreational Industries," a code which the County did not use as a reference for the Open Air Games category.

We note that there are other uses listed in the Table which do reference NAICS code 713990, the code assigned to shooting ranges. However, these categories are for "Golf Courses" and "Riding Stables" and not for any use within which a shooting range would fall. The UDO provides that the NAICS codes are meant to provide a reference to determine which uses fall within a given category, but the codes are not meant to enlarge the scope of a category beyond the category's descriptive title. Specifically, the UDO Table provides that the NAICS codes "are for reference purposes only, and do not mean that all uses under a specified code heading as provided in the [NAICS] Manual are permitted or conditional uses in the applicable zone."

Here, if the County had intended shooting ranges to be considered an Open Air Game, the County could have added the NAICS code assigned to shooting ranges as a reference for the category; however, the County did not do so. Accordingly, we believe the proper interpretation is that shooting ranges are not Open Air Games in the Table.

B. The UDO Prohibits Shooting Ranges in the County

Petitioners argue that since the Table does not contain a category for shooting ranges, the UDO does not regulate shooting ranges, and, therefore, the County cannot prevent them from operating a shooting range on their Property. We disagree.

Our Supreme Court has provided the following guidance when construing ordinances:

> Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [within] their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions

> of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation marks omitted).

We believe that the UDO is unambiguous in prohibiting shooting ranges in the County. UDO section 6-1 states that "[u]ses not specifically listed in the Table of Permitted Uses are prohibited." Based on a "fair and reasonable construction" of this language, the County clearly recognized that it could not list every conceivable way that property could be used, and, therefore, it sought to provide that any use not listed would be prohibited unless and until any said use not listed was added to the UDO through an amendment thereto approved by the Board of Commissioners. Otherwise, landowners would be allowed to operate a shooting range or any other use not specifically listed in the Table *anywhere* in the County.

Petitioners argue that our holding in *Land* compels us to conclude that since shooting ranges are not expressly excluded by the UDO, they *must* be allowed. We believe that Petitioners' interpretation of *Land* is overly broad and would lead to absurd results.

The central issue in *Land* was whether a shooting range on the property of the aptly named Dr. Land was regulated by the Union County Ordinance. The ordinance, like the UDO, contained a table of permitted uses. The ordinance also stated that "those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed use," and that "uses that are not listed [] and that do not have impacts that are similar to those of the listed uses are prohibited." *Land*, 206 N.C. App. at 129, 697 S.E.2d at 462. Union County opposed Dr. Land's shooting range.

This Court in *Land* rejected the interpretation of the ordinance advocated by Union County that "all uses not expressly permitted are implied prohibited." *Id.* at 130, 697 S.E.2d at 462. The Court disfavored the ordinance's approach towards unlisted uses, stating that "a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was 'similar to' a nebulous category in the [ordinance]" and further that the approach "leaves landowners exposed to decisions to the arbitrary and capricious whims of zoning authorities who may disagree with the landowner's decision concerning 'similarity of use.' " *Id.* at 132, 697 S.E.2d at 464. In conclusion, the Court held that "absent a clear [ordinance] regulating shooting ranges, Dr. Land was not required to obtain a special use permit." *Id.*

We construe this Court's holding in *Land* narrowly to the language of the ordinance that was before it, namely one which states that permitted uses are those uses which are listed and "other uses that have similar impacts to" those listed while prohibiting all other uses.[3] We believe that the language in the UDO is clear in prohibiting shooting ranges even though it does not specifically mention "shooting ranges" by name. Unlike the ordinance in *Land*, the UDO does not contain a similarity provision. It would be absurd to state that a use is allowed as a matter of right everywhere in a county, simply because the county failed to list the use expressly by name in its ordinance.[4] Otherwise where an ordinance provides that property within a residential district can only be used for residential purposes and for no other purpose and under Petitioners' interpretation, the residential property owner could use his property not only for residential purposes but also for any commercial use which the ordinance fails to specifically mention. Petitioners' argument is overruled.

For the foregoing reasons, we reverse that portion of the trial court's order determining that the UDO required Petitioners to obtain a special use permit to operate their shooting range. However, in light of our holding that Petitioners' shooting range was not a permitted use within the County, we affirm the ultimate result reached by the trial court albeit on different grounds.

AFFIRMED IN PART, REVERSED IN PART.

Judge DAVIS concurs.

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3. We need not address to what extent *Land* applies to the interpretation of ordinances which provide a means by which an unlisted use might be permitted if similar to a listed use. We note, for example, that in contrast to the *Land* Court's concern regarding unlisted uses and the "similar to" language as conferring too much discretion to county officials, this Court in *Fairway Outdoor Adver. v. Town of Cary*, applied the language of an "unlisted use" provision in an ordinance that provided for a level of discretion to the town's planning director to permit certain unlisted uses, but that ordinance provided criteria for exercising that discretion. ___ N.C. App. ___, ___, 739 S.E.2d 579, 583 (2013). Further, we note that, more recently, this Court applied ordinance language providing that in determining whether an unlisted use is permitted, "the use addressed by this ordinance that is most closely related to the land use impacts of the proposed [unlisted] use shall apply[.]" *Fort v. County of Cumberland*, ___ N.C. App. ___, ___, 761 S.E.2d 744, 747 (2014) (concluding that a firearms training facility – a use not listed in the ordinance - was "similar" to the listed use category "Recreation/Amusement Outdoor").

4. We have held that a firearms training facility was not allowed in a particular zoning district because this use did not fall within the use category "SCHOOLS, public, private, elementary or secondary." *Fort v. County of Cumberland*, ___ N.C. App. ___, 721 S.E.2d 350 (2012) ("*Fort I*").

HUNTER, Robert C., Judge, concurring in part and dissenting in part.

I concur with the majority's conclusion that the trial court erred by interpreting the Franklin County Unified Development Ordinance ("UDO") as including shooting ranges under the category of "Open Air Games." However, because I believe that *Land v. Village of Wesley Chapel*, 206 N.C. App. 123, 697 S.E.2d 458 (2010), is controlling, I respectfully dissent from the majority's position that the UDO prohibits any land use that it does not specifically name.

In *Land*, the landowner challenged a cease-and-desist order issued by a zoning administrator prohibiting him from using a shooting range on his private property. *Land*, 206 N.C. App. at 126, 697 S.E.2d at 460. The trial court found in favor of the landowner, and the Village of Wesley Chapel ("the Village") appealed. *Id.* at 124, 697 S.E.2d at 459. The Village argued that its land use ordinance regulated every conceivable use of property, whether or not the use was specifically mentioned. *Id.* at 129, 697 S.E.2d at 462. The applicable provisions of the ordinance read as follows:

> (a) The presumption established by this ordinance is that all legitimate uses of land are permissible within at least one zoning district with the county. Therefore, because the list of permissible uses set forth in Section 146 (Table of Permissible Uses) cannot be all-inclusive, those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed uses.
>
> (b) *All uses that are not listed in Section 146 and that do not have impacts that are similar to those of the listed uses are prohibited.* Nor shall Section 146 be interpreted to allow a use in one zoning district when the use in question is more closely related to another specified use that is permissible only in other zoning districts.

Id. (emphasis added). Thus, the Village argued that because its ordinance did not list the operation of a shooting range as a permissible land use, such use was implicitly prohibited under subsection (b).

Citing long-standing common law principles of the "free use of property," this Court rejected the philosophy embedded in the Village's ordinance, and in the UDO here, that "everything is proscribed except that which is allowed." *Id.* at 131, 697 S.E.2d at 463. The problem with such

an ordinance, as expressed by the Court, was that "it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the [ordinance]." *Id.* Citing *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966), which itself quoted Yokley, *Zoning Law and Practice*, Second Edition (1962 supplement), Vol. 1, Section 184), this Court reaffirmed the notion that "[z]oning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly [sic.] their express terms." *Id.* Based on these principles, the Court held that, despite the language in subsection (b) prohibiting all uses not explicitly mentioned in the ordinance, the landowner was not required to obtain a special use permit absent a clear mandate within the ordinance regarding shooting ranges. *Id.* at 132, 697 S.E.2d at 464.

I find *Land* to be dispositive on the issue presented here. The majority attempts to distinguish *Land* on the fact that the Village's ordinance contained a provision allowing "other uses that have similar impacts" to those explicitly mentioned, and the UDO does not contain a similar clause. I do not find this distinction material to our analysis. Rather than relying on the "similar impacts" provision to form the basis of its holding, the *Land* Court cited long-standing precedent in rejecting the notion that a zoning ordinance may prohibit uses not explicitly allowed. *See, e.g.*, *In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) ("A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use."); *In re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962) ("Zoning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner." (internal quotation marks omitted)); *Coleman v. Town of Hillsborough*, 173 N.C. App. 560, 564, 619 S.E.2d 555, 559 (2005) ("Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation.").

The *Land* Court made clear that the law favors uninhibited free use of private property over governmental restrictions. Despite this principle, the majority asserts that it would be absurd for a use to be allowed as a matter of right because the county failed to expressly restrict the use in its zoning ordinance. I believe that it would be similarly absurd, but more importantly, unlawful, to support the notion that an otherwise legal use of private property is automatically *disallowed* simply because the government failed to identify it by name in a zoning ordinance.

Based on the holding in *Land*, I am bound to conclude that the UDO's provision prohibiting all uses not explicitly allowed in the ordinance is in derogation of the common law and is without legal effect. Therefore, I would reverse the trial court's order.

SANTIAGO ESTRADA, EMPLOYEE, PLAINTIFF
v.
TIMBER STRUCTURES, INC., EMPLOYER AND AMERICAN ZURICH INSURANCE COMPANY, CARRIER AND JAMES C. CERATT, JR., D/B/A/ TIMBER STRUCTURES BUILDERS, NON-INSURED EMPLOYER, DEFENDANTS

No. COA14-468

Filed 18 November 2014

Workers' Compensation—expiration of policy—end of policy period—renewal premium not paid

A workers' compensation insurance policy did not cover defendants at the time of plaintiff's injury where defendants did not pay the renewal premium by the expiration date of the policy and the policy expired. Neither N.C.G.S. § 58-36-105 nor N.C.G.S. § 58-36-110 govern the expiration of a workers' compensation insurance policy at the end of the policy period.

Appeal by plaintiff and defendants from the Opinion and Award entered 24 January 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 8 October 2014.

Hedrick Kepley, PLLC, by Jeffrey M. Hedrick, for plaintiff-appellant.

Patrick Harper & Dixon L.L.P., by Michael P. Thomas, for defendant-appellants Timber Structures, Inc., and James C. Ceratt, Jr., d/b/a Timber Structures Builders.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Shelley W. Coleman and M. Duane Jones, for defendant-appellee American Zurich Insurance Company.

STEELMAN, Judge.

Where defendants failed to pay the renewal premium due on their workers' compensation insurance policy by the expiration date of the policy, the policy expired. Neither N.C. Gen. Stat. § § 58-36-105 nor 58-36-110 govern the expiration of a workers' compensation insurance policy at the end of the policy period.

I. Factual and Procedural History

James C. Ceratt, Jr., (with James C. Ceratt, Jr., d/b/a Timber Structures Builders, collectively, "defendants") is a licensed general contractor. Santiago Estrada Flores (plaintiff) was employed as a laborer and carpenter for defendants. Prior to 2009, defendants had several workers' compensation insurance policies canceled due to defendants' failure to pay the required premium. As a result, in 2009 defendants obtained workers' compensation insurance through the North Carolina Rate Bureau, which assigned defendant-appellee American Zurich Insurance Company ("Zurich") to offer defendants workers' compensation insurance. Upon defendants' payment of a premium deposit of $850.00, Zurich issued Policy Number 6ZZ0B-9856M64-8-09 to defendants for the period 4 August 2009 through 4 August 2010.

On 25 May 2010 Zurich mailed defendants a letter offering to renew the workers' compensation insurance policy. At the top of the letter was printed "EXPIRATION DATE 080410." The letter stated in relevant part that:

> Enclosed is your renewal quotation[.]
>
> . . .
>
> IMPORTANT NOTICE
>
> All Premiums billed under your expiring policy must be paid before your policy can be renewed. . . .
>
> In order to avoid a lapse in coverage, your renewal payment must be received by the expiration date shown on your bill. Depending on the plan requirements, if payment is not received by the expiration date, either the policy will be issued with a lapse in coverage or your premium check will be returned and no policy will be issued.

The letter was accompanied by a "Premium Notice" listing the "Date of Bill" as 25 May 2010, and stating that:

> "Your policy will expire on the expiration date if the renewal premium is not paid. If the required deposit is

> received by us within 60 days after policy expiration, your renewal will be effective the day after the U.S. postmark date appearing on the renewal deposit envelope. Monies received for deposit more than 60 days after the expiration date will be returned and the policy will not be reinstated."

The Premium Notice also included a chart reiterating the relevant payment amount, due date, and expiration date:

Amount Due	$1000
Date Due	7-21-10
Expiration Date	08-04-10

Mr. Ceratt admitted at the hearing that he did not make a payment towards the premium prior to the expiration date of 4 August 2010.

On 19 August 2010 plaintiff suffered an injury by accident arising out of and in the course of his employment for defendants. On 3 September 2010 plaintiff filed an Industrial Commission Form 18 notifying defendants of his injury and seeking workers' compensation medical and disability benefits.[1] The Form 18 named Zurich as the workers' compensation insurance carrier. Zurich denied "that a workers' compensation policy was in effect for [defendants] on the date of [plaintiff's] accident." A hearing was conducted on plaintiff's claim before Industrial Commission Deputy Commissioner Adrian Phillips on 23 July 2012. On 20 June 2013 Deputy Commissioner Phillips filed an Opinion and Award holding that defendants' workers' compensation insurance had expired at the time of plaintiff's injury and awarding plaintiff medical and temporary total disability benefits, to be paid by defendants. Both plaintiff and defendants appealed to the Full Commission. On 18 September 2013 the Commission filed an order dismissing defendants' appeal for failure to timely file an Industrial Commission Form 44, Application for Review.

On 24 January 2014 the Full Commission filed an order affirming the decision of the Deputy Commissioner with modifications. The order noted the dismissal of defendants' appeal and specified that "only Plaintiff's appeal remains before the Full Commission for review." The Commission found in relevant part that:

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1. On 19 August 2010 plaintiff was working for defendants at the Blackberry Creek Mattress Store in Boone, N.C. Plaintiff initially sought compensation from the store, but it was dismissed as a defendant and is not a party to this appeal.

. . .

24. Defendant-Employer James C. Ceratt, Jr., d/b/a Timber Structures Builders [("Ceratt")] . . . obtained a policy of workers' compensation coverage from Defendant-Carrier American Zurich Insurance Company [("Zurich")], with an initial policy period covering August 4, 2009 to August 4, 2010[.]

25. On or around May 25, 2010, [Zurich] sent [Ceratt] a "Workers' Compensation Insurance Plan Letter" (hereinafter "the letter") providing a policy renewal quote. The letter informed [Ceratt] that "in order to avoid a lapse in coverage, your renewal payment must be received by the expiration date shown on your bill." Along with the letter, [Zurich] provided [Ceratt] a "Premium Notice" indicating a "Date of Bill" of May 25, 2010, an amount of $1000.00 due . . . July 21, 2010, and an "Expiration Date" of August 4, 2010.

. . .

33. After [Ceratt] learned that [he] was not covered by the policy, he sought to renew the policy with [Zurich]. On September 9, 2010, [Zurich] issued a "renewal" of [the policy] stating a retroactive policy period from August 24, 2010 to August 4, 2011[.]

34. [Ceratt] was uninsured from 12:01 a.m. August 4, 2010 through August 24, 2010.

. . .

38. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [Zurich] did not insure [Ceratt] on Plaintiff's date of injury.

The Commission held that defendants' workers' compensation insurance policy expired on 4 August 2010 due to their failure to submit payment prior to the expiration date, and that defendants were not insured at the time of plaintiff's accident.

Plaintiff and defendants appeal.

II. Standard of Review

"The standard of review in workers' compensation cases has been firmly established by the General Assembly and by numerous decisions of this Court. Under the Workers' Compensation Act, '[t]he Commission

is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' Therefore, on appeal from an award of the Industrial Commission, review is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), and citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (other citations omitted). Findings that are not challenged on appeal are "presumed to be supported by competent evidence" and are "conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003). The "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

III. Workers' Compensation Insurance

The sole issue on appeal is whether a workers' compensation insurance policy covered defendants at the time of plaintiff's injury. We hold that the policy issued by Zurich expired on 4 August 2010 and was not in effect on 19 August 2010, the date that plaintiff was injured.

" 'We first note the well-settled principle that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto.' " *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (quoting *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). "This Court's review of contract provisions is *de novo*. 'It is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts.' " *Fulford v. Jenkins*, 195 N.C. App. 402, 404, 672 S.E.2d 759, 760 (2009) (citing *Sutton v. Messer*, 173 N.C. App. 521, 525, 620 S.E.2d 19, 22 (2005), and quoting *Chavis v. Southern Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986)). In addition:

> The cardinal principle pertaining to the construction and interpretation of insurance contracts is that the intention of the parties should control. If not ambiguous or uncertain, the express language the parties have used should be given effect, and the intention of the parties must be derived from the language employed. . . . If the intention

> of the parties is clear, the courts have no authority to change the contract in any particular or to disregard the express language the parties have used.

Lineberry v. Trust Co., 238 N.C. 264, 267, 77 S.E.2d 652, 654 (1953).

N.C. Gen. Stat. § 97-99(a) provides that a "policy for the insurance of the compensation in this Article, or against liability therefor, shall be deemed to be made subject to the provisions of this Article." "[W]hen a statute is applicable to the terms of an insurance policy, the provisions of the statute become a part of the policy, as if written into it. If the terms of the statute and the policy conflict, the statute prevails." *Progressive American Ins. Co. v. Vasquez*, 350 N.C. 386, 392, 515 S.E.2d 8, 12 (1999) (quoting *Isenhour v. Universal Underwriters Ins. Co.*, 341 N.C. 597, 605, 461 S.E.2d 317, 322 (1995)).

In this case, the parties have discussed two statutes with relevance to workers' compensation insurance policies. N.C. Gen. Stat. § 58-36-105(a) provides in pertinent part that "[n]o policy of workers' compensation insurance or employers' liability insurance written in connection with a policy of workers' compensation insurance shall be cancelled by the insurer before the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, except for any one of the following reasons: (1) Nonpayment of premium in accordance with the policy terms. . . ." (emphasis added). The statute expressly limits its application to cancellation of an insurance policy before the end of the policy term. We hold that N.C. Gen. Stat. § 58-36-105 does not apply to the expiration of a policy of workers' compensation insurance at the end of the term, based upon the insured's failure to renew the policy.

N.C. Gen. Stat. § 58-36-110(a) provides that "[n]o insurer shall refuse to renew a policy of workers' compensation insurance or employers' liability insurance written in connection with a policy of workers' compensation insurance except in accordance with the provisions of this section, and any nonrenewal attempted or made that is not in compliance with this section is not effective. . . . " This statute only applies to a situation in which the insurer refuses to renew a policy. As we held in *Zaldana v. Smith*, __ N.C. App. __, 749 S.E.2d 461 (2013), *disc. review denied*, __ N.C. __, 758 S.E.2d 869 (2014):

> "The plain meaning of 'refuse' is 'to indicate unwillingness to do.' The American Heritage College Dictionary 1148 (3rd ed. 1993). An insurer, therefore, 'refuses to renew' a policy

> when the insurer indicates an unwillingness to renew the policy." . . . An insurer cannot 'indicate an unwillingness' to renew a policy merely by letting it expire under its own express terms. At a minimum, an insurer must, by word or action, specifically indicate to the insured that it is unwilling to renew the policy at issue.

Zaldana, __ N.C. App. at __, 749 S.E.2d at 463 (quoting *Associates Fin. Servs. of Am. v. N.C. Farm Bureau Mut. Ins. Co.*, 137 N.C. App. 526, 531, 528 S.E.2d 621, 624 (2000)). Based on the statutory language and on *Zaldana*, we hold that N.C. Gen. Stat. § 58-36-110 is only applicable to a situation in which an insurer "refuses to renew" a policy, and is not relevant to a situation in which the insurer is willing to renew an insurance policy but the insured fails to submit a premium payment by the expiration date.

The relevant facts of this case are not in dispute and establish that defendants' workers' compensation insurance policy expired on 4 August 2010 because defendants failed to make a premium payment by that date. Therefore, on 19 August 2010, the date of plaintiff's injury, defendants were not insured under the policy issued by Zurich.

In arguing for a contrary result, appellants do not challenge the evidentiary support for the Commission's factual findings that (1) Zurich sent defendants a letter on 25 May 2010 stating that it was willing to renew defendants' workers' compensation insurance and that a premium payment of $1000 was due by 4 August 2010; (2) the letter warned that the policy would expire on 4 August 2010 if no payment was received, and; (3) defendants made no payments until after the date of plaintiff's injury. Instead, appellants argue that, although Zurich was neither cancelling defendants' insurance policy prior to its expiration date nor refusing to renew the policy, Zurich was nonetheless required to comply with the procedures set out in N.C. Gen. Stat. § 58-36-105 and § 58-36-110. Appellants make similar arguments regarding the analogous provisions of the Rules promulgated by the Rate Bureau. As discussed above, these statutes do not apply in the factual context of the present case, in which Zurich did not cancel defendants' insurance policy before its term expired, and was willing to renew the policy for another year. Simply put, defendants failed to pay the premium required to renew the policy and, as a result, did not have workers' compensation insurance coverage on the date of plaintiff's injury.

Conclusion

We conclude that the Full Commission did not err by ruling that defendants' workers' compensation insurance expired on 4 August 2010 and that its Opinion and Award should be

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

IN THE MATTER OF A.W.

No. COA14-597

Filed 18 November 2014

1. Termination of Parental Rights—grounds—one sufficient

Although a father challenged each of the statutory grounds under N.C.G.S. § 7B-1111 on which the trial court terminated his parental rights, a finding of any one of the enumerated grounds for termination of parental rights under the statute is sufficient to support a termination.

2. Termination of Parental Rights—grounds—initial grounds beyond father's control—little effort to involve himself with child

The trial court had sufficient grounds to terminate a father's parental rights under N.C.G.S. § 7B–1111(a)(2) (willfully leaving the juvenile in foster care and not making reasonable progress toward correction of the circumstances that led to removal). Although the conditions which lead to the child's placement with foster parents were not in the father's control, he made essentially no effort to involve himself with the child until the mother indicated that she was voluntarily terminating her parental rights so that the child could be adopted by the foster parents. Moreover, there was a sufficient basis in the record for terminating the father's parental rights that had nothing to do with poverty.

3. Termination of Parental Rights—trial counsel's concession—other grounds for termination

The trial court did not err in a termination of parental rights proceeding by relying on trial counsel's concession that grounds

may have existed to terminate a father's parental rights. There were unrelated findings of fact that sufficiently supported the trial court's terminating the father's parental rights.

Appeal by Respondent-Father from order entered 25 February 2014 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 20 October 2014.

Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Petitioner-Appellee.

Kilpatrick Townsend & Stockton LLP, by John M. Moye, for guardian ad litem.

Robert W. Ewing for Respondent-Appellant.

McGEE, Chief Judge.

Respondent ("the Father") appeals from the trial court's order terminating his parental rights as to the minor child, A.W. ("the Child"). We affirm the trial court's order.

I. Background

Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") filed a juvenile petition on 30 December 2010, alleging that the Child was dependent. On that same date, YFS obtained nonsecure custody of the Child. The Child's mother ("the Mother") was eighteen years old at the time and had entered into a Contractual Agreement for Continuing Residential Support ("CARS agreement") with YFS after she had aged out of foster care. This agreement allowed the Mother to remain in foster care with stipulations that she remain in school and comply with the rules and regulations of her placement. Paternity had not been established for the Child and there were no relative placement options. The trial court adjudicated the Child dependent on 10 February 2011.

The Mother identified the Father as the potential biological parent of the Child in December of 2011. The Father was contacted by YFS soon thereafter, and paternity testing confirmed that he was the Child's biological father. The Father was notified that he was the Child's biological father on 23 January 2012.

The YFS social worker conducted a home visit with the Father and his sister on 15 February 2012. The social worker inquired about the Father's willingness to work a case plan for reunification with the Child. The Father indicated that he was not able to at the time, but that his sister was interested. The social worker discussed the process with the Father's sister, letting the Father's sister know that she must fill out paperwork and return it so that a home study could be done on her home. This paperwork was never submitted.

The social worker did not speak with the Father again until December 2012. At that time, the Father had learned that the Mother wanted to surrender her parental rights so that the Child could be adopted by his foster parents. The Father met with the social worker, and the social worker explained to him that he would need to submit to a Families in Recovery to Stay Together ("F.I.R.S.T.") assessment, and then a case plan could be developed. The social worker also explained that the Father would need to appear in court and state his wishes before they could move forward. The Father appeared in court for the first time on 25 January 2013, at a permanency planning hearing. The trial court appointed him counsel and continued the matter to allow the Father an opportunity to meet with counsel.

Subsequent permanency planning hearings were scheduled for 20 February 2013 and 3 May 2013 but had to be rescheduled. In continuance orders filed 12 April 2013 and 23 April 2013, the trial court noted that its determination regarding whether it would be in the Child's best interests to have visitation with the Father would have to occur at a later time. The trial court conducted the permanency planning hearing on 9 July 2013. The trial court found:

> [The Father] was informed on January 23, 2012 that he would have to seek a court order authorizing him to receive custody and/or visitation of [the Child] but [the Father] did not take action until December 10, 2012. During those 11 months, [the Father] did not participate in a FIRST assessment as requested by the social worker, did not contact YFS to inquire about the [Child's] well-being, failed to provide consistent support or assistance, did not follow up with the social worker about having [the Child] placed with his sister, and did not take any other action toward gaining custody of [the Child]. From January 2012 to January 2013, [the Father] visited with [the Child] sporadically and has not seen [the Child] since January of 2013. Although [the Father] was employed with Fed Ex

> and worked 25-30 hours a week, he never inquired with the department about how to begin paying child support or made any payments, but he did buy [the Child] a few outfits during this time.

The trial court ceased reunification efforts, established adoption as the permanent plan, and ordered YFS to file a petition to terminate the Father's parental rights. However, the trial court also granted the Father visitation rights.

YFS filed a petition to terminate the Father's parental rights on 16 August 2013, alleging grounds existed to terminate his parental rights based upon (1) neglect, (2) failure to make reasonable progress, (3) willful failure to pay a reasonable portion of the cost of care, (4) failure to legitimate, and (5) willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (5), and (7) (2013). The termination hearing was held on 6 January 2014, after which the trial court found the existence of all grounds alleged by YFS. The trial court determined that termination of the Father's parental rights was in the Child's best interests and entered an order terminating the Father's parental rights ("the order"). The Father appeals.

II. Standard of Review

"We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.' " *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Moreover, the trial court's findings of fact are binding on appeal if they are supported by any competent evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Where a respondent does not challenge the trial court's findings, those findings are presumed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

III. Analysis

During the termination hearing, which the Father did not attend, the trial court found that:

> 3. [The Child] came into [YFS] custody . . . [the day after he was born,] 30 December 2010. Given his mother's

placement with Mecklenburg County YFS at that time[,] [and because she] was previously a minor in foster care and unable to provide care for the baby or for herself[,] [the Mother] had agreed to a CARS agreement, which allowed her to remain in a [YFS] placement beyond her eighteenth birthday.

. . . .

7. [The Father], the biological father of [the Child], . . . has never made himself available to set up a family service agreement (case plan) to address the issues that brought the child into care and to place himself in a position to parent [the Child].

8. [The Father] was told repeatedly that he was found to be the father of [the Child] and that he needed to establish a case plan. First when he spoke with [the social worker's] supervisor, and then later at a home visit in February 2012 [when he met with the social worker].

9. At that February 2012 meeting [the Father] was told that the first step toward reunification or being involved in [his] son's life was obtaining a F.I.R.S.T. (Families in Recovery Stay Together) assessment and setting up a case plan. He at the time and ever since that time has demonstrated the he was not or is not able nor interested himself in providing a placement or caring for [the Child's] needs.

10. [The Father] did indicate that his sister [("Sister 1")] was a potential placement at the February 2012 meeting. Unfortunately, [Sister 1] never followed up nor submitted the paperwork provided by YFS to be considered for placement. [Sister 1] never contacted YFS to express any further interest in placement after the February 2012 meeting and YFS was unable to contact her regarding her willingness to be considered for placement.

11. [The Father] has a second sister[("Sister 2")] that the paternal grandmother made [YFS] aware of in December 2012. [Sister 2] did participate in the completion of a home study to be considered for placement of [the Child].

12. [Sister 2] completed the home study as requested but was not approved for a variety of reasons for placement.

13. [The Father's] mother, [the Child's] paternal grandmother, indicated that she is not able to be a placement for the child.

14. No one else was ever identified by [the Father] as a possible permanent placement for [the Child].

15. No one else from [the Father's] family ever step [*sic*] forward to offer a relative placement for [the Child].

16. An appointment for an assessment with [F.I.R.S.T.] was scheduled in March 2012. [The Father] did not appear for the appointment and never completed the [F.I.R.S.T.] assessment.

17. There was no contact between [the Father] and YFS from February 2012 until December 2012 and early January 2013, although YFS made several attempts to contact [the Father] by telephone, by mail, and by home visit.

18. In December 2012 and early January 2013, [the Father] had some contact with [YFS]. [YFS] made [the Father] aware that he needed to participate in the court proceedings and maintain contact with YFS if he wanted to be involved in his child's life. On 25 January 2013, [the Father] appeared for [a] court hearing that was continued to 20 February 2013. [The Father] appeared at the 20 February 2013 [hearing], however he did not avail himself during or following that court hearing to any plan or services to work towards reunification with [the Child].

19. [The Father] appeared again at a scheduled hearing on 9 July 2013. [The Father] was allowed visitation [at] that time. [The Father] has participated in seven visits since that time. He visited with [the Child] two times in August [2013], two times in September [2013], two times in October [2013], no visits in November [2013], and one visit around the holiday in December [2013].

. . . .

24. Although [the Father] was employed for a good portion of this case and he being aware since early 2012 that he is [the Child's] father, he has paid no support to YFS or to [the Child's foster parent] or to any placement where [the Child] has resided. [The Father] has apparently

> on some occasions provided some clothing items for [the Child]. That is the extent of the financial support of his child.
>
> . . . .
>
> 38. [The Father's] absences in court speak volumes regarding his commitment to parent [the Child]. There have been numerous court hearings and he has made three court appearances. He has just not been involved.

The Father does not challenge any of the above findings. Therefore, they are binding on appeal. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

[1] Instead, the Father challenges each of the five statutory grounds under N.C. Gen. Stat. § 7B-1111 on which the trial court terminated his parental rights. However, a "finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. [§] 7B–1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003) (citation omitted). The trial court may terminate parental rights under § 7B–1111(a)(2) upon a finding that:

> [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

We find it dispositive of the Father's appeal that the evidence supports termination of his parental rights on these grounds.

[2] In his brief, the Father contends that his parental rights were not subject to termination under § 7B–1111(a)(2) because the "conditions" which led to the Child's placement in YFS custody were not within the Father's control. However, the Father's argument is unpersuasive.

First, in order for a trial court to terminate a parent's rights under § 7B-1111(a)(2), the parent must have willfully left the juvenile in YFS custody for more than twelve months. A finding of willfulness here does not require proof of parental fault. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted). On the contrary, "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort."

In re McMillon, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001). "A finding of willfulness is not precluded even if the respondent has made *some* efforts to regain custody of [his child]." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (emphasis added).

From the time the Father was notified on 23 January 2012 that he was the biological parent of the Child to when his parental rights were terminated by court order two years later, the Father made no meaningful effort to remove the Child from YFS custody. YFS engaged with the Father repeatedly over that time in an attempt to put together a case plan to reunify the Child and the Father. These efforts by YFS were met almost universally with inaction by the Father. Indeed, the Father made essentially no effort to involve himself with the Child until the Mother indicated in December of 2012 that she was voluntarily terminating her parental rights.

It is true that the Father was not actually granted visitation rights with the Child until 19 July 2013, one month before this action to terminate his parental rights was filed by YFS. Moreover, it is uncontested that the Father visited the Child seven times between July and December 2013. However, these facts alone are not dispositive of the trial court's conclusion that, by making almost no effort to get the Child placed in his custody, the Father willfully left the Child in YFS custody for more than twelve months.

[3] The Father's willfully leaving the Child in YFS custody is also directly tied to the second requirement for terminating his parental rights under § 7B–1111(a)(2): that the parent has not made reasonable progress under the circumstances in correcting the conditions which led to his child being placed in YFS custody. Notably, the Child was placed in YFS custody as a result of being adjudicated dependent. In order to be adjudicated dependent, a child either must have "no parent, guardian, or custodian responsible for the juvenile's care or supervision" or, as in the present case, the child has a parent, guardian, or custodian, but that caretaker "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). "[T]he determinative factors [when adjudicating a child abused, neglected, or dependent] are the circumstances and conditions surrounding the child, *not* the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (emphasis added). This Court has admonished that the adjudication of a child's dependency "should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). In other words, the "conditions"

which led to the Child being placed in YFS custody are not necessarily tied to the "fault" of either biological parent. Instead, those "conditions" were based entirely on "circumstances and conditions surrounding" the Child at the time he was adjudicated dependent.

Thus, what is required of a parent to avoid the termination of his or her parental rights under § 7B–1111(a)(2) is that the parent make "reasonable progress under the circumstances" towards correcting those conditions that led to the child being placed in YFS custody, irrespective of whoever's fault it was that the child was placed in YFS custody in the first place. *Cf. In re D.N.W.*, __ N.C. App. __, __ S.E.2d __, COA12-765, *slip op.* at 12–14 (Dec. 18, 2012) (unpublished) (terminating a respondent father's parental rights under § 7B–1111(a)(2) even though the child was removed from the mother's home and placed in DSS custody before the father's paternity had been established); *but cf. In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) (briefly noting that the respondent father did not cause children to be placed in foster care when analyzing § 7B–1111(a)(2), although the trial court's termination order broadly lacked clear, cogent, and convincing evidence to support termination). In the present case, the Father could have completely cured the Child's dependency by establishing himself as a parent who could "provide for [the Child's] care or supervision," or by arranging for an "appropriate alternative child care arrangement" for the Child. *See* § 7B-101(9). As previously discussed, the Father made almost no effort to do so.

The Father does not present this Court with an argument under § 7B-1111(a)(2) that his parental rights were terminated solely because he might have been in poverty. We do note that the Father challenges the trial court's ground for termination under § 7B–1111(a)(3), which relates to a parent's willful failure to pay a reasonable portion of the cost of care for his child in spite of being physically and financially able to do so. The trial court found that the Father "was employed for a good portion of this case" and that he "has paid no support to YFS or to [the Child's foster parent] or to any placement where [the Child] has resided" since discovering he was the Child's biological parent. However, the trial court did not make an express finding that the Father was physically and financially able to pay for the Child's care. Nonetheless, for the purposes of examining § 7B–1111(a)(2), there was a sufficient basis in the record for terminating the Father's parental rights that had nothing to do with poverty. Indeed, the Father's failure to obtain custody of the Child appears primarily to have been the result of his own inaction, and thus poverty could not have been the "sole reason" for terminating the

Father's parental rights. Therefore, the trial court had sufficient grounds to terminate the Father's parental rights under § 7B–1111(a)(2).

Lastly, the Father argues the trial court erred by relying on trial counsel's concession that grounds may have existed to terminate his parental rights. During closing arguments, the Father's trial counsel stated: "My argument to the Court is that obviously there have been some statutory elements in here that probably have been met[.]" The trial court found: "Mr. McKnight, counsel for [the Father], has conceded that the grounds for termination including neglect and abandonment have been met, but requested that the Court consider whether it be in [the Child's] best interests for [the Father's] parental rights to be terminated." This finding by the trial court does not prejudice the Father. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006) ("[When] ample other findings of fact support [the trial court's conclusions of law] . . ., erroneous findings unnecessary to the determination do not constitute reversible error."). As discussed above, there are unrelated findings of fact that sufficiently support the trial court terminating the Father's parental rights under § 7B-1111(a)(2). Accordingly, we affirm the trial court's order.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.

IN THE MATTER OF J.F.

No. COA14-101 & No. COA14-562

Filed 18 November 2014

1. Juveniles—sufficiency of petitions—first-degree sexual offense—crimes against nature—identification of particular sex act not required

The trial court did not err by denying a juvenile's motion to dismiss on the ground that the petitions for first-degree sexual offense and crimes against nature were defective. The State was not required to identify the particular sex acts involved or describe the manner in which they were performed. Further, nothing in the crime against nature statute required that the accused be the one performing the sexual act.

2. Sexual Offenses—first-degree sexual offense—crime against nature—sexual purpose

The trial court did not err by failing to require the State to present evidence of sexual purpose with respect to the first-degree sexual offense and crime against nature charges. The Court of Appeals must give effect to each of the statutes as written, and it does not have the power to add a sexual purpose element to a statute that does not contain one.

3. Sexual Offenses—first-degree sexual offense—crimes against nature—penetration

The trial court erred in a first-degree sexual offense and crimes against nature case by failing to require the State to prove that penetration occurred. Although penetration is not a required element of first-degree sexual offense, it is for crimes against nature. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden and the crime against nature adjudications were reversed.

4. Jurisdiction—juvenile appeal of adjudication before disposition hearing—statutory interlocutory appeal

The trial court's disposition order in a juvenile case was vacated and remanded for a new disposition. The General Assembly permits a juvenile to appeal his adjudication before the disposition hearing if that hearing does not take place within 60 days after adjudication. Because an appeal divested the trial court of jurisdiction over the matter when the juvenile took a statutory interlocutory appeal of the adjudication under N.C.G.S. § 7B-2602, the trial court was divested of jurisdiction to modify the order or proceed to disposition during the pendency of the appeal.

Appeal by juvenile from adjudication order entered 14 May 2013 by Judge Regan A. Miller and from disposition order entered 23 January 2014 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins and Assistant Attorney General Kimberly N. Callahan, for the State.

Michelle FormyDuval Lynch, for juvenile-appellant.

DIETZ, Judge.

This juvenile case involves acts of oral sex between two boys, ages fourteen and seven. Fourteen-year-old J.F. convinced the seven-year-old victim to perform fellatio on him, and also performed fellatio on the victim. The trial court adjudicated J.F. delinquent on two counts of first-degree sexual offense and two counts of crime against nature.

On appeal, J.F. argues that the petitions charging him with these juvenile offenses were defective. J.F. also contends that there was insufficient evidence of sexual purpose and of penetration, which J.F. argues are essential elements of the charged offenses. Finally, in a separate appeal, J.F. challenges the terms of his disposition. On the State's motion, we consolidated the two appeals for purposes of decision.

We hold that the petitions in this case are sufficient, that sexual purpose is not an element of either charged offense, and that penetration is not an element of first-degree sexual offense. Accordingly, we affirm the adjudication on the two first-degree sexual offense charges.

However, we must reverse the two adjudications for crime against nature. Our case law requires penetration as an element of the crime against nature offense. Here, the victim testified that there was no penetration and that the two merely "licked" each other's genitalia. As a result, we are constrained to reverse the two crime against nature adjudications.

Accordingly, we affirm the trial court's adjudication order on the two counts of first-degree sexual offense; we reverse the trial court's adjudication order on the two counts of crime against nature; and we vacate the trial court's disposition order and remand for a new disposition.

Facts and Procedural History

On 20 or 21 July 2012, M.H. and J.F. were playing together at the home of M.H.'s grandmother, Mrs. Johnson. Mrs. Johnson was J.F.'s foster mother. At the time, M.H. was seven years old and J.F. was fourteen years old. The two boys were alone in the open loft area of the Johnson home when J.F. asked M.H. to "suck" his penis. M.H. stated that he refused to suck J.F.'s penis, but after J.F. kept asking, M.H. did "lick" it. J.F. then licked M.H.'s penis. After this incident occurred, M.H. returned home, but he did not tell his mother or grandmother what had happened.

The following Sunday, M.H. approached his mother and asked, "why don't I have hair on my guts like [J.F.]?" "Guts" is a word that M.H. used to describe his genitalia. When his mother asked him how he knew this about J.F., M.H. told her that J.F. "asked me to suck his guts." M.H. said that he didn't do it because he knew it was wrong, but that J.F. kept asking

him to "suck it like you're sucking a straw." M.H.'s mother immediately went to Mrs. Johnson's house to tell her what had happened. On the way, M.H.'s mother contacted the police and had them meet her there.

The State filed petitions against J.F. on 14 November 2012 for two counts of first-degree sexual offense, two counts of crime against nature, and one count of indecent liberties between children. The trial court held a delinquency hearing on 14 May 2013. At the close of the evidence, J.F.'s counsel moved to dismiss all of the charges, arguing that the petitions were defective and that the State had failed to produce evidence of all required elements for each offense.

The trial court granted the motion to dismiss the indecent liberties between children charge on the ground that there was insufficient evidence of sexual purpose, a required element of that offense. But the court denied the motion to dismiss on the two counts of first-degree sexual offense and the two counts of crime against nature, concluding that the petitions were not defective and that there was sufficient evidence to support those four charges.

The trial court adjudicated J.F. delinquent on 14 May 2013. On 15 July 2013, before the disposition hearing occurred, J.F. filed an interlocutory appeal from the adjudication order under N.C. Gen. Stat. § 7B-2602 (2013). The trial court proceeded with the case and entered a disposition order on 23 January 2014. J.F. then filed notice of appeal from the disposition order on 30 January 2014. On the State's motion, this Court consolidated the two appeals for hearing.

Analysis

I. Sufficiency of the Juvenile Petitions

[1] J.F. first argues that the trial court erred in denying his motion to dismiss on the ground that the petitions were defective. Specifically, J.F. contends that "the petitions do not give him enough actual notice for the crimes he is alleged to have committed, and whether it was during one setting or one period of time or more, or one or two or more acts of fellatio." For the reasons that follow, we reject this argument and hold that the petitions are sufficient.

The sufficiency of a juvenile petition is a jurisdictional issue that this Court reviews *de novo*. *In re K.W.*, 191 N.C. App. 812, 813, 664 S.E.2d 66, 67 (2008). The petition in a juvenile action serves the same purpose as an indictment or other charging instrument in a criminal case. The petition "must contain a plain and concise statement asserting facts supporting *every element* of a criminal offense and the juvenile's commission

thereof with sufficient precision clearly to apprise the juvenile of the *conduct which is the subject of the allegation*." *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004) (quotation marks and ellipses omitted).

The sufficiency of a juvenile petition is evaluated by the same standards applied to indictments in adult criminal proceedings. *See In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). The general rule is that an indictment charging a statutory sexual offense will be sufficient if it is "couched in the language of the statute." *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

A petition charging first-degree sexual offense is sufficient if it alleges "that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid." N.C. Gen. Stat. § 15-144.2(b) (2013). It is not necessary to specify in the petition which particular sexual act was committed. *State v. Edward*s, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982).

Similarly, a petition charging a crime against nature involving a juvenile victim is sufficient if it states that "defendant did unlawfully, willfully and feloniously commit the infamous crime against nature with a particular man, woman or beast" and further alleges the age of the victim or otherwise indicates that the victim was a minor. *State v. O'Keefe*, 263 N.C. 53, 54, 138 S.E.2d 767, 768 (1964); *accord In re R.L.C.*, 361 N.C. 287, 296, 643 S.E.2d 920, 925 (2007).[1] Although it is necessary to "allege the person with or against whom the offense was committed," it is not necessary to identify "the manner in which [the offense] was committed." *O'Keefe*, 263 N.C. at 54, 138 S.E.2d at 768.

Applying this precedent, we hold that the four petitions in this case are sufficient to satisfy the applicable statutory and constitutional requirements. The petitions charging J.F with first-degree sexual offense follow the statutory language of N.C. Gen. Stat. § 14-27.4(a)(1) by stating that J.F. "did unlawfully, willfully and feloniously . . . [e]ngage in a sexual act with [M.H.], a child under the age of thirteen (13) years," identifying M.H. by his full name. The petitions also state that the "victim was 7," and one petition states that "juvenile performed fellatio on victim," while the other states that "victim performed fellatio on juvenile."

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1. The U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) narrowed the scope of our State's crime against nature statute. However, our Supreme Court has held that the crime against nature statute still applies to fellatio involving a juvenile. *In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925.

Under *Edwards*, these petitions provide sufficient details of the sex acts charged. 305 N.C. at 380, 289 S.E.2d at 362.

Likewise, the petitions charging J.F. with crimes against nature allege that J.F. "did unlawfully, willfully and feloniously . . . commit the abominable and detestable crime against nature with [M.H.]," again identifying M.H. by his full name. Like the first-degree sex offense petitions, these petitions also state that "victim was 7 years old," and one petition states that "victim performed fellatio on juvenile," while the other states that "juvenile performed fellatio on victim." Under *O'Keefe*, these petitions provide sufficient details of the sex acts charged. 263 N.C. at 54, 138 S.E.2d at 768.

J.F. also argues that, even if each petition is sufficient standing alone, they are defective when viewed together because "there is no specification if one or two acts of fellatio are alleged," and therefore the petitions "did not give [J.F.] enough actual notice for the crimes he is alleged to have committed." In other words, J.F. contends that he cannot know if the charges of first-degree sexual offense and crimes against nature refer to the same acts of fellatio or to multiple, separate acts.

We reject this argument because it is precluded by our case law. As explained above, when pleading these sex offenses, the State need not identify the particular sex acts involved or describe the manner in which they were performed. *See Edwards*, 305 N.C. at 380, 289 S.E.2d at 362; *O'Keefe*, 263 N.C. at 54, 138 S.E.2d at 768. If J.F. required more specific details about the factual circumstances underlying each charge in order to prepare his defense, he should have moved for a bill of particulars. *See In re K.R.B.*, 134 N.C. App. 328, 332, 517 S.E.2d 200, 202 (1999). Accordingly, we reject J.F.'s argument that the petitions were defective because they failed to provide sufficient details concerning the sex acts underlying the offenses.

J.F. next argues that the two petitions alleging that M.H. performed fellatio on J.F. are defective because the victim "was the actor" and therefore the petitions do not allege a crime by J.F. As explained below, we reject this argument as well.

The statute defining first-degree sexual offense does not require that the accused perform the sexual act *on* the victim, but rather that he "engage[] in a sexual act *with*" the victim. N.C. Gen. Stat. § 14-27.4(a) (2013) (emphasis added). Moreover, the statute under which J.F. was charged, N.C. Gen. Stat. § 14-27.4(a)(1), does not require that the sex acts involve force or be against the will of the victim; instead, the statute requires only that the victim is under 13 years of age and there is a

sufficient age differential between the accused and the victim. *Compare* N.C. Gen. Stat. § 14-27.4(a)(1), *with id.* § 14-27.4(a)(2) (requiring first-degree sexual offense involving adult victims to be "by force and against the will" of the victim). This conclusion is confirmed by *State v. Sweat*, in which our Supreme Court affirmed a defendant's conviction on two counts of first-degree sexual offense based on allegations that the juvenile victim performed fellatio on the defendant. 366 N.C. 79, 727 S.E.2d 691 (2012).

Likewise, nothing in the crime against nature statute requires that the accused be the one performing the sexual act. Our appellate courts repeatedly have upheld crime against nature adjudications in which the alleged victim performed fellatio on the accused. *See*, *e.g.*, *In re R.L.C.*, 361 N.C. at 296, 643 S.E.2d at 925; *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815 (2001). Accordingly, we reject J.F.'s arguments and hold that the petitions at issue in this appeal are not defective.

II. Evidence of Sexual Purpose

[2] J.F. next argues that the State failed to present evidence of "sexual purpose" with respect to the first-degree sexual offense and crime against nature charges. This "sexual purpose" language comes from the indecent liberties between children statute, which requires that the sex act be "for the purpose of arousing or gratifying sexual desire." N.C. Gen. Stat. § 14-202.2(a)(2) (2013).

The trial court dismissed the indecent liberties charge in this case because there was insufficient evidence that J.F. acted for the purpose of arousing or gratifying sexual desire. J.F. argues that we should judicially impose the same sexual purpose element on the remaining charges as well. We disagree.

This Court reviews *de novo* the question of what elements are required to prove a particular offense. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. When interpreting an unambiguous statute, courts "are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978). Relying on this precedent, our Supreme Court previously refused to read an age differential requirement into the crime against nature statute, although similar age differential provisions are included in other juvenile sex offense statutes. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924.

The reasoning of *R.L.C.* controls here. Neither the first-degree sexual offense statute nor the crime against nature statute contains a

sexual purpose requirement. *See* N.C. Gen. Stat. §§ 14-27.4(a)(1), 14-177. Because the General Assembly included this requirement in the indecent liberties statute, but omitted it from these other sex offense statutes, we must conclude that the omission was intentional. *See In re R.L.C.*, 361 N.C. at 294, 643 S.E.2d at 924. Simply put, this Court must give effect to each of the statutes as written; we do not have the power to add a sexual purpose element to an unambiguous criminal statute that does not contain one. Accordingly, we reject J.F.'s argument.

III. Evidence of Penetration

[3] J.F. next argues that the State failed to prove that penetration occurred. J.F. contends that penetration is an essential element of both first-degree sexual offense and crime against nature.

"We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quotation marks omitted). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986).

As an initial matter, we must address whether penetration is an essential element of these two offenses. As explained below, we hold that penetration is a required element of the offense of crime against nature, but that it is not a required element of first-degree sexual offense.

First-degree sexual offense requires a "sexual act." N.C. Gen. Stat. § 14-27.4(a). The term "sexual act" is defined by statute and includes "cunnilingus, fellatio, analingus, or anal intercourse." *Id.* § 14-27.1(4). It also includes "penetration, however slight, by any object into the genital or anal opening of another person's body." *Id.* This Court has explained that this definition encompasses two different types of sexual acts: "one which requires penetration by 'any object' into two specifically named bodily orifices, and one which the North Carolina courts have interpreted to require a touching." *State v. Johnson*, 105 N.C. App. 390, 392, 413 S.E.2d 562, 563 (1992). Fellatio falls into this latter, "touching" category. *See id.* Fellatio is "any touching of the male sexual organ by the lips, tongue, or mouth of another person." *State v. Smith*, 362 N.C. 583, 593, 669 S.E.2d 299, 306 (2008) (quotation marks omitted). Thus, in first-degree sexual offense cases involving fellatio, proof of penetration is

not required. *See id.*; *see also State v. Hoover*, 89 N.C. App. 199, 208, 365 S.E.2d 920, 926 (1988).

By contrast, penetration *is* a required element of the offense of crime against nature. As our Supreme Court has held, an essential element of crime against nature is "some penetration, however slight, of a natural orifice of the body." *State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (1961). "Proof of penetration of or by the sexual organ is essential to conviction." *Id.*; *see also In re R.N.*, 206 N.C. App. 537, 540, 696 S.E.2d 898, 901 (2010). As a result, we must determine whether the State presented sufficient evidence of penetration to support J.F.'s adjudication for the two crime against nature offenses.

There is no direct testimony of penetration in this proceeding. M.H. testified that the two boys were alone in the open loft area of the Johnson home when J.F. asked him to "suck" J.F.'s penis. In describing the incident, M.H. differentiated between J.F. asking him to "suck" his penis, which he refused to do, and to "lick" it, which he did. When asked to elaborate, M.H. explained that "lick" meant to touch it with his tongue. When asked directly whether J.F.'s penis went into his mouth, M.H. replied "just a tongue." Likewise, when asked about how J.F. touched M.H.'s penis, M.H. stated that J.F. only used his tongue and "lick[ed] it."

Our Court has held that nearly identical direct testimony was insufficient to establish penetration. *See In re R.N.*, 206 N.C. App. at 542, 696 S.E.2d at 902 (vacating crime against nature adjudication for insufficient evidence of penetration where the evidence merely showed that the juvenile "licked" the victim's "private area").

Although there is no direct evidence of penetration, the State argues that this Court should infer penetration based on surrounding circumstances, as we did in the 2001 case *In re Heil*, 145 N.C. App. 24, 550 S.E.2d 815. In *Heil*, a four-year-old victim performed an act of fellatio on an eleven-year-old juvenile. *See id.* at 26-27, 550 S.E.2d at 817-18. The four-year-old did not testify at the adjudication hearing. Instead, the State introduced the testimony of the victim's father, who described how the victim demonstrated what he had done by licking his mother's thumb. *See id.* The juvenile appealed his adjudication for crime against nature, arguing that there was insufficient evidence of penetration.

On appeal, this Court held that, based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth." *Id.* at 29-30, 550 S.E.2d at 820.

In re Heil is distinguishable in several ways. First, *Heil* relied on the close quarters in which the incident occurred in determining that an inference of penetration was reasonable. Here, both M.H.'s mother and grandmother testified that the loft where the incident occurred was an open area with no door. More importantly, unlike the four-year-old in *Heil*, who was unable to testify, seven-year-old M.H. testified to the details of the incident at the delinquency hearing. That testimony differentiated between acts involving penetration, which M.H. testified did not occur, and acts that merely involved licking or touching with the tongue.

In short, we do not believe the inference of penetration drawn in *Heil* appropriately can be drawn here. That inference conflicts with the victim's own direct testimony. Moreover, a key circumstantial factor relied upon in *Heil* to draw this inference—the small closet space where the incident occurred—is not present here. Because there was no direct evidence of penetration and insufficient evidence to infer penetration, the State failed to meet its evidentiary burden. As a result, we must reverse the crime against nature adjudications.

IV. Jurisdiction to Conduct Disposition Hearing

[4] Our decision to reverse the two crime against nature adjudications compels us to vacate and remand the disposition order. But we would have been required to vacate and remand that order in any event, because the trial court lacked jurisdiction over the disposition proceeding. We briefly address this jurisdictional issue to provide guidance to trial courts faced with similar situations in the future.

As a general matter, an appeal from a trial court order "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein." N.C. Gen. Stat. § 1-294 (2013). Thus, unless another statute provides otherwise, "[a]n appeal removes a cause from the trial court which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court." *Upton v. Upton*, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972). The statutes governing appeals in juvenile delinquency proceedings confirm this general rule. *See* N.C. Gen. Stat. § 7B-2606 (2013) (providing that in the event of an appeal, the trial court shall have the authority to modify or alter an adjudication order only after "affirmation of the order" by the appellate courts).

But there is an additional wrinkle in juvenile cases. The General Assembly permits a juvenile to appeal his adjudication *before* the disposition hearing (the juvenile equivalent of criminal sentencing) if that hearing does not take place within 60 days after adjudication. *See* N.C.

Gen. Stat. § 7B-2602. Because an appeal divests the trial court of jurisdiction over the matter, when a juvenile takes a statutory interlocutory appeal of the adjudication under section 7B-2602, the trial court is divested of jurisdiction "to modify the order or proceed to disposition during the pendency of the appeal." *In re Rikard*, 161 N.C. App. 150, 153, 587 S.E.2d 467, 469 (2003).

That is precisely what happened here. The trial court entered its adjudication order on 14 May 2013. No disposition was made within 60 days, and J.F. filed notice of appeal from the adjudication order under section 7B-2602 on 15 July 2013. The court later held a disposition hearing on 23 January 2014. As a result of the pending appeal, the trial court had no jurisdiction to conduct that disposition hearing.

In future juvenile delinquency cases where the disposition hearing occurs long after the adjudication, it may be prudent for trial courts first to determine whether the juvenile appealed the adjudication order. This will prevent a trial court from using its already limited time and judicial resources on a proceeding over which the court lacks jurisdiction.

Conclusion

For the reasons stated above, we affirm the trial court's adjudication order on the two counts of first-degree sexual offense; we reverse the trial court's adjudication order on the two counts of crime against nature; and we vacate the trial court's disposition order and remand for a new disposition consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and GEER concur.

IN RE J.R.W.

[237 N.C. App. 229 (2014)]

IN THE MATTER OF J.R.W.

No. COA14-657

Filed 18 November 2014

1. Termination of Parental Rights—right to appeal—guardian ad litem's motion to withdraw

Respondent had no right under N.C.G.S. § 7B-1001(a) to appeal the trial court's order entered on her assistive guardian ad litem's motion to withdraw. Further, even if respondent had had a right to appeal under section N.C.G.S. § 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it. Finally, even if the Court of Appeals had suspended its rules pursuant to N.C.R. App. P. 2, respondent's argument would have been moot.

2. Termination of Parental Rights—competency hearing—appointment of guardian ad litem

The trial court did not abuse its discretion in a termination of parental rights case by conducting the termination proceedings without first holding a hearing to determine whether a guardian ad litem should have been appointed for respondent mother. The record did not suggest that respondent's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she was non compos mentis and would be unable to aid in her defense at the termination of parental rights proceeding.

Appeal by Respondent-mother from order entered 27 March 2014 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 27 October 2014.

Mercedes O. Chut for Petitioner Guilford County Department of Health and Human Services.

Peter Wood for Respondent-mother.

Ellis & Winters LLP, by Lenor Marquis Segal, for guardian ad litem.

STEPHENS, Judge.

Respondent-mother ("Respondent") appeals from an order terminating her parental rights[1] to her minor child, "Joey."[2] Respondent does not challenge the order itself; instead, she argues that the trial court abused its discretion by conducting the termination proceedings without first holding a hearing to determine whether a guardian *ad litem* ("GAL") should have been appointed for her. After careful review of the record and in light of the recent revisions to N.C. Gen. Stat. § 7B-1101.1, which governs when a guardian *ad litem* must be appointed for a parent in a termination of parental rights ("TPR") hearing, we hold that the trial court did not abuse its discretion by not inquiring into Respondent's competency prior to holding the TPR hearing.

Facts and Procedural History

The record indicates that since 2008, Respondent has lost custody of six children, including Joey, due to a combination of Respondent's substance abuse issues, unstable housing, unemployment, and mental health problems. Prior to this matter, Respondent's parental rights were involuntarily terminated as to her three oldest children, and she relinquished her parental rights to her fourth child. On 13 July 2012, the Guilford County Department of Social Services ("DSS")[3] obtained nonsecure custody of Joey and his twin brother two days after their birth and filed petitions alleging they were neglected and dependent juveniles. After a hearing on 22 August 2012, the trial court entered an adjudication and dispositional order in which it concluded Joey and his brother were dependent juveniles, but dismissed the allegation of neglect. The court continued custody of Joey and his brother with DSS, directed DSS to continue to make reasonable efforts toward reunification of Joey and his brother with Respondent and their father, established case plans for Respondent and the father, and directed Respondent and the father to comply with their case plans and cooperate with DSS. The day after the hearing, Joey's brother died from an acute respiratory infection while in foster care.

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1. In her notice of appeal, Respondent also indicated her intent to appeal "the permanency planning order changing the plan to adoption filed 20 July 2013." However, this order does not appear in the record and Respondent does not address it in her brief.

2. For the purpose of protecting his privacy, in accordance with Rule 3.1 of our Rules of Appellate Procedure, we refer to the juvenile by a pseudonym in this opinion.

3. Although the Department of Social Services is now known as the Department of Health and Human Services, for ease of reading we refer to the agency throughout this opinion as "DSS."

Respondent initially worked with DSS on her case plan, and on 16 May 2013, the trial court appointed a GAL to assist her in the juvenile proceedings pursuant to the then-extant version of N.C. Gen. Stat. § 7B-1101.1(c), which provided for a GAL to be appointed for a parent "if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2011). While the record does not specifically indicate why a GAL was appointed here, there is no indication that substantial questions arose regarding Respondent's competency to participate in these proceedings.[4] Moreover, when Respondent's GAL filed a motion to withdraw on 19 September 2013, he indicated that he had been appointed only in an assistive capacity, and was withdrawing in light of our General Assembly's enactment of Session Law 2013-129, which eliminated the assistive GAL role for respondents with diminished capacity in TPR cases effective 1 October 2013. The trial court subsequently granted the motion to withdraw, although, perhaps due to a clerical error, it left several pre-printed boxes unchecked in its findings of facts and conclusions of law. Consequently, the court's order did not explicitly indicate: (1) whether there were substantial questions regarding Respondent's competency; (2) whether there was good cause to allow Respondent's GAL to withdraw; and (3) whether the GAL was merely assistive and should thus be permitted to withdraw pursuant to recent statutory changes without holding another hearing to determine if a new substitutive GAL should be appointed.

The record indicates that Respondent failed to make sufficient progress toward reunification, and by order entered 30 August 2013, the trial court modified the permanent plan to include adoption as well as reunification with a parent. DSS subsequently filed a motion to terminate the parental rights of Respondent and Joey's father on 30 September 2013. DSS alleged grounds to terminate Respondent's parental rights on the basis of neglect, failure to make reasonable progress to correct the conditions that led to Joey's removal from Respondent's home, failure to pay a reasonable portion of the cost of care for Joey, dependency, and the prior termination of her parental rights to other children. *See*

4. According to the trial court's Permanency Planning Review Hearing Order of 30 August 2013, Respondent, who was diagnosed with schizo-affective bipolar disorder in 2012, reported to a social worker in April 2013 that she occasionally heard voices and saw images that were not there; that resulted in the appointment of an assistive GAL in a separate TPR proceeding regarding her fourth-oldest child. There is no evidence in the record that the trial court ever appointed a substitute GAL in this or any prior proceeding involving Respondent or any of her children.

N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6), (9) (2013). By order entered 19 December 2013, the trial court relieved DSS of further reunification efforts, changed the permanent plan for Joey to adoption only, and directed DSS to continue making efforts toward finalizing the permanent plan of adoption. In its motion to terminate Respondent's parental rights, DSS acknowledged the previous appointment of a GAL for assistance but alleged that "[t]here is no evidence to suggest that the mother is incompetent." In her reply to the motion to terminate her parental rights, Respondent fully admitted to the allegation that there was no evidence to suggest she is incompetent. After a hearing on 11 February 2014, the trial court entered an order on 27 March 2014 terminating Respondent's parental rights to Joey.[5] The court concluded all five grounds alleged by DSS existed, and that termination of Respondent's parental rights was in Joey's best interest. Respondent appeals.

GAL Withdrawal Order

[1] Respondent first argues that the trial court's order entered on her assistive GAL's motion to withdraw is fatally deficient because it does not make adequate findings of fact or conclusions of law. Respondent, however, has no right to appeal this order under N.C. Gen. Stat. § 7B-1001(a) (2013) (limiting the orders which may be appealed in cases brought under Chapter 7B); *see also In the Matter of A.R.G.*, 361 N.C. 392, 646 S.E.2d 349 (2007) (demonstrating our Supreme Court's refusal to expand the bases for appellate review under section 7B-1001 and its predecessors). Further, even if Respondent did have a right to appeal under section 7B-1001(a), it would have been lost due to her failure to provide written notice within 30 days of her intent to exercise it as required by section 7B-1001(b). Respondent has not filed a petition for a writ of certiorari seeking review of the order under Rule 21 of our Rules of Appellate Procedure, and her argument is thus not properly before this Court. Finally, even if this Court were to suspend its rules pursuant to N.C.R. App. P. 2, Respondent's argument would be moot, and it is well-established that where an argument is moot, no appellate review should lie. *See*, *e.g.*, *Davis v. Zoning Bd. of Adjustment of Union Cnty.*, 41 N.C. App. 579, 582, 255 S.E.2d 444, 446 (1979) (dismissing appeal after finding that all questions raised had been rendered moot by amendments to the ordinance in question). Here, given the statutory changes to section 7B-1101.1 that went into effect on 1 October 2013, Respondent's assistive GAL would have been removed by operation of law with or without

5. Joey's father agreed to sign a general relinquishment of his parental rights at the start of the termination hearing.

a court order. Moreover, nothing in the record indicates that substantial questions had arisen regarding Respondent's competency sufficient to qualify her for a substitutive GAL when she had previously not qualified. Indeed, Respondent herself admitted in her reply to DSS's motion to terminate her parental rights that there is no evidence to suggest she is incompetent. Accordingly, Respondent's first argument is without merit.

GAL Inquiry

[2] Respondent next contends that the trial court abused its discretion when it did not conduct, on its own motion, an inquiry to determine whether she required a GAL before holding the hearing to terminate her parental rights. We disagree.

We review a trial court's determination of whether or not to appoint a GAL for a parent for abuse of discretion. *See In re M.H.B.*, 192 N.C. App. 258, 664 S.E.2d 583 (2008). "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511 (citation omitted), *affirmed per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Under the statutory changes that went into effect on 1 October 2013, section 7B-1101.1(c) of our General Statutes provides that, "[o]n motion of any party or on the court's own motion, the court may appoint a guardian *ad litem* for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013). North Carolina law defines an incompetent adult as one who

> lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2013). As noted above, although prior versions of section 7B-1101.1 also provided for the appointment of an

assistive GAL for a parent who suffers from diminished capacity, our General Assembly eliminated that provision when it revised the statute.

In the present case, Respondent contends that due to her history of mental health problems, the trial court should have conducted an inquiry into her competence and need for a GAL in the termination proceedings. In support of her argument, Respondent relies on case law decided under prior versions of section 7B-1101.1(c), such as *In re N.A.L.*, 193 N.C. App. 114, 666 S.E.2d 768 (2008), which she contends supports the proposition that allegations of mental health issues should trigger a GAL inquiry. Essentially, the crux of Respondent's argument boils down to the notion that if her mental health history rendered her incompetent as a parent, it must also have rendered her incompetent as a litigant.

However, this argument ignores the fact that mental health was just one of several bases for the court's TPR order. It also appears to erroneously conflate the circumstances generating incapacity to provide appropriate care and supervision of a juvenile with the circumstances that establish a parent's lack of capacity to manage her own affairs or act in her own interest during termination proceedings. We note that these are two separate concepts with their own specific standards, and conflating them ignores this Court's prior holdings that evidence of mental health problems is not per se evidence of incompetence to participate in legal proceedings. *See, e.g.*, *In re S.R.*, 207 N.C. App. 102, 698 S.E.2d 535, *disc. review denied*, 364 N.C. 620, 705 S.E.2d 371 (2010) (concluding the trial court did not abuse its discretion in not appointing a guardian *ad litem sua sponte* where, even though the mother suffered from substance abuse and mental health issues, there was no indication that she was incompetent or had a diminished capacity); *Soderlund v. Kuch*, 143 N.C. App. 361, 546 S.E.2d 632, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 438 (2001) (holding that a mentally ill adult was not necessarily legally incompetent).

Much of Respondent's argument relies on cases, such as *N.A.L.*, that were decided under earlier iterations of section 7B-1101.1(c), which required appointment of GALs for parents who suffered from diminished capacity in addition to GALs for those who are incompetent. Indeed, prior versions of the controlling statute once contained language that required a trial court to appoint a guardian *ad litem* any time a TPR petition alleged incapability to care for the juvenile due to substance abuse, mental retardation, mental illness, or organic brain syndrome. However, that language was deleted when section 7B-1101.1 was enacted in 2005, *see* 2005 N.C. Sess. Laws 398 § 14, and the current version of section 7B-1101.1(c) is far narrower in its requirements. In fact, nothing in the

statute's plain language requires the trial court to conduct an inquiry to determine whether a GAL should be appointed for a parent merely because of her mental health history. Although our General Assembly could have revised the statute to reinstate this requirement in 2013, it chose not to do so. Instead, as it stands, the statute vests discretion in the trial court, which *may* hold a hearing on appointing a GAL only for a parent who is incompetent.

Here, despite Respondent's claims to the contrary, the record establishes both that the severity of her mental health problems was well known to the trial court, and that those issues did not rise to the level of incompetency. On the one hand, the fact that Respondent attended all but one of the hearings related to this matter gave the trial court ample opportunity to observe and evaluate her capacity to act in her own interests. Moreover, although the record contains no evidence that Respondent could not "manage [her] own affairs" or "make or communicate important decisions," *see* N.C. Gen. Stat. § 35A-1101(7), it does include facts in keeping with a finding of competency.

For example, Respondent successfully transitioned from living at a shelter when Joey was born to living by herself in an apartment through a supportive housing program in July 2012, where she resided through the date of the termination hearing. Respondent also enrolled in a GED program and attended a vocational rehabilitation program. Although the fact that Respondent's application for Social Security disability benefits was denied is by no means conclusive proof of her competency, it does provide some evidence to support such a finding. Respondent regularly visited Joey, where she functioned as a parent and exhibited no instances of poor judgment. Additionally, in August 2012, Respondent asked to participate in the Juvenile Court Infant Toddler Initiative and completed the Positive Parenting Program in February 2013. Respondent does not suggest that her mental health problems worsened between the release of her GAL in September 2013 and the hearing to terminate her parental rights on 11 February 2014. In sum, the record does not suggest that Respondent's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she is *non compos mentis* and would be unable to aid in her defense at the termination of parental rights proceeding.

Accordingly, we hold that the trial court did not abuse its discretion when it did not, on its own motion, inquire into Respondent's competency before holding the hearing to terminate her parental rights. Respondent does not challenge the grounds found to terminate her parental rights or the trial court's conclusion that termination of her parental rights is in

Joey's best interest. Thus, the trial court's order terminating her parental rights to Joey is

AFFIRMED.

Judges GEER and McCULLOUGH concur.

IN THE MATTER OF N.G.H.

No. COA14-621

Filed 18 November 2014

Jurisdiction—subject matter—standing—termination of parental rights

Petitioners' failure to include a copy of the petition to adopt in the record in a termination of parental rights case deprived the trial court of subject matter jurisdiction. Because the district court lacked jurisdiction, the order terminating respondent mother's parental rights was vacated without prejudice to petitioners' right to file a new petition alleging facts that would show they had standing to bring the action.

Appeal by Respondent-mother from order entered 12 March 2014 by Judge R. Russell Davis in Pender County District Court. Heard in the Court of Appeals 27 October 2014.

Corbett & Fisler, by Robert H. Corbett, for Petitioners.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for Respondent-mother.

STEPHENS, Judge.

Respondent-mother appeals from an order terminating her parental rights to her minor child, N.G.H.,[1] who was born in January 2012. Petitioners, a cousin of Respondent-mother and his wife, filed a petition to terminate Respondent-mother's parental rights on 5 August 2013.

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1. We refer to the juvenile by her initials in order to protect her identity.

Respondent-mother contends that the order must be vacated because Petitioners failed to establish that they had standing to file the petition. "Whether petitioner had standing is a legal issue that this Court reviews *de novo*." *In re A.D.N.*, ___ N.C. App. ___, ___, 752 S.E.2d 201, 205 (2013) (italics added), *disc. review denied*, ___ N.C. ___, 755 S.E.2d 626 (2014). Standing to file a legal proceeding is a matter of subject matter jurisdiction, and "[i]ssues of subject matter jurisdiction may be raised at any time, including on appeal." *Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 267, 546 S.E.2d 110 (2000). Standing to file a petition or motion to terminate parental rights is conferred by N.C. Gen. Stat. § 7B-1103. *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004). A petition or motion must state "[t]he name and address of the petitioner or movant and facts sufficient to identify the petitioner or movant as one authorized by [section] 7B-1103 to file a petition or motion" to terminate parental rights. N.C. Gen. Stat. § 7B-1104(2) (2013). The petition must include any document or order through which the petitioner claims standing that will enable the court to determine whether it has subject matter jurisdiction. *In re T.B.*, 177 N.C. App. 790, 793, 629 S.E.2d 895, 897-98 (2006).

Petitioners submit that they have standing because they have filed a petition to adopt the child. *See* N.C. Gen. Stat. § 7B-1103(7) (2013) (stating that "[a]ny person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes" has standing to file a petition to terminate parental rights). We are unable, after careful examination of the petition, to find any factual allegation therein that Petitioners have filed a petition for adoption pursuant to Chapter 48. No petition for adoption is attached to the termination of parental rights petition or referenced therein.

On appeal, Petitioners concede that the petition is deficient. However, they contend that "matters outside the pleadings, such as [a] contract attached to [a] defendant's motion [to dismiss for lack of subject matter jurisdiction], may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter." *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978) (citation omitted). Tart, however, concerned a contract dispute, not a petition for termination of parental rights filed under Chapter 7B. *See id.* In *In re T.B.*, we held

> that, where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the

> petition is filed, that awards DSS custody of the child. This is implicitly recognized by N.C. Gen. Stat. § 7B-1104(5) . . ., which sets out the requirements for a petition for termination of parental rights, and provides in relevant part that the petition shall set forth . . . (5) The name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion.

177 N.C. App. at 793, 629 S.E.2d at 897-98 (citation and internal quotation marks omitted; emphasis in original). Likewise, section 7B-1104 also requires that a petition for termination of parental rights must include, *inter alia*, "[t]he name and address of the petitioner or movant and *facts sufficient to identify the petitioner or movant as one authorized by* [*section*] *7B-1103 to file a petition or motion*." N.C. Gen. Stat. § 7B-1104(2). This Court has upheld orders terminating parental rights in cases where petitions failed to allege or prove standing, but only where the required documentation, such as a custody order, was later filed and made part of the record. *See*, *e.g.*, *In re H.L.A.D.*, 184 N.C. App. 381, 390-92, 646 S.E.2d 425, 429-30 (2007) (rejecting a challenge to the petitioners' standing where, although [the] petitioners failed to attach a copy of the custody order to the petition for termination, the custody order was later made part of the record before the trial court, and the mother failed to show that she was prejudiced in any way by the failure to physically attach a custody order to the motion), *affirmed per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); *In re W.L.M.*, 181 N.C. App. 518, 526, 640 S.E.2d 439, 444 (2007) (rejecting a challenge to the trial court's subject matter jurisdiction where no custody order was attached to the petition, but "the motion to terminate [the] respondent's parental rights incorporated by reference the juvenile file and custody order in effect when the motion was filed.").

Petitioners note that, at the termination hearing, one of them testified that the Petitioners had "contemporaneous[ly] . . . filed an action for adpotion[.]" However, no testimony established that any adoption petition was filed pursuant to Chapter 48 or that Petitioners had standing to file an adoption petition under Chapter 48. The petition to terminate Respondent-mother's parental rights did not incorporate by reference any adoption petition, and no copy of any adoption petition was ever filed in this matter. Petitioners' failure to include a copy of the petition to adopt in the record "ultimately deprived the [district] court of subject matter jurisdiction." *See In re T.B.*, 177 N.C. App. at 793, 629 S.E.2d at

898. Because the district court lacked subject matter jurisdiction, the order terminating Respondent-mother's parental rights must be vacated without prejudice to Petitioners' right to file a new petition alleging facts that would show they have standing to bring that action. *See id.* Accordingly, the order terminating Respondent-mother's parental rights is

VACATED.

Judges GEER and McCULLOUGH concur.

IN THE MATTER OF T.L.H.

No. COA14-549

Filed 18 November 2014

Termination of Parental Rights—appointment of GAL—mother with substance abuse and mental health issues

The trial court abused its discretion in a termination of parental rights case by not conducting an inquiry into whether it was necessary to appoint a guardian ad litem (GAL) for a mother who had a substance abuse history and was schizophrenic. Although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into the need for a GAL.

Judge HUNTER, Robert C., dissenting.

Appeal by respondent mother from order entered 4 February 2014 by Judge Tabatha Holliday in Guilford County District Court. Heard in the Court of Appeals 6 October 2014.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

J. Thomas Diepenbrock for respondent-appellant mother.

Parker Poe Adams & Bernstein, LLP, by Sye T. Hickey, for guardian ad litem.

ELMORE, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights to the juvenile T.L.H. Respondent contends the trial court abused its discretion by failing to inquire into whether it was necessary to appoint her a guardian *ad litem* (GAL), when the allegations supporting termination of her rights were focused on her serious mental health disorders. We reverse the order terminating respondent's parental rights and remand for a hearing to determine whether respondent requires a GAL.

I. Background

In addition to the juvenile T.L.H., who was born in 2013, respondent has two older children who were removed from her care. The Guilford County Department of Health and Human Services (DHHS) became involved with this juvenile at the time of the juvenile's birth, after respondent informed the hospital that she had no place to take the juvenile and a hospital psychiatrist evaluated respondent and determined the juvenile would not be safe with her. Respondent has a substance abuse history and is schizophrenic. According to DHHS, respondent "has a history of substance abuse and has diagnoses of schizophrenia, chronic paranoid type, chronically noncompliant, marijuana dependence, personality disorder," and DHHS stated it needed to "rule out borderline intellectual functioning." Respondent requested that DHHS "take custody of [the juvenile] until [respondent] could obtain her own housing and other things needed for her and her baby."

On 12 April 2013, DHHS filed a petition alleging the juvenile was neglected and dependent, and the juvenile was placed in non-secure custody. The petition alleged that respondent had "a substance abuse history and is schizophrenic and has poor mental health compliance;" respondent had two children removed from her care due to substance abuse, domestic violence and her unresolved mental health issues; and respondent was hospitalized on several occasions in the past year due to mental health complications.

Deputy County Attorney Robert W. Brown, III requested that the trial court appoint respondent a GAL at an 18 April 2013 hearing to determine the need for the continued nonsecure custody of the juvenile. Judge Betty Brown (Judge Brown) appointed attorney Amy Bullock as respondent's GAL on that date. Judge Brown did not indicate whether the GAL was appointed in a substitutive capacity or an assistive capacity. The trial court dismissed the neglect allegation but adjudicated the

juvenile dependent in an order entered 5 June 2013. The order also relieved DHHS of the duty to make reasonable efforts toward reunification, although it permitted DHHS to continue to make such efforts.

The matter came on for a permanency planning hearing on 11 July 2013, and respondent testified at the hearing. The trial court changed the permanent plan for the juvenile to adoption. On 9 September 2013, DHHS filed a petition to terminate the parental rights of respondent and the juvenile's unidentified father. As grounds for termination of respondent's rights, the petition alleged: (1) neglect; (2) dependency; and (3) respondent's rights to another child had previously been terminated and she lacked the ability to establish a safe home. N.C. Gen. Stat. § 7B-1111(a)(1, 6, 9) (2013). A pretrial hearing was conducted before Judge Thomas Jarrell (Judge Jarrell), following which Judge Jarrell entered an order on 19 November 2013 stating: "Attorney Amy Bullock was released by operation of law effective October 1, 2013 as [respondent's] guardian ad litem attorney of assistance." Respondent proceeded in this matter without the assistance of a GAL. The case came on for a termination hearing on 6 January 2014. Respondent was not present for the hearing, and her attorney made a motion to continue on her behalf. According to the attorney, he had been unable to send respondent notice of the hearing because she had moved and DHHS had not provided him with her new address. The attorney had sent correspondence to respondent's former address in November and December of 2013. DHHS contended that a social worker had informed respondent of the termination hearing date and that respondent had not been present for any court dates since the July permanency planning hearing. The trial court denied the motion to continue, and terminated respondent's parental rights based on all three grounds alleged in the petition. The trial court's order also terminated the parental rights of the juvenile's unidentified father. Respondent appeals.

II. Appointment of GAL

In her sole argument on appeal, respondent contends the trial court abused its discretion by failing to conduct an inquiry into whether it was necessary to appoint her a guardian ad litem. We agree.

In 2013, our General Assembly enacted amendments to Article 11 of the Juvenile code that apply to all proceedings occurring on or after 1 October 2013. 2013 N.C. Sess. Laws 129, §§ 32, 42. N.C. Gen. Stat. § 7B-1101.1(c) no longer allows the trial court to appoint a GAL for a parent with diminished capacity. Instead, subsection (c) specifies: "On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with

G.S. 1A-1, Rule 17." As such, N.C. Gen. Stat. § 7B-1101.1 now contemplates the appointment of a GAL only for the substitution for a parent who is incompetent in accordance with N.C. Gen. Stat. 1A-1, Rule 17. N.C. Gen. Stat. § 7B-1101.1 (2013).

In line with this amendment is the well-settled rule that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). "Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.* (citation and quotation omitted). Thus, although a dependency allegation no longer automatically triggers appointment of a GAL, allegations of mental health problems that raise a question regarding a parent's competence require the trial court to inquire into whether a GAL need be appointed. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008). This Court has recently explained the process which must be followed in connection with the appointment of a parental guardian ad litem pursuant to N.C. Gen. Stat. § 7B-1101.1(c) as follows:

> [T]he trial court . . . must conduct a hearing in accordance with the procedures required under [N.C. Gen. Stat. § 1A-1,] Rule 17 in order to determine whether there is a reasonable basis for believing that a parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. If the court chooses to exercise its discretion to appoint [a guardian ad litem] under N.C. Gen. Stat § 7B-1101.1(c), then the trial court must specify the prong under which it is proceeding, including findings of fact supporting its decision, and specify the role that the [guardian ad litem] should play, whether one of substitution or assistance.

In re P.D.R., ___ N.C. App. ___, ___, 737 S.E.2d 152, 159 (2012). There is no record evidence that Judge Brown conducted a hearing to determine in what capacity respondent's GAL would serve. In the present case, "the record clearly reflects that the trial court failed to delineate the precise role to be played by Respondent-Mother's guardian ad litem during the termination proceeding as required by N.C. Gen. Stat. § 7B-1101.1(c)." *In re B.P.*, ___, N.C. App. ___, 748 S.E.2d 773, 2013 WL 3379659 at *7 (2013). Though Judge Jarrell indicated that he believed respondent's GAL was serving in an assistive capacity, there is no record evidence

that he conducted any hearing before making the determination. We believe *B.D.* and *P.D.R.* required that he do so before removing respondent's GAL.

To illustrate the effect of the amendment, we look to an unpublished opinion recently authored in this Court, *In re* H.B., 762 S.E.2d 1 (N.C. Ct. App. 2014). *In re* H.B., the respondent-mother argued that the trial court erred in failing to inquire as to whether she needed a GAL based on the fact that the trial court had before it evidence of her diminished capacity and because, at the time of the termination hearing, N.C. Gen. Stat. § 7B-1101.1(c) (2011) authorized the appointment of a GAL based on evidence of incompetency and/or diminished capacity. This Court noted that, as amended, N.C. Gen. Stat. § 7B-1101.1, applied to any future proceedings occurring on or after 1 October 2013. *Id.* Given that the termination order was entered after the amendment date, we held that the record must have shown evidence of incompetency to require the trial court to consider whether to appoint a GAL in the cause. Because there was no such evidence in the record and because DHHS did not allege dependency as a ground for terminating the respondent's parental rights, we concluded the trial court did not err. *Id.*

In *In re N.A.L.*, the juvenile petition alleged that the juveniles were dependent and that the respondent-mother was "incapable of providing for the proper care and supervision of the minor child" because of her "problems in controlling her anger outbursts; her significant tendency to be aggressive towards others, including her child; and her lack of understanding of her prior neglect of the minor child." *N.A.L.*, 193 N.C. App. at 118-19, 666 S.E.2d at 771. Further, the respondent was also diagnosed as having Personality Disorder NOS and Borderline Intellectual Functioning. *Id.* In the order terminating the respondent's parental rights, the trial court found that she "has significant mental health issues which impact her ability to parent this child and meet his needs." *Id.* at 119, 666 S.E.2d at 771. Despite DHHS's allegations and its own findings of mental health issues, the trial court did not inquire whether the appointment of a GAL was appropriate. On appeal, the respondent-mother argued, and we agreed, that the trial court should have "properly inquired into" the respondent's competency pursuant to N.C. Gen. Stat. § 1A-1, Rule 17 to determine whether she was a candidate for the appointment of a GAL. *Id.* at 119, 666 S.E.2d at 771-72.

Here, respondent challenges the trial court's failure to inquire into her need for a GAL based on the evidence of her incompetency and the DHHS petition alleged dependency as a ground for termination. As in *In re N.A.L.*, the allegations against respondent in this case partly revolve

around respondent's multiple, serious mental health conditions. DHHS alleged that respondent had schizophrenia, had poor mental health compliance, and was not taking her medication. A hospital psychiatrist evaluated respondent and determined that "there was no way this newborn child can be safe with this mother." DHHS also noted that respondent's parental rights to her two other biological children were terminated, in part, due to her unresolved mental health issues. In the petition to terminate respondent's parental rights filed 9 September 2013, DHHS requested that the trial court make an inquiry to determine whether a guardian was necessary to proceed with the termination. There is no indication in the record, however, that the trial court ever made such an inquiry at the termination stage. The petition also noted that respondent's mental illness was one of the facts that led to the juvenile's removal to DHHS custody, and that respondent received Social Security benefits based on her mental health diagnoses.

In the termination order, the trial court made the following findings of fact:

> 16. The mother has been diagnosed with Bipolar Disorder, Schizophrenia, Schizo-Affective Disorder, and Narcolepsy. The mother also has a long history of failing and refusing to take her mental health medications as prescribed and recommended. As a result of the Narcolepsy, the mother falls asleep unexpectedly and may remain asleep for hours. The mother has also been diagnosed with Cannabis Dependence, has a long history of the same, tested positive for Marijuana, and failed to submit to a substance abuse assessment as requested.
>
> . . . .
>
> 26. The mother's mental illness, consistent refusal to comply with mental health medications, narcolepsy, and [Cannabis] Dependence render the mother incapable of providing proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of N.C.G.S. § 7B-101. These conditions contributed to the juvenile being removed from the home and the dependency adjudication on May 16, 2013. The mother's long history of the same conditions despite [DHHS] intervention in 2000 and 2004 evidences a reasonable probability that such incapability will continue for the foreseeable future. The mother has failed to come forward with an appropriate alternative child care arrangement.

Given the serious nature of respondent's multiple ongoing mental health conditions, the trial court's reliance on those conditions to support grounds to terminate her parental rights, and the probable impact of respondent's mental health status on her ability to participate in the proceedings, we believe the record demonstrates that the trial court abused its discretion by failing to conduct an inquiry into respondent's competency and the need for a guardian *ad litem*. *See In re N.A.L.*, 193 N.C. App. at 119, 666 S.E.2d at 772 (trial court erred by failing to make inquiry in light of evidence raising issues of respondent's competence). There was evidence before Judge Brown which could reasonably have allowed her to appoint the GAL in a substitutive capacity, but Judge Brown failed to make the determinations required by *P.D.R.*, *supra*. There is no record evidence that Judge Jarrell conduced a hearing pursuant to *P.D.R.* In light of this evidence, we remand for the purpose of determining respondent's "need for a GAL and the proper role of that GAL." *P.D.R.*, ___, N.C. App. at ___, 737 S.E.2d at 159, and "conducting any additional proceedings that might be needed dependent upon the determination made at that time." *B.P.*, ___ N.C. App. at ___, 748 S.E.2d 773, ___, 2013 WL 3379659 at *7. Accordingly, we reverse the termination order as to respondent, and remand for a hearing for the trial court to determine whether respondent is in need of a GAL.

Reversed and remanded.

Chief Judge McGEE concurs.

HUNTER, Robert C., dissenting.

Because I believe that the record shows that the trial court did not abuse its discretion in failing to inquire as to respondent's competency at the termination hearing, I must respectfully dissent.

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013). Although the statute formerly allowed the trial court to appoint a GAL for a parent who was incompetent or had diminished capacity, it was amended in October 2013 to delete language permitting appointment of GALs for parents who have diminished capacity. The statute now only allows appointment of a GAL for incompetent parents. An incompetent adult:

> [L]acks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions

> concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A-1101(7) (2013).

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). "Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.* "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010).

Previously, a trial court was required to appoint a GAL when the petition alleged dependency as a ground to terminate the parent's rights. *In re J.D.*, 164 N.C. App. 176, 180, 605 S.E.2d 643, 645, *disc. review denied*, 358 N.C. 732, 601 S.E.2d 531 (2004). However, a dependency allegation no longer automatically triggers appointment of a GAL, although allegations of mental health problems may still require the trial court to inquire into appointment of a GAL. *In re N.A.L.*, 193 N.C. App. 114, 118-19, 666 S.E.2d 768, 771-72 (2008).

On appeal, respondent contends that the "trial court . . . had a duty to properly inquire whether [respondent] was incompetent, and required the appointment of a guardian ad litem. The trial court's failure to conduct such an inquiry is an abuse of discretion and requires reversal." Citing respondent's mental illness and failure to comply with treatment, respondent alleges that there was a substantial question as to respondent's competency. For the following reasons, I disagree.

To resolve whether the trial court abused its discretion, I believe it is necessary to detail the procedural history of the case prior to the termination stage. Based on the allegations in the juvenile petition filed 12 April 2013, the trial court appointed Amy Bullock as respondent's provisional GAL at the first hearing on the petition. At the time, the trial court exercised its then-existing authority under section 7B-1101.1(c) to appoint a GAL for a parent with diminished capacity. Respondent's GAL assisted respondent in a number of hearings including the adjudication

and disposition hearing on 16 May 2013, the permanency planning hearing on 11 July 2013, and the pretrial hearing on 18 November 2013. It was only after the statute change in October 2013 that the trial court released the GAL, noting that a parent with diminished capacity was no longer entitled to a GAL.

Furthermore, I disagree with the majority's conclusion that the record demonstrates respondent's incompetency to such a level that its failure to conduct another inquiry as to her competency once the statute changed constituted an abuse of discretion. In contrast, while I do believe that the evidence would support a finding of diminished capacity, I cannot say that the evidence rose to such a level that the trial court abused its discretion. As discussed, the trial court initially appointed the GAL based on its finding of diminished capacity but released the GAL once the statute changed in October 2013. Implicit in this decision is that the trial court concluded that respondent was not incompetent as of October 2013; otherwise, the trial court would not have dismissed the GAL despite the statute change. Thus, the issue is whether the trial court was presented with sufficient evidence that respondent was incompetent to render the failure to conduct an inquiry at the termination hearing an abuse of discretion.

"[A] person with diminished capacity is not incompetent, but may have some limitations that impair their ability to function." *In re P.D.R.*, __ N.C. App. __, __, 737 S.E.2d 152, 158 (2012). Therefore, the fact that respondent was initially appointed a GAL based on diminished capacity has little bearing on the determination of whether she was/is incompetent. As noted above, for purposes of a section 7B-1101.1(c) determination of whether a parent should be appointed a GAL, incompetency means that the parent is unable to manage her affairs or communicate important decisions due to, among other conditions, mental illness.

Respondent cites her mental health diagnoses as sufficient evidence requiring an inquiry into her competency, and it is undisputed that she has a long history of mental illness. However, respondent has identified no specific information in the record that indicates she is incapable of managing her own affairs due to her mental conditions, including in this termination matter. At the July 2013 permanency planning hearing, respondent testified that she began receiving social security benefits. When she received the first check, she used it to pay back rent and bills. In November 2013, respondent applied for and obtained new housing away from her boyfriend with whom she had a long history of domestic violence. In December 2013, she came to DSS and applied for new benefits. Finally, by releasing the GAL appointed based on the lower

threshold of diminished capacity, the trial court implicitly indicated that respondent is not incompetent. Accordingly, I am unable to conclude that the trial court's decision to release the GAL was so arbitrary that it could only have been the result of an unreasoned decision; since respondent exhibited some level of sufficiency at managing her affairs, I do not think the trial court abused its discretion in releasing the GAL.

Finally, the majority's reliance on *In re N.A.L.* is misplaced. There, despite allegations that the respondent had serious mental health issues, the trial court failed to conduct any inquiry as to whether she was entitled to a GAL under section 7B-1101.1(c). *In re N.A.L*, 193 N.C. App. at 119, 666 S.E.2d at 771. Therefore, the Court held that the trial court abused its discretion by failing to conduct any inquiry as to whether the respondent should be appointed a GAL. *Id.* at 119, 666 S.E.2d at 772.

However, unlike *In re N.A.L.*, here, the trial court actually appointed a GAL under section 7B-1101.1(c) based on the circumstances alleged in the juvenile petition that suggested that respondent had diminished capacity. It was only after the statute changed in October 2013 that the trial court released the GAL because parents with diminished capacity were no longer entitled to a GAL. Furthermore, *In re N.A.L.* was decided before N.C. Gen. Stat. § 7B-1101.1(c) changed. Thus, this Court had to determine whether the evidence was sufficient to raise a substantial question as to the respondent's incompetency and diminished capacity, a lesser standard than incompetency. *See generally In re P.D.R.*, __ N.C. App. at __, 737 S.E.2d at 158. Accordingly, *In re N.A.L.* is distinguishable from the present case and is not controlling.

Finally, I believe that the Court's recent decision in *In re H.B.*, No. COA13-1474, 2014 WL 2507835 (June 3, 2014) (unpublished), provides guidance, and I would adopt its reasoning. In *In re H.B.*, the trial court originally appointed the respondent a GAL prior to the adjudication hearings. *Id.* at *2. However, although the GAL participated in the hearings through the permanency planning review hearing, she did not attend any further hearings nor was there any indication in the record why she no longer participated. *Id.* On appeal, the respondent argued that the trial court abused its discretion by failing to inquire into her competency or diminished capacity because "nothing in the record indicate[d] that her need for a GAL had lessened." *Id.* After noting that her appeal as to diminished capacity was moot based on the change in N.C. Gen. Stat. § 7B–1101.1, this Court found no abuse of discretion as to the trial court's failure to inquire into her competency. *Id.* at *3.

Here, like *In re H.B.*, respondent was initially appointed a GAL before the statute changed in October 2013. However, once the statute changed, the trial court released the GAL, noting that parents with diminished capacity were no longer entitled to a GAL. Furthermore, I do not believe that respondent's circumstances had worsened to the extent that the trial court's decision to not inquire as to her competency at the later termination hearing was so arbitrary that it could not have been the result of a reasoned decision. In contrast, I believe that the evidence shows that her circumstances had improved. After the appointment of the GAL based on diminished capacity, respondent began receiving social security benefits, paid back bills and rent, applied for new benefits, and obtained new housing away from her boyfriend. Accordingly, I would find no abuse of discretion.

In sum, I believe that the trial court did not abuse its discretion by failing to re-inquire as to respondent's competency at the termination hearing. Although respondent clearly had a long history of mental illness, she was able to apply for and obtain new housing, apply for new benefits at DSS, and use her social security benefits to pay back rent and bills. Thus, given this evidence of competency, I am unable to say that the trial court's decision was so arbitrary that it could have only resulted from an unreasoned decision. Therefore, I would affirm the order terminating her parental rights.

ROBERT M. PHILLIPS, SR., THOMAS E. OSBORNE,
AND WIFE KAREN L. OSBORNE, PLAINTIFFS
v.
ORANGE COUNTY HEALTH DEPARTMENT, DEFENDANT

No. COA13-1463

Filed 18 November 2014

1. Parties—real party in interest—not raised at trial

Defendant consented to being treated as the real party in interest by declining to raise the issue before the trial court.

2. Jurisdiction—subject matter—necessary parties

The trial court did not lack subject matter jurisdiction based on the failure to join necessary parties because defendant did not raise the issue below, and because failure to join a necessary party does not negate a court's subject matter jurisdiction.

3. Declaratory Judgments—appropriate subject—justiciable issue—authority of county to inspect and charge fees

A case involving the authority of a county to inspect and to charge inspection fees for certain wastewater systems when those systems have already been permitted and inspected by the State was an appropriate subject for a declaratory judgment. A justiciable controversy existed even though the inspections plaintiffs complained about had already been completed because plaintiffs argued that defendant had no legal right to conduct those inspections.

4. Immunity—governmental—declaratory judgment action

The trial court did not lack subject matter jurisdiction in an action concerning a county's authority to inspect certain wastewater treatment systems after they had been inspected by the State based on plaintiffs' failure to allege waiver of governmental immunity. This was a declaratory judgment rather than a negligence action.

5. Administrative Law—exhaustion of remedies—statutory basis—wastewater treatment—local board of health rules

The trial court properly exercised subject matter jurisdiction in a case involving the authority of a county to inspect certain wastewater treatment facilities that had already been certified by the State. Although defendant further contended that plaintiffs had failed to exhaust administrative remedies, there were no prescribed administrative remedies available to plaintiffs.

6. Sewage—spray irrigation wastewater systems—authority of local health department

The trial court's conclusion that a county health department did not have the authority to inspect plaintiffs' spray irrigation wastewater systems was supported by the facts and by appropriate law. The statutes expressly created a different system of regulation for wastewater systems that discharge effluent onto the land surface.

7. Declaratory Judgments—county health department—authority to inspect

The trial court did not err in a declaratory action concerning a county health department's authority to inspect certain wastewater systems by failing to grant defendant county's motion to dismiss or to grant its motion for judgment on the pleadings. Plaintiffs' complaint set forth a justiciable claim and requested appropriate relief, and the trial court had subject matter jurisdiction over plaintiffs' complaint.

8. Sewage—wastewater treatment systems—local inspections—preemption by State

A health department facing a challenge to its authority to inspect certain waste water treatment systems was not entitled to judgment on the pleadings on its contention that it adopted more stringent rules for the regulation of plaintiffs' spray irrigation systems than required by the State. It was held elsewhere in the opinion that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs' wastewater systems.

9. Sewage—wastewater irrigation system—exclusive authority of State—summary judgment

The trial court did not err in granting plaintiffs' motion for summary judgment in an action involving the authority of a county health department to inspect certain wastewater systems. The parties indicated at the hearing that there were no genuine issues as to the material fact, and, by statute, only the State has the authority to regulate plaintiffs' spray irrigation systems.

10. Attorney Fees—declaratory judgment action—county's authority to inspect wastewater facility—award not an abuse of discretion

The trial court's award of attorneys' fees to plaintiffs was affirmed in an action involving the county's authority to inspection certain wastewater treatment facilities. The trial court had subject matter jurisdiction and its decision to award attorneys' fees was not so arbitrary that it could not have been the result of a reasoned decision.

Appeal by defendant from order entered 11 June 2013 by Judge George B. Collins in Orange County Superior Court. Heard in the Court of Appeals 4 June 2014.

Hoof Hughes Law, PLLC, by James H. Hughes, for plaintiff-appellees.

Orange County Attorney's Office, by Annette M. Moore, Jennifer Galassi, and John L. Roberts, for defendant-appellant.

CALABRIA, Judge.

The Orange County Health Department ("defendant") appeals from an order granting summary judgment and declaratory judgment in favor of Robert M. Phillips, Sr. ("Phillips"), Thomas E. Osborne ("Osborne"), and Karen L. Osborne (collectively, "plaintiffs"). The trial court found

(1) that defendant had no authority to inspect and charge fees for inspecting plaintiffs' wastewater systems; and (2) that defendant is statutorily preempted from regulating any wastewater treatment systems permitted by the North Carolina Department of Environment and Natural Resources ("NCDENR") under rules adopted by the North Carolina Environmental Management Commission ("EMC") pursuant to Article 21, Chapter 143 of the General Statutes of North Carolina. The court also awarded plaintiffs attorneys' fees. We affirm.

I. Background

Plaintiffs own properties in Orange County, North Carolina that failed perk tests, which determine whether land is suitable to percolate wastewater. Since the properties were determined to be unsuitable for traditional septic tank systems for wastewater disposal, plaintiffs' properties utilize "spray irrigation" wastewater systems designed to discharge effluent directly to the land surface ("spray irrigation system"). NCDENR is the agency that designed a method of advancing its statutory purpose of administering a complete program of water and air conservation, by issuing permits for property owners utilizing spray irrigation systems in North Carolina. *See* N.C. Gen. Stat. §§ 143-211(c); -215.1(a4) (2013).

On 18 April 1997 and 14 February 2005, plaintiffs obtained permits from NCDENR allowing them to use spray irrigation systems on their properties. The conditions of the permits were that the systems would be periodically inspected by NCDENR, and that plaintiffs would be billed and be responsible for paying NCDENR an "administering and compliance fee." Plaintiffs executed operation and maintenance agreements with NCDENR, indicating that they would maintain their spray irrigation systems in compliance with the permitted conditions.

Prior to the events of the instant case, Phillips received a notice of late inspection fees from defendant. When Phillips inquired into the matter, questioning defendant's authority to inspect and charge fees, defendant indicated that the Orange County Board of Health had approved a program "whereby all non-discharge systems permitted by the State . . . would be inspected on a periodic basis[,]" and that Phillips' spray irrigation system was subject to inspection.

Defendant subsequently attempted to inspect plaintiffs' spray irrigation systems. Osborne objected to an inspection of his spray irrigation system because the State of North Carolina had recently inspected it. Despite Osborne's objection in December 2011, defendant again attempted to inspect his spray irrigation system in January 2012. After

being deterred by a locked gate, defendant sent Osborne an incomplete inspection report and invoice, along with a request that he contact defendant to schedule an inspection appointment. On 15 March 2012, defendant received an inspection payment from Osborne, along with a letter indicating that "[p]ayment is made under protest and believe [sic] to be fraudulent."

Defendant encountered similar resistance from Phillips in its efforts to inspect his spray irrigation system. In July 2012, Phillips contacted defendant, indicating that he did not want his system inspected, and that he did not want any of defendant's employees on his property without his permission. Phillips and defendant subsequently corresponded regarding defendant's authority to inspect Phillips's spray irrigation system and charge fees for such inspections. In August 2012, defendant informed Phillips of a proposed date to inspect his spray irrigation system. Phillips indicated that he was unavailable on the proposed date and referred the matter to his attorney. However, Phillips stated that while he was amenable to the inspection being conducted while he was present, he refused to pay the accompanying fee.

On 16 November 2012, defendant sent letters to plaintiffs, requesting permission to enter plaintiffs' properties to inspect the spray irrigation systems and informing them that defendant would seek administrative inspection warrants if permission was not granted. Plaintiffs' counsel advised defendant of plaintiffs' position that defendant had no legal authority to conduct the requested inspections. Counsel further requested that defendant notify him should it seek administrative inspection warrants, so that he could object to the warrants at that time. Plaintiffs' counsel also noted that plaintiffs were amenable to supervised inspections, but that they would not pay fees for the inspections. On 28 November 2012, defendant sought and obtained administrative inspection warrants to complete inspections of both plaintiffs' spray irrigation systems. Defendant executed the warrants on 29 November 2012, and sent invoices to plaintiffs for inspection costs.

On 14 December 2012, plaintiffs filed a complaint seeking a declaratory judgment in Orange County Superior Court. Plaintiffs alleged, *inter alia*, that since plaintiffs' spray irrigation systems were permitted by NCDENR under rules adopted by the EMC, defendant had no right to inspect, or charge fees for inspecting, plaintiffs' systems. Plaintiffs sought to enjoin defendant from (1) conducting further inspections of plaintiffs' systems; or (2) taking any action to collect inspection fees for plaintiffs' systems. Plaintiffs also sought to recover attorneys'

fees from defendant, and to have defendant refund the inspection fees it had collected.

On 22 January 2013, defendant filed an answer, a motion to dismiss, and a motion for judgment on the pleadings. Plaintiffs filed a motion for summary judgment on 16 April 2013. After a hearing, the trial court entered an order finding that defendant was preempted by statute from regulating plaintiffs' type of wastewater treatment system and enjoining defendant from taking any action to collect fees from inspections that had already been conducted on plaintiffs' spray irrigation systems. The trial court also ordered defendant to refund Osborne's inspection fee, which he had paid under protest. Defendant appeals.

Defendant raises several issues on appeal, including (1) that the trial court lacked subject matter jurisdiction; (2) that the trial court erred in declaring that defendant was statutorily preempted from regulating wastewater systems permitted by NCDENR under rules promulgated by the EMC and had no right to inspect or collect fees for inspecting plaintiffs' wastewater systems; (3) that the trial court erred by granting summary judgment in favor of plaintiffs; (4) that the trial court erred by failing to grant defendant's motion to dismiss or its motion for judgment on the pleadings; and (5) that the trial court erred by awarding plaintiffs costs and attorneys' fees.

II. Subject Matter Jurisdiction

We first address defendant's jurisdictional claims. Specifically, defendant contends that the trial court lacked subject matter jurisdiction because (1) defendant is not the real party in interest; (2) necessary parties were not joined; (3) there was no justiciable claim; (4) plaintiffs' complaint was defective as a result of failing to allege a waiver of sovereign or governmental immunity; and (5) plaintiffs failed to exhaust their administrative remedies. We disagree.

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *New Bar P'ship v. Martin*, ___ N.C. App. ___, ___, 729 S.E.2d 675, 681 (2012) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

A. Real Party in Interest

[1] Defendant first contends that the trial court lacked subject matter jurisdiction because defendant is not a real party in interest. Specifically, defendant contends that it is not a real party in interest because the

enabling statutes of local health departments do not contain provisions for the capacity of health departments to sue or be sued.

As an initial matter, we note that defendant did not raise the issue of whether it was the real party in interest before the trial court. Where "th[e] question as to [defendant's] right to sue was not raised in the court below[,] . . . it is too late now to make this contention." *Asheville Safe Deposit Co. v. Hood*, 204 N.C. 346, 348, 168 S.E.2d 524, 526 (1933). Therefore, by declining to raise the issue before the trial court, defendant conceded to being treated as the real party in interest. Defendant's argument is without merit.

B. Joinder

[2] Defendant next contends that the trial court lacked subject matter jurisdiction because necessary parties were not joined in the instant case pursuant to N.C. Gen. Stat. § 1A-1, Rule 19.

"The defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal." *Sutton v. Messer*, 173 N.C. App. 521, 528, 620 S.E.2d 19, 24 (2005). In addition, "a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 573, 344 S.E.2d 789, 793, *disc. rev. denied*, 318 N.C. 418, 349 S.E.2d 601 (1986). Because defendant failed to raise this issue below, and because failure to join a necessary party does not negate a court's subject matter jurisdiction, *id.*, this argument is overruled.

C. Justiciability

[3] Defendant next contends that plaintiffs have no justiciable claim because the inspections that plaintiffs are complaining about have already been completed, and the next inspections are not scheduled to occur until November 2015. Defendant is mistaken.

"[C]ourts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation appears unavoidable." *Wendell v. Long*, 107 N.C. App. 80, 82-83, 418 S.E.2d 825, 826 (1992) (citations omitted).

Plaintiffs' complaint includes other issues in addition to the already completed inspections. Specifically, it includes the reimbursement of the fees that were paid for the inspections as well as an injunction

to prevent any further inspections and fees. The affidavits submitted to obtain the administrative warrants indicate that plaintiffs' wastewater systems are subject to inspection every three years, meaning that defendant intends to continue the inspections in the future. Although defendant has already completed the currently contested inspections, there is no authority for defendant to continue doing so in the future. Because plaintiffs argue that defendant had no legal right to conduct the inspections it has already completed, a justiciable controversy exists. Moreover, the very purpose of a declaratory judgment is to "make certain that which is uncertain and secure that which is insecure." *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 802 (1971) (citation omitted). Because it is uncertain whether defendant may inspect and charge fees for inspecting wastewater systems when such systems have already been permitted and inspected by the State, this question is an appropriate subject under the Uniform Declaratory Judgment Act.

D. Sovereign/Governmental Immunity

[4] Defendant further contends that the trial court lacked subject matter jurisdiction because plaintiffs failed to allege that defendant had waived sovereign or governmental immunity in its complaint.

"Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (citation omitted). A complaint fails to state a cause of action where it fails to allege that immunity has been waived. *See, e.g.*, *In re Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 567, 665 S.E.2d 760, 765-66 (2008) (holding trial court did not err by granting summary judgment in favor of defendants where plaintiffs' complaint failed to allege a waiver of governmental immunity).

Local boards of health derive their powers from the counties in which they sit. *See* N.C. Gen. Stat. § 130A-34 (providing that counties "shall operate a county health department, establish a consolidated human services agency, . . . participate in a district health department, or contract with the State for the provision of public health services."). As such, any action against a local board of health, as an agency of the county, is an action against the county for the purposes of governmental immunity.

It is true that plaintiffs failed to allege that appellant had waived governmental immunity in their complaint. However, the complaint

in the instant case is a declaratory judgment action, not a negligence action. Although defendant enjoys governmental immunity, such immunity does not bar the claims brought by plaintiffs in the instant case. Therefore, this argument is overruled.

E. Exhaustion of Administrative Remedies

[5] Defendant further contends that, because plaintiffs failed to exhaust the administrative remedies available to them pursuant to N.C. Gen. Stat. § 130A-24(b) (2013), the trial court lacked subject matter jurisdiction and the action should have been dismissed. We disagree.

"As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, ___ N.C. App. ___, ___, 760 S.E.2d 302, 307 (2014) (quoting *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). "If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed." *Id.* (citation omitted). Therefore, defendant must establish that plaintiffs (1) had administrative remedies available to them; and (2) that they failed to exhaust those remedies.

Defendant relies on N.C. Gen. Stat. § 130A-24(b), asserting that plaintiffs had administrative remedies prescribed by statute. Defendant's reliance on this statute, however, fails to consider that plaintiffs' wastewater systems are not permitted pursuant to Chapter 130A. Rather, plaintiffs' wastewater systems are permitted pursuant to Chapter 143, which provides its own administrative remedies. In addition, N.C. Gen. Stat. § 130A-24(b) provides the procedure for appeals concerning the enforcement of rules adopted by the local board of health.

Defendant also contends that even if Chapter 143 of the North Carolina General Statutes applies, plaintiffs have failed to exhaust the administrative remedies available to them. Defendant specifically identifies N.C. Gen. Stat. § 143-215.5 (2013) as the statute prescribing these remedies. However, there are no provisions in this statute governing appeals regarding the enforcement of board of health rules; all of the administrative remedies in this statute apply to the State, rather than local entities. Therefore, there are no prescribed administrative remedies available to plaintiffs in this case. Accordingly, defendant's argument is overruled. The trial court properly exercised subject matter jurisdiction.

III. Statutory Authority/Preemption

[6] Defendant's next argument addresses its authority to inspect plaintiffs' spray irrigation systems. Specifically, defendant argues that the trial court erred in declaring that defendant did not have the right to inspect plaintiffs' spray irrigation systems. We disagree.

"The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Danny's Towing 2, Inc. v. N. Carolina Dep't of Crime Control and Pub. Safety*, 213 N.C. App. 375, 382, 715 S.E.2d 176, 182 (2011) (citation omitted). "[T]he trial court's conclusions of law are reviewable *de novo*." *Id.*

Defendant contends that it has authority to inspect plaintiffs' spray irrigation systems pursuant to Chapter 130A of the North Carolina General Statutes and the Orange County Regulations. Defendant is mistaken.

N.C. Gen. Stat. § 130A-335(b) provides, in pertinent part, that

> [a]ll wastewater systems shall be regulated by the Department [of Health and Human Services] under rules adopted by the Commission [for Public Health] *except for the following wastewater systems that shall be regulated by the Department under rules adopted by the Environmental Management Commission:*
>
> (1) Wastewater collection, treatment, and disposal systems designed to discharge effluent to the land surface or surface waters.

N.C. Gen. Stat. § 130A-335(b) (2013) (emphasis added). In addition, N.C. Gen. Stat. § 130A-39(b) (2013) expressly excepts certain wastewater systems from the authority of local health boards: "[A] local board of health may adopt rules concerning wastewater collection, treatment and disposal systems *which are not designed to discharge effluent to the land surface or surface waters*[.]" (emphasis added). Wastewater systems designed to discharge effluent to the land surface or surface waters "shall be regulated by [NCDENR] under rules adopted by the [Environmental Management] Commission[.]" N.C. Gen. Stat. § 143-215.1(a4) (2013).

Additionally, a statement of intent to provide a complete statutory program is strong evidence of the General Assembly's intent to preempt local regulation. *See Granville Farms, Inc. v. Cty. Of Granville*, 170 N.C. App. 109, 113, 612 S.E.2d 156, 159 (2005). N.C. Gen. Stat. § 143-211(c) (2013) provides that

> [i]t is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environment and Natural Resources as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions.

This Court has previously held that this statute "evidences an intent to create a complete and integrated regulatory scheme to the exclusion of local regulation." *Granville Farms*, 170 N.C. App. at 115, 612 S.E.2d at 160.

In the instant case, according to the statutes, only NCDENR has authority to regulate plaintiffs' spray irrigation systems. Defendant does not. The General Assembly's statement of intent in N.C. Gen. Stat. § 143-211(c) evidences an intent to provide a complete regulatory scheme, thus preempting defendant from regulating wastewater systems designed to discharge effluent to the land surface.

Defendant contends that because N.C. Gen. Stat. § 130A-39 remained in full force and effect when the General Assembly enacted N.C. Gen. Stat. § 143-211, local boards of health are therefore allowed to make rules regulating wastewater systems regulated by the EMC. However, the statutes expressly create a different system of regulation for wastewater systems that discharge effluent to the land surface. The General Assembly asserted the intent to provide a complete regulatory scheme governing wastewater systems permitted pursuant to Chapter 143, and did not intend for local boards of health to have the power to regulate areas that were already completely regulated by the State through NCDENR and the EMC. Therefore, the trial court's conclusion that defendant did not have the authority to inspect plaintiffs' wastewater systems is supported by the facts and by appropriate law. Defendant's argument is overruled.

IV. Motion to Dismiss and Judgment on the Pleadings

[7] Defendant next argues that the trial court erred by failing to grant its motion to dismiss or, alternatively, to grant its motion for judgment on the pleadings. We disagree.

"On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted." *Lynn v. Fed. Nat'l Mtge. Ass'n*, ___ N.C. App. ___, ___, 760 S.E.2d 372, 374 (2014) (citations omitted). On appeal, "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.*, 760 S.E.2d at 374-75 (citation omitted). Similarly, "[a] trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal." *Samost v. Duke Univ.*, ___N.C. App. ___, ___, 742 S.E.2d 257, 259 (2013) (citation omitted).

Defendant essentially contends that it was entitled to have its motion to dismiss granted because plaintiffs' complaint requested relief that the court was not authorized to grant, and therefore the court lacked subject matter jurisdiction. However, as previously discussed, plaintiffs' complaint set forth a justiciable claim and requested appropriate relief. Additionally, the trial court had subject matter jurisdiction over plaintiffs' complaint. Therefore, defendant's argument is without merit.

[8] Defendant contends in the alternative that it was entitled to judgment on the pleadings because, pursuant to N.C. Gen. Stat. § 130A-39, it adopted more stringent rules for the regulation of plaintiffs' spray irrigation systems. "A motion for judgment on the pleadings . . . should not be granted unless 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.' " *Samost*, ___ N.C. App. at ___, 742 S.E.2d at 260 (citation omitted). It is undisputed that plaintiffs' wastewater systems are designed to discharge effluent to the land surface. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we previously held that the trial court properly applied the law in deciding that defendant was preempted from inspecting plaintiffs' wastewater systems, defendant was not entitled to judgment as a matter of law. Therefore, defendant's argument is without merit.

V. Summary Judgment

[9] Defendant also argues that the trial court erred by granting summary judgment in favor of plaintiffs because its decision was unsupported by

law. Specifically, defendant repeats its contention that the trial court erred in awarding summary judgment in favor of plaintiffs because defendant was entitled to judgment as a matter of law. We disagree.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "On appeal from an order granting summary judgment, our standard of review is *de novo*, and we view the evidence in the light most favorable to the non-movant." *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007).

As previously discussed, according to the statutes, only NCDENR has authority to regulate plaintiffs' spray irrigation systems. Defendant does not. At the hearing, the parties indicated that there were no genuine issues as to the material facts, and that the only dispute was a legal dispute. Because we have previously held that the trial court properly applied the law, and there were no genuine issues of material fact, we accordingly hold that the trial court did not err in granting plaintiffs' motion for summary judgment.

VI. Attorneys' Fees

[10] Finally, defendant argues that the trial court abused its discretion in awarding attorneys' fees to plaintiffs because doing so was manifestly unsupported by reason. Specifically, defendant contends that the trial court lacked subject matter jurisdiction. We disagree.

In a proceeding under the Uniform Declaratory Judgment Act, "the court may make such award of costs as may seem equitable and just." N.C. Gen. Stat. § 1-263 (2013). Additionally, "[i]n any action in which a . . . county is a party, upon a finding by the court that the . . . county acted outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the . . . county's action[.]" N.C. Gen. Stat. § 6-21.7 (2013). Such a decision is within the trial court's discretion. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994) ("It was within the trial court's discretion under [N.C. Gen. Stat. § 1-263] to apportion costs as it deemed equitable."). In North Carolina, "to overturn the trial judge's determination [of attorney's fees and costs], the defendant must show an abuse of discretion." *Williams v. New Hope Found., Inc.*, 192 N.C. App. 528, 530, 665 S.E.2d 586, 587 (2008) (alteration in original) (citation omitted).

In the instant case, the trial court declared that defendant, an agency of the county, was preempted by statute from inspecting plaintiffs' wastewater systems. The trial court's order provided that "the cost of this action in the amount of $782.32 be charged to the Defendant and that Plaintiffs recover attorney fees from the Defendant in the amount of $16,055.00 pursuant to NCGS 1-263."

Despite defendant's argument that the trial court abused its discretion by awarding attorneys' fees to plaintiffs, the trial court did have subject matter jurisdiction. This Court affords the trial court's decision to award attorneys' fees a substantial amount of deference, and defendant has failed to establish that the trial court's decision was "so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). Accordingly, we affirm the trial court's award of attorneys' fees to plaintiffs.

VII. Conclusion

The trial court properly exercised subject matter jurisdiction over the instant case. Plaintiffs' wastewater systems are subject to regulation pursuant to Chapter 143 of the North Carolina General Statutes, and defendant is preempted from regulating plaintiffs' systems under the statutory scheme. Therefore, the Orange County Regulations do not apply in the instant case. Accordingly, the trial court properly denied defendant's motions to dismiss and for a judgment on the pleadings. Furthermore, the trial court properly granted plaintiffs' motion for summary judgment and did not abuse its discretion in awarding plaintiffs attorneys' fees. Therefore, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and GEER concur.

ROBERTSON v. STERIS CORP.

[237 N.C. App. 263 (2014)]

TERRI LYNN ROBERTSON AND MARY DIANNE GODWIN DANIEL, PLAINTIFFS-APPELLANTS
v.
STERIS CORPORATION, A DELAWARE CORPORATION; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC., A WISCONSIN CORPORATION; BRUNSWICK COMMUNITY HOSPITAL, INC., AKA COLUMBIA BRUNSWICK HOSPITAL, A NORTH CAROLINA CORPORATION; NOVANT HEALTH, INC., A NORTH CAROLINA CORPORATION; HCA, INC. A DELAWARE CORPORATION; SEALMASTER CORPORATION AKA SEALMASTER, INC., A MINNESOTA CORPORATION; MICHAEL WILBUR, AN INDIVIDUAL; K. BROWN, AN INDIVIDUAL; W. GREEN, AN INDIVIDUAL; R. MARTIN, AN INDIVIDUAL; AND JOHN DOE DEFENDANTS A,B,C,D, AND E, DEFENDANTS

No. COA14-253 & No. COA14-254

Filed 18 November 2014

1. Jurisdiction—subject matter—written order—filed after judge's resignation

The Clerk of Court was not divested of jurisdiction to properly enter the order following the resignation of the judge who signed an order. Where a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry.

2. Jurisdiction—subject matter—final order appealed—motion and resolution prior to appeal docketed

The trial court did not lack subject matter jurisdiction to hear intervener's motion for interest because plaintiffs' appeal of the trial court's final order did not divest the trial court of authority to hear that motion. Intervener's Rule 60(a) motion and the resolution of that motion occurred before plaintiffs' appeal was docketed.

3. Jurisdiction—subject matter—Rule 60(a) motion—interest on award—correction of clerical error

Intervener's post-trial claim for interest on an award in quantum meruit was a correction of a clerical mistake that fell within the ambit of Rule 60(a). Failure to include interest mandated by N.C.G.S. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a).

4. Interest—on quantum meruit award—N.C.G.S. § 24-5(b)

The trial court did not err by granting intervener interest on a quantum meruit award pursuant to N.C.G.S. § 24-5(b), even though intervener only requested interest pursuant to N.C.G.S. § 24-5(a).

The trial court had the authority to address and correct this oversight regardless of the arguments intervener made.

Appeal by Plaintiffs from orders entered 3 May 2013 and 25 July 2013 by Judge D. Jack Hooks, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 9 September 2014. Pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure, these cases were consolidated for hearing as the issues presented to this Court by the appeals of Plaintiffs involve common questions of law.

The Lorant Law Firm, by D. Bree Lorant; and Womble, Carlyle, Sandridge & Rice, LLP, by Burley B. Mitchell, Jr. and Robert T. Numbers, II, for Plaintiffs-Appellants.

Young Moore and Henderson P.A., by Walter E. Brock, Jr. and Andrew P. Flynt, for Appellees G. Henry Temple, Jr. and Temple Law Firm.

McGEE, Chief Judge.

Terri Lynn Robertson and Mary Dianne Godwin Daniel ("Plaintiffs") were injured in a work-related accident in 2004. Plaintiffs initially hired G. Henry Temple, Jr. ("Temple") of Temple Law Firm, PLLC to represent them, and Plaintiffs filed their complaint on 18 January 2007. For reasons unclear from the record, Plaintiffs never entered into a written fee agreement with Temple, and the record does not reflect whether Temple discussed his standard fee agreement with Plaintiffs.

Several named defendants were dismissed during the course of the litigation. The case was declared exceptional in July 2009, and "a protracted discovery period with numerous lengthy hearings regarding discoverable materials and sanctions" followed. An initial mediation was conducted, and the remaining defendants Sealmaster, Inc. and Steris Corporation ("Defendants") offered settlement amounts. In an order dated 5 February 2013, the trial court found: "Temple determined more intensive discovery and trial preparation would be necessary for either an improved settlement position, or for the inevitable trial if the matter would not settle."

Defendant Sealmaster, in March 2011, agreed to settle for an amount slightly higher than its original offer. Following a second mediation in March 2011, Defendant Steris also agreed to settle with Plaintiffs. The settlement agreement Temple obtained from Defendant Steris was more

than twice the initial settlement offer. However, Plaintiffs did not follow through on the settlement agreement and Defendant Steris filed a motion to enforce the settlement agreement in June 2011.

Plaintiffs decided to hire a new attorney, and discharged Temple. A letter to this effect was mailed to Temple on 8 September 2011. Temple filed a motion to intervene and a motion in the cause on 5 October 2011, seeking to recover in *quantum meruit* for more than four and one-half years of costs and fees incurred working on Plaintiffs' case.

The trial court conducted a conference call on 13 October 2011 that included Plaintiffs, their new attorney, the remaining Defendants, and Temple. "After discussion as to the positions of the respective parties and counsel, an agreement in principle was reached to provide for final dismissal of this matter between the Plaintiffs and Defendants Seal Master and Steris and for payment of the previously negotiated Worker's Compensation liens for both Plaintiffs." These agreements included confidentiality agreements concerning the amount of damages Plaintiffs were awarded.

Temple's 5 October 2011 motions were heard on 9 October 2012. In a 7 February 2013 order, the trial court concluded that Temple was "entitled to recover in quantum meruit for legal services rendered and expenses reasonably incurred during representation of [P]laintiffs" because Temple's legal representation "had value to [P]laintiffs" and Temple had represented Plaintiffs with an expectation of payment. The trial court concluded that "[t]o deny the motion by [Temple] would result in a windfall to [P]laintiffs[.]" The trial court then ruled that Temple should receive a certain sum in *quantum meruit* "representing the attorney fees and costs" the trial court had addressed in its findings of fact, which included expenses and one third of the recovery "after common costs."

Plaintiffs appealed on 4 March 2013.[1] Temple filed a "Motion to Correct Judgment" on 25 March 2013, requesting that the trial court correct the 7 February 2013 order by including "interest on the quantum meruit award, which pre- and post-judgment interest would accrue pursuant to G.S. 24-5(a)." This matter was heard on 17 April 2013. Judge D. Jack Hooks, Jr. signed a written order, dated 19 April 2013, ruling that Temple was entitled to interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b), and awarded interest at the legal rate

1. This Court ultimately affirmed the trial court's *quantum meruit* award in *Robertson v. Steris Corp.*, __ N.C. App. __, 760 S.E.2d 313 (2014) ("*Robertson I*").

from 5 October 2011, the date Temple filed motions in the cause and to intervene. Temple served Plaintiffs with the order on 26 April 2013. Judge Hooks resigned from office, which was effective 30 April 2013. The order was filed with the Brunswick County Clerk of Superior Court on 3 May 2013.

Plaintiffs filed a "Motion to Amend Order and Alternative Motion for Relief From Order" on 10 May 2013, seeking to have the trial court reverse its ruling granting Temple interest on the "quantum meruit award." Judge Hooks was sworn in as an Emergency Judge of the Superior Court on 31 May 2013, and was assigned to hear Plaintiffs' motions. The trial court denied Plaintiffs 10 May 2013 motions by order filed 25 July 2013. Plaintiffs then filed notices of appeal from the 3 May 2013 and 25 July 2013 orders on 23 August 2013. Plaintiffs docketed separate appeals from the two orders. Appeal from the 3 May 2013 order is before us in COA14-253, and appeal from the 25 July 2013 order is before us in COA14-254.[2] We address both appeals in this opinion. Additional facts may be found in *Robertson I*.

Appeal COA14-254

[1] Plaintiffs appeal from the trial court's 25 July 2013 order, which, in relevant part, denied Plaintiffs' motion to set aside the 3 May 2013 order on the basis of lack of subject matter jurisdiction. Plaintiffs argue that the trial court lacked jurisdiction to enter the 3 May 2013 order because the order was filed after Judge Hooks had resigned.

Judge Hooks signed the written order on 19 April 2013. Temple's attorneys served Plaintiffs with this written and signed order on 26 April 2013. Judge Hooks' resignation was effective 30 April 2013. The Brunswick County Clerk of Superior Court filed this written and signed order on 3 May 2013. It is clear this order was not entered until it was filed on 3 May 2013, three days after Judge Hooks' resignation became effective. The question before us is whether the Clerk of Court was divested of jurisdiction to properly enter the order following Judge Hooks' resignation.

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2. We note that it was unnecessary for Plaintiffs to file separate appeals, as both orders could have been argued in a single appeal. Further, as the merits of COA14-254 deal solely with the issue of subject matter jurisdiction, they could have been addressed along with the issues in COA14-253 in a single appeal, even though this issue was not argued prior to entry of the 3 May 2013 order. *Burgess v. Burgess*, 205 N.C. App. 325, 328, 698 S.E.2d 666, 669 (2010) (citation omitted) ("the issue of subject matter jurisdiction may be raised for the first time on appeal").

According to the relevant portion of Rule 58 of the North Carolina Rules of Civil Procedure,

> a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. . . . . If service is by mail, three days shall be added to the time periods prescribed[.]

N.C. Gen. Stat. § 1A-1, Rule 58 (2013). "[T]he purposes of the requirements of Rule 58 are to make the time of entry of judgment easily identifiable, and to give fair notice to all parties that judgment has been entered." *Durling v. King*, 146 N.C. App. 483, 494, 554 S.E.2d 1, 7 (2001) (citations omitted).

> Before the adoption of Rule 58, our statutes expressly required a detailed entry in the court minutes in order to constitute entry of judgment. N.C.G.S. § 1-205 provided:
>
> > Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. N.C.G.S. § 1-205 (1953) (repealed by 1967 N.C. Sess. Laws ch. 957, § 4).

Reed v. Abrahamson, 331 N.C. 249, 253, 415 S.E.2d 549, 551 (1992). "In 1967, the General Assembly repealed the entry of judgment provision of section 1-205 and enacted the North Carolina Rules of Civil Procedure, including Rule 58[.]" *Id.* at 254, 415 S.E.2d at 551. Rule 58 was more complicated at the time *Reed* was decided, requiring:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such

> notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Reed, 331 N.C. at 251-52, 415 S.E.2d at 550 (quoting N.C. Gen. Stat. § 1A-1, Rule 58 (1990)).

With respect to abuse, neglect, and dependency orders, our Supreme Court has stated: "When the trial court fails to enter its order or to call the subsequent hearing pursuant to N.C.G.S. § 7B–807(b), that failure is a ministerial action subject to mandamus."

In re T.H.T., 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008). Failure to enter an order at the appropriate time without legitimate reason has been referred to as a "bureaucratic failure." *Id.* at 457, 665 S.E.2d at 61. Further, a judgment may be filed outside the session of court in which the matter was decided "so long as the hearing to which the order relates was held in term." *Pinckney v. Van Damme*, 116 N.C. App. 139, 155, 447 S.E.2d 825, 835 (1994) (citations omitted). Filing of an order or judgment has traditionally been the province of the clerk, not the judge. The current version of Rule 58 has simplified identifying the time of entry by tying entry of an order or judgment to the time the order or judgment is file-stamped by the clerk, a process which neither requires nor invites participation by the trial judge.

Though we find no authority directly on point, we hold that where, as in the matter before us, a judge signs an otherwise valid written order

or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry. Our holding is not in conflict with the purpose of Rule 58, and we can conceive of no public policy interests counseling a different outcome. Plaintiffs in the present case were provided timely notice and a definite date of entry for the 3 May 2013 order. *King*, 146 N.C. App. at 494, 554 S.E.2d at 7.

Appeal COA14-253

Motion to Dismiss

Temple filed a motion to dismiss Plaintiffs' appeal in COA14-253 on 1 May 2014, arguing that Plaintiffs failed to timely file their notice of appeal in that matter. We make no decision on the merits of Temple's argument. Assuming, *arguendo*, Plaintiffs' notice of appeal was untimely, we treat Plaintiffs' appeal as a petition for writ of *certiorari*, and grant it. *See State v. SanMiguel*, 74 N.C. App. 276, 277–78, 328 S.E.2d 326, 328 (1985) (citations omitted) ("[T]he record does not contain a copy of the notice of appeal or an appeal entry showing that appeal was taken orally. In our discretion we treat the purported appeal as a petition for writ of certiorari and pass upon the merits of the questions raised."). We deny Temple's 1 May 2014 motion to dismiss, and reach the merits of Plaintiffs' appeal in COA14-253.

Analysis

I.

[2] Plaintiffs first argue that "the trial court lacked subject matter jurisdiction to hear Temple's motion for interest because Plaintiffs' appeal of the trial court's final order divested the trial court of authority to hear that motion."

" 'As a general rule, an appeal takes a case out of the jurisdiction of the trial court.' " *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975) (citation omitted). However, "Rule 60(a) specifically permits the trial court to correct *clerical mistakes* before the appeal is docketed in the appellate court, and thereafter while the appeal is pending with leave of the appellate court[.]" *Id.* at 199, 217 S.E.2d at 542.

The trial court entered its order awarding Temple recovery in *quantum meruit* on 7 February 2013. Plaintiffs filed notice of appeal from this order on 4 March 2013. Temple filed a "Motion to Correct Judgment" pursuant to Rule 60(a) on 25 March 2013. The matter was

heard, and the trial court entered an order on 3 May 2013 providing that "interest at the legal rate be added to the award of . . . attorney fees and necessary costs" that had been awarded in the 7 February 2013 order. Plaintiffs' appeal from the 7 February 2013 order was finally docketed on 20 November 2013. Plaintiffs' Rule 60(a) motion and the resolution of that motion occurred before Plaintiffs' appeal in COA14-253 was docketed.

Therefore, the trial court, in response to Temple's Rule 60(a) motion, had jurisdiction in its 3 May 2013 order to correct any clerical errors in its 7 February 2013 order. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2013) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division."); *Sink*, 288 N.C. at 199, 217 S.E.2d at 542.

II.

[3] In Plaintiffs' second argument, they contend "Temple's post-trial claim for interest is not a correction of a 'clerical mistake' that falls within the ambit of [Rule] 60(a)." We disagree.

> "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order."

In re C.N.C.B., 197 N.C. App. 553, 556, 678 S.E.2d 240, 242 (2009) (citations omitted).

Plaintiffs argue that, by its 3 May 2013 order, the trial court created an additional obligation of "nearly fifty thousand dollars[.]" Plaintiffs further argue: "For Plaintiffs, both of whom are disabled and unable to work as a result of the events that gave rise to their underlying action, this new additional financial obligation is clearly a substantive change in the court's original order." However, the substantive change addressed in *C.N.C.B.* has nothing to do with a party's physical condition or ability to pay. A change is only substantive if it changes the underlying order in a substantive way. " '[T]he amount of money involved is not what creates

a substantive right[.]' " *Lee v. Lee*, 167 N.C. App. 250, 254, 605 S.E.2d 222, 225 (2004) (citation omitted). Instead, "it is the source from which this money is derived" that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a). *Id.*

> In *Ice v. Ice*, this Court found that an award of interest on a distributive award was not a substantive change, as "[t]he subject of the litigation . . . was the amount of the distributive award; interest was only incidental and tangential[.]" *Ice*, 136 N.C. App. 787, 792, 525 S.E.2d 843, 847 (2000).

Id. In the present case, the value of Temple's services rendered in support of Plaintiffs' action was the subject of the litigation. Pursuant to *Lee* and *Ice*, the interest owed pursuant to the award in *quantum meruit* "was only incidental and tangential[.]" *Id.*; *see also Ward v. Taylor*, 68 N.C. App. 74, 80, 314 S.E.2d 814, 820 (1984).

N.C. Gen. Stat. § 24-5(b) states in part: "In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." N.C. Gen. Stat. § 24-5(b) (2013). Pursuant to N.C. Gen. Stat. § 24-5(b), monetary awards other than costs bear interest as a matter of law. *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 138, 463 S.E.2d 199, 202 (1995). The trial court determined that its "[f]ailure to address said award of interest was an error arising by oversight. As such, it may and should be corrected pursuant to [Rule] 60(a)." We hold that failure to include interest mandated by N.C. Gen. Stat. § 24-5(b) constitutes a clerical mistake for the purposes of Rule 60(a).

III.

[4] In Plaintiffs' third argument, they contend that the trial court erred in granting Temple interest on the *quantum meruit* award pursuant to N.C. Gen. Stat. § 24-5(b). We disagree.

Plaintiffs argue that Temple only requested interest pursuant to N.C. Gen. Stat. § 24-5(a), not N.C. Gen. Stat. § 24-5(b), and that Temple is therefore limited to recovery, if any, pursuant to N.C. Gen. Stat. § 24-5(a). Temple was awarded *quantum meruit* based upon quasi-contract, not contract. " '*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law.' " *Watson Elec. Constr. Co. v. Summit Cos.*, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (citation omitted). N.C.

Gen. Stat. § 24-5(a) concerns amounts awarded for actions in contract, not quasi-contract. *Farmah v. Farmah*, 348 N.C. 586, 588, 500 S.E.2d 662, 663 (1998). The trial court was correct to look to N.C. Gen. Stat. § 24-5(b) when deciding Temple's Rule 60(a) motion for interest. *Id.* The fact that Temple mistakenly requested relief pursuant to N.C. Gen. Stat. § 24-5(a) is not determinative. "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time *on his own initiative* or on the motion of any party[.]" N.C. Gen. Stat. § 1A-1, Rule 60(a) (emphasis added). The trial court had the authority to address and correct its oversight regardless of the arguments Temple made in his Rule 60(a) motion and the related hearing.

Plaintiffs further argue that N.C. Gen. Stat. § 24-5(b) does not allow for interest on equitable remedies, such as quasi-contract, that involve monetary awards. Plaintiffs cite *Medical Mut. Ins. Co. of N.C. v. Mauldin*, 157 N.C. App. 136, 139, 577 S.E.2d 680, 682 (2003) ("This court has held repeatedly that equitable remedies which require the payment of money do not constitute compensatory damages as set forth in N.C. Gen. Stat. § 24–5(b)."). First, we note the two cases cited in *Mauldin: Hieb v. Lowery*, 134 N.C. App. 1, 516 S.E.2d 621 (1999) and *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985), do not hold that equitable remedies requiring money awards cannot constitute compensatory damages. This Court in *Hieb* held:

> St. Paul's workers' compensation lien on the Hartford proceeds is neither derived from an action in contract nor from an amount "designated by the fact-finder as compensatory damages." *See* G.S. § 24-5; *cf. Bartell v. Sawyer*, 132 N.C. App. 484, 487, 512 S.E.2d 93, 95 (1999) (G.S. § 97-10.2(f)(1)(c) provides for reimbursement to defendant insurance company "for all benefits . . . paid or to be paid by the employer under award of the Industrial Commission" and "does not state that [insurance company is] entitled to any prejudgment interest").

Hieb, 134 N.C. App. at 19, 516 S.E.2d at 632. We held in *Appelbe* that the plaintiff's equitable distribution award was "neither due plaintiff by contract, nor [wa]s it compensatory damages." *Appelbe*, 76 N.C. App. at 394, 333 S.E.2d at 313. Neither of these opinions attempts to broaden its holding beyond the particular facts involved.

Second, our Supreme Court has held that N.C. Gen. Stat. § 24-5(b) does control the award of interest in quasi-contract actions:

> Defendants argue essentially that this is not a contract action governed by N.C.G.S. § 24-5(a), that N.C.G.S. § 24-5(b) applies, and that interest should have been awarded only from the date the action was instituted. We agree. Plaintiffs' claims were grounded in the equitable principles of quasi-contract which are different from the legal principles of contract law. The instant action is not one for breach of contract; it is an action other than contract. Therefore the awarding of interest is controlled by N.C.G.S. § 24-5(b) rather than (a).

Farmah, 348 N.C. at 588, 500 S.E.2d at 663, *reversing Farmah v. Farmah*, 126 N.C. App. 210, 484 S.E.2d 96 (1997) (the plaintiff recovered pre-judgment interest on claim for unjust enrichment); *see also Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 543-44, 534 S.E.2d 622, 629 (2000) (interest on actions in quasi-contract governed by N.C. Gen. Stat. § 24-5(b)). To the extent, if any, that the holding in *Mauldin* conflicts with *Farmah*, we are bound by *Farmah*. The trial court properly ruled that interest on Temple's quasi-contract claim for *quantum meruit* was controlled by N.C. Gen. Stat. § 24-5(b). Though the trial court did not expressly designate the award in *quantum meruit* as "compensatory damages," we hold that that designation is clearly inferred in the 3 May 2013 order.

Plaintiffs further argue that Temple "never commenced an action thus a date from which pre-judgment interest would begin to run could not be determined." We disagree.

"[A]n attorney may properly bring a claim for fees in *quantum meruit* against a former client by the filing of a motion in the underlying action to be resolved by the trial court via a bench trial." *Robertson v. Steris Corp.*, __ N.C. App. __, __, 760 S.E.2d 313, 318 (2014). Plaintiffs, in a one-page argument including no authority directly on point, state that "the [trial] court cannot determine a date from which interest would begin to run." Plaintiffs contend this is because Temple never initiated an action against them, but merely brought a claim by filing a motion in their underlying action. Plaintiffs then invite this Court to peruse two of this Court's opinions "for analysis of when an action is deemed to commence for purposes of determining § 24-5(b) interest." "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Plaintiffs have not properly argued this issue as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

Therefore, we do not address this argument. The date determined by the trial court as the date from which calculation of pre-judgment interest would begin stands. Because we affirm the trial court's award of pre-judgment interest, we do not address Plaintiffs' argument concerning post-judgment interest.

Affirmed.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DERRICK OBRIAN CARTER, DEFENDANT

No. COA13-1146

Filed 18 November 2014

1. Constitutional Law—effective assistance of counsel—failure to move to suppress evidence—could not be resolved on appellate record—dismissed

Defendant's argument that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a motion to suppress the evidence seized was dismissed without prejudice to its being asserted in a motion for appropriate relief.. The IAC claim could not be resolved based on the record before the Court.

2. Police Officers—resisting, delaying, or obstructing a public officer—officer did not produce warrant—officer not engaged in lawful conduct

The trial court erred when it denied defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer. Because the officer who arrested defendant for resisting a public officer did not read or produce a copy of the warrant to defendant prior to seeking to search defendant's person, in violation of N.C.G.S. § 15A-252, the arresting officer was not engaged in lawful conduct.

3. Constitutional Law—right to confront witnesses—no hearsay admitted—no constitutional issues raised by nonhearsay

Defendant's argument in a possession of cocaine case that his constitutional right to confront an adverse witness was violated through testimony that contained inadmissible hearsay statements

was overruled. No hearsay was admitted; defendant failed to cite any authority for his constitutional argument and the argument was deemed abandoned; and even assuming defendant's confrontation clause argument was properly before the court, the admission of nonhearsay raises no Confrontation Clause concerns.

4. Evidence—reliability—insufficient indicia of reliability—field tests—presence of cocaine

The trial court abused its discretion by allowing into evidence testimony of an investigator regarding field tests (NIKs) he conducted to detect the presence of cocaine. The State failed to demonstrate the reliability of the NIKs pursuant to any of the indices of reliability under *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004) or any alternative indicia of reliability. However, the admission of the evidence amounted to harmless error where there was overwhelming evidence of defendant's guilt.

5. Evidence—photographic identification cards—failure to redact information—not prejudicial

Even assuming that the trial court erred in a drug possession case by allowing into evidence defendant's ID card photo and a DOC ID card without redacting the words "FELON" and "INMATE," any error was harmless, given defendant's testimony that he had been previously convicted of drug trafficking. There was no reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the challenged evidence.

Appeal by defendant from judgments entered 17 April 2013 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 23 April 2014.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Kimberly P. Hoppin for defendant-appellant.

GEER, Judge.

Defendant Derrick OBrian Carter appeals from a judgment sentencing him, as a habitual felon, based on convictions for maintaining a dwelling to sell a controlled substance, possession of cocaine, possession of drug paraphernalia, resisting a public officer, and possession of

marijuana. On appeal, defendant primarily challenges his conviction for resisting a public officer that arose out of defendant's refusal to allow an officer to search him pursuant to a search warrant. Because the uncontradicted evidence showed that the officer who arrested defendant for resisting a public officer did not read or produce a copy of the warrant to defendant prior to seeking to search defendant's person -- thereby violating N.C. Gen. Stat. § 15A-252 (2013) -- the arresting officer was not engaged in lawful conduct. The State, therefore, failed to present evidence sufficient to support a conviction of resisting a public officer. Because we find defendant's remaining arguments unpersuasive, we reverse only defendant's conviction for resisting a public officer and remand for resentencing.

Facts

The State's evidence tended to show the following facts. On 11 April 2012, Detective K.N. Harvey and Investigator Michael Burns, deputies with the Davidson County Sheriff's Office, met with a confidential source and arranged for a controlled drug purchase. The confidential source agreed to make a controlled purchase of crack cocaine at 286 Shirley Road (the "Shirley Road residence"), which is a mobile home where defendant lived. Investigator Burns knew defendant previously from "numerous dealings."

The confidential source and a person accompanying the source made the controlled purchase at the Shirley Road residence as planned. After the transaction, the deputies met the confidential source at a prearranged location and took possession of a quantity of crack cocaine obtained as a result of the controlled buy.

The following day, on 12 April 2012, the deputies applied for and obtained a search warrant authorizing a search of defendant's person and the Shirley Road residence. After obtaining the warrant, the deputies planned to "go to the residence, secure it, and basically conduct a search." Investigator Burns was the first to leave to conduct the search, but on his way to the Shirley Road residence, he passed a car going the opposite direction and noticed that defendant was riding in the passenger seat. Investigator Burns turned around, caught up with the vehicle, which was being driven by defendant's friend Perry Goble, and stopped it.

Investigator Burns approached Mr. Goble and asked him for his license. When Mr. Goble produced no license, Investigator Burns wrote him a citation. Investigator Burns then walked to the passenger side of the car where he informed defendant that defendant was the named subject of a search warrant. Investigator Burns ordered defendant out of

the car multiple times to allow the officer to search him. Because defendant repeatedly refused to leave the car, Investigator Burns radioed for backup and informed defendant that he was under arrest.

Shortly after several other officers arrived, defendant got out of Mr. Goble's vehicle, and Investigator Burns handcuffed him and took him into custody for resisting a public officer. A search of defendant's person yielded only a cell phone and $406.00 in cash. Defendant was given the option of being taken to the Davidson County Sheriff's Office for processing or back to the Shirley Road residence to be present as officers searched the mobile home. Defendant chose to go to the Sheriff's Office.

Several deputies conducted a search of the Shirley Road residence, which included two bedrooms, a kitchen, and a living room. The deputies seized items they believed were controlled substances or drug paraphernalia, took photographs and notes, tested for the presence of cocaine with narcotics indicator field test kits ("NIKs"), and catalogued all the property they seized.

On top of a glass table in the kitchen, deputies found a box of small plastic bags, a utility knife, and a set of black digital scales that were all sitting next to each other. There were white crumbs on the glass tabletop as well as on the scale's plate. In the kitchen sink, deputies found a Pyrex bowl three-quarters full of water. Deputies also observed a white "splatter" on the stove next to a burner. On top of a glass table in defendant's living room, deputies found two plastic bags that they believed to contain marijuana. Also in the living room, deputies found a wooden box that contained the remains of a marijuana "roach" and an identification card for defendant issued by the Department of Correction.

After deputies finished their search of the Shirley Road residence, they sent some of the material believed to be marijuana and some of the "off white rock substances" found sitting atop one of the scales to the Iredell Crime Lab for analysis. The deputies did not send the Pyrex bowl, the scales, or the knife for testing. The Crime Lab concluded that the material they received amounted to 5.1 grams of marijuana and 0.03 grams of cocaine.

Defendant was indicted for possession of cocaine with the intent to manufacture, sell, or deliver, maintaining a dwelling to sell a controlled substance, possession of marijuana, possession of drug paraphernalia, resisting a public officer, and being a habitual felon. The State elected at trial to proceed on a charge of possession of cocaine rather than possession of cocaine with the intent to sell and deliver.

The jury found defendant guilty of each of the tried charges and determined that defendant is a habitual felon. The trial court sentenced defendant to a presumptive-range term of 33 to 52 months imprisonment for the possession of cocaine conviction and to a consecutive presumptive-range term of 33 to 52 months imprisonment for the consolidated charges of maintaining a dwelling to sell a controlled substance, possession of drug paraphernalia, resisting a public officer, and possession of marijuana. Defendant timely appealed to this Court.

I

[1] Defendant first argues that he received ineffective assistance of counsel ("IAC") when his trial counsel failed to make a motion to suppress the evidence seized at the Shirley Road residence. To prevail on an IAC claim,

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

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

Our Supreme Court has held that "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). But, if "the reviewing court determine[s] that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525.

We do not believe that this IAC claim can be resolved based on the record before this Court and, therefore, we dismiss this argument without prejudice to its being asserted in a motion for appropriate relief. *See State v. Johnson*, 203 N.C. App. 718, 722, 693 S.E.2d 145, 147 (2010) (finding premature defendant's IAC claim based on trial counsel's failure to make timely motion to suppress).

II

[2] We next address defendant's contention that the trial court erred when it denied his motion to dismiss the charge of resisting, delaying, or obstructing a public officer. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is that amount of evidence "sufficient to persuade a rational juror to accept a particular conclusion." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005), *overruled on other grounds by State v. Tanner*, 364 N.C. 229, 695 S.E.2d 97 (2010).

The elements of the offense of resisting, delaying, or obstructing a public officer are: "(1) that the victim was a public officer; (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer; (3) that the victim was discharging or attempting to discharge a duty of his office; (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse." *State v. Dammons*, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

The third element of resisting, delaying, or obstructing a public officer -- that the victim was discharging or attempting to discharge a duty of his office -- "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *State v. Sinclair*, 191 N.C. App. 485, 489, 663 S.E.2d 866, 870 (2008). For example, in *State v. Sparrow*, 276 N.C. 499, 512, 173 S.E.2d 897, 905 (1970), the Supreme Court held that a defendant had a right to interfere with a police officer attempting to execute a search warrant when the arresting officer illegally entered the defendant's home without first complying with North Carolina's common law rule requiring the officer to announce his "authority and purpose" before entry. Although *Sparrow* recognized an officer's duty to enter a home to execute a search warrant, it explained that "one who resists an *illegal* entry is not resisting an officer in the discharge of the duties of his office." *Id.*, 173 S.E.2d at 906 (emphasis added).

Pertinent to this case, N.C. Gen. Stat. § 15A-252 (emphasis added) sets out the statutory requirements for an officer intending to execute a search warrant:

> *Before undertaking any search or seizure pursuant to the warrant, the officer must read the warrant and give a copy of the warrant application and affidavit to the person to be searched*, or the person in apparent control of the premises or vehicle to be searched. If no one in apparent and responsible control is occupying the premises or vehicle, the officer must leave a copy of the warrant affixed to the premises or vehicle.

This Court has found a violation of N.C. Gen. Stat. § 15A-252 when a defendant was not given a copy of the search warrant before the search was conducted. *See State v. Vick*, 130 N.C. App. 207, 219, 502 S.E.2d 871, 879 (1998) (holding failure to give warrant to defendant prior to execution of search warrant was "violation of the plain language of section 15A-252").

Here, Investigator Burns testified that at the time he stopped Mr. Goble's vehicle, he "didn't have anything to show Mr. Carter and say[,] 'Mr. Carter, here is a search warrant I have for you[.]' " This uncontradicted evidence shows that Investigator Burns did not comply with N.C. Gen. Stat. § 15A-252 before searching defendant pursuant to the warrant. Consequently, Investigator Burns was not lawfully executing the warrant, and defendant had a right to resist him.

The State argues only that the stop of Mr. Goble's car was lawful and, therefore, defendant was not entitled to resist arrest. Defendant does not, however, challenge the stop of Mr. Goble's car, and the legality of the stop has no bearing on the legality of Investigator Burns' conduct in executing the search warrant. The basis for the charge of resisting a public officer was defendant's refusal to get out of the car and submit to a search of his person. Because the State failed to show that Investigator Burns complied with N.C. Gen. Stat. § 15A-252 before attempting to search defendant, we hold that the State failed to produce sufficient evidence that defendant resisted a public officer, and the trial court erred in denying defendant's motion to dismiss that charge.

III

[3] Defendant next argues that his constitutional right to confront an adverse witness was violated through testimony by Investigator Burns that, defendant contends, contained inadmissible hearsay statements from the confidential source "identif[ying] [defendant] as the person who sold the alleged crack cocaine to the informant." At trial, Investigator Burns testified extensively regarding the controlled purchase, including

his interactions with the confidential informant and accompanying person before and after the controlled purchase.

With respect to defendant's hearsay argument, Rule 801(c) of the Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence* to prove the truth of the matter asserted." (Emphasis added.) Defendant has not, however, pointed to any testimony by Investigator Burns that referenced any statement made by the confidential source, and we have found no such testimony in the record. Accordingly, no hearsay was admitted at trial.

We note that because defendant cites no relevant authority in support of his constitutional argument on appeal, his confrontation argument "is considered abandoned." *State v. Black*, 197 N.C. App. 731, 736, 678 S.E.2d 689, 693 (2009); N.C.R. App. P. 28(b)(6). Nonetheless, even assuming defendant's confrontation clause argument were properly before us, "the admission of nonhearsay raises no Confrontation Clause concerns." *State v. Alexander*, 177 N.C. App. 281, 285, 628 S.E.2d 434, 436 (2006).

IV

[4] Defendant next argues it was prejudicial error for the trial court to admit the testimony of Investigator Burns regarding field tests -- the NIKs -- he conducted to detect the presence of cocaine. Defendant contends that "[t]he State did not sufficiently establish the reliability of the field tests pursuant to 'any of the indices of reliability' under *Howerton* [*v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004)] or 'any alternative indicia of reliability.' " (Quoting *State v. James*, 215 N.C. App. 588, 590, 715 S.E.2d 884, 886 (2011).) We review the trial court's admission of this testimony for abuse of discretion. *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686. A trial court abuses its discretion if its decision was " 'manifestly unsupported by reason' " or was " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Peterson*, 179 N.C. App. 437, 463, 634 S.E.2d 594, 614 (2006) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007).

Our Supreme Court has stated that "expert witness testimony required to establish that the substances introduced . . . are in fact controlled substances must be based on a scientifically valid chemical analysis[.]" *State v. Ward*, 364 N.C. 133, 142, 694 S.E.2d 738, 744 (2010). This Court addressed whether a trial court abused its discretion in allowing a law enforcement officer to testify that substances were cocaine based

on use of a field test in *State v. Meadows*, 201 N.C. App. 707, 687 S.E.2d 305 (2010).

In *Meadows*, Captain John Lewis of the Onslow County Sheriff's Office analyzed the contents of a baggie found by another deputy sheriff using a "NarTest" machine "which displayed test results that the substance was crack cocaine." *Id.* at 708, 687 S.E.2d at 306. At trial, the trial court admitted the Captain's testimony identifying the seized substance as cocaine.

In holding that the trial court abused its discretion in admitting this testimony, this Court noted that the NarTest machine had not been approved by a state agency for identifying controlled substances and that our courts had not recognized it as an accepted method for identifying controlled substances. *Id.* at 711, 687 S.E.2d at 308. This Court continued:

> The State did not present any evidence of the reliability of the NarTest machine beyond Captain Lewis's opinion that it was reliable based upon his personal experience of using the machine and the fact that some of the test results had been confirmed by the NarTest manufacturer. Indeed, the State's evidence does not even describe the method of analysis the NarTest machine uses or how it works; the evidence is simply that you put the substance to be analyzed into the machine and the machine uses "florescence" to determine what the substance is and prints out a result. The State did not present any evidence independent of information from the Nartest's manufacturer which would establish its reliability; although such information might exist, it is not in the record before us. We cannot find that the NarTest machine is sufficiently reliable based upon the evidence presented.
>
> As the State failed to proffer evidence to support any of the "indices of reliability" under *Howerton* or any alternative indicia of reliability, we conclude that "the expert's proffered method of proof [is not] sufficiently reliable as an area for expert testimony[.]" [358 N.C.] at 458-60, 597 S.E.2d at 686-87. Without a "sufficiently reliable" method of proof, expert testimony was not properly admissible, and we need not address whether "the witness testifying at trial qualified as an expert in that area of testimony" and whether "the expert's testimony [was] relevant[.]" *Id.*

> at 458, 597 S.E.2d at 686. Accordingly, allowing Captain Lewis to testify as to the results of the NarTest machine was an abuse of discretion.

Id. at 712, 687 S.E.2d at 308-09.

Here, Investigator Burns gave the following testimony concerning the NIKs at trial:

> Q What is a field test?
>
> A We as investigators are supplied with a number of field test kits for various types of drugs. They react different with certain chemicals in these drugs and provide us with a color that's noticeable so we can distinguish whether the particular item is a controlled substance or not. For example, if I dropped some -- now we are into a Cocaine test kit -- it is not going to change color but if I drop Cocaine into a test kit, it will turn real bright blue. Some of the tests are liquid ampoules that you break. And some are wipes. On a Cocaine wipe when you take it out of the pack it is pink in color. If it comes into contact with Cocaine or anything with Cocaine, that particular item will turn bright blue. At that time I tested splatter on the stove. It immediately turned blue, which I immediately identified as Cocaine.

In addition, Investigator Burns testified that the NIK wipes also turned blue and indicated the presence of cocaine when swiped against the off white residue on the Pyrex, the white residue on the scales, and the white residue on the dining room table. He also testified that he has been in law enforcement for about 18 years, he had "approximately 400 hours of training specifically in the narcotics field," he had been "exposed" to cocaine "500 plus" times, and he "wouldn't say" that the NIKs were "unreliable."

There is no material difference between the testimony offered in *Meadows* that this Court concluded was inadmissible and Investigator Burns' field test testimony in this case. First, we note that NIKs similar to the ones used here have not previously been found by our courts to be a reliable method of controlled substance identification. *See James*, 215 N.C. App. at 589, 590, 715 S.E.2d at 886 (finding State "did not sufficiently establish the reliability of [a] NIK" consisting of "small 'moist towelette . . . about the size of a[n] alcohol wipe[]' . . . that . . . turned blue, thereby indicating that the substance tested positive for cocaine"). Further, the State did not present evidence describing the

NIKs' method of chemical analysis, and the only testimony concerning the tests' reliability -- Investigator Burns' testimony that the NIKs were not "unreliable" -- was based only on his personal experience as a law enforcement officer.

Therefore, we hold that, in this case, the State, as in *Meadows*, failed to demonstrate the reliability of the NIKs pursuant to "any of the 'indices of reliability' under *Howerton* or any alternative indicia of reliability[.]" 201 N.C. App. at 712, 687 S.E.2d at 308-09 (quoting *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687). The trial court, therefore, abused its discretion in admitting Investigator Burns' testimony to the effect that the NIKs indicated the presence of cocaine in the Shirley Road residence.

However, defendant bears the burden of showing that "there is a reasonable possibility that . . . a different result would have been reached at the trial" had the trial court excluded the testimony regarding the field tests. N.C. Gen. Stat. § 15A–1443(a) (2013). It is well established that "[i]f there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless." *State v. Crawford*, 104 N.C. App. 591, 598, 410 S.E.2d 499, 503 (1991).

In arguing the error was prejudicial, defendant contends that without Investigator Burns' erroneously admitted testimony that the items tested with the NIK wipes had cocaine residue on them, "the jury could have concluded that the items in [defendant's] residence alleged to be drug paraphernalia were not at all associated with the use of controlled substances[.]" Given the State's other evidence, we cannot conclude that there is a reasonable possibility that the jury, in the absence of the contested testimony, would have found defendant not guilty of possession of drug paraphernalia.

N.C. Gen. Stat. § 90-113.21(a) (2013) describes "drug paraphernalia" as "equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate . . . manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and . . . introducing controlled substances into the human body." N.C. Gen. Stat. § 90-113.21(a)(5), (8), and (10) further provide that "drug paraphernalia" includes the following: scales and balances for weighing or measuring controlled substances; blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances; and containers and other objects for storing or concealing controlled substances. N.C. Gen. Stat. § 90-113.21(b) sets out a number

of factors, along with "all other relevant evidence," that may be considered in determining whether an object is drug paraphernalia. Two of the enumerated factors include "[t]he existence of any residue of a controlled substance on the object" and "[t]he proximity of the object to a controlled substance." N.C. Gen. Stat. § 90-113.21(b)(4) and (5).

Here, the scales, plastic bags, and utility knife found in defendant's kitchen were in close proximity to "white crumbs" that the Iredell Crime Lab determined to be crack cocaine. Investigator Burns gave unchallenged testimony that these items were typically used to package crack cocaine "for distribution." Investigator Burns also gave detailed testimony as to why the Pyrex dish, based on its appearance, was likely used to "manufacture" crack cocaine. Additionally, defendant's own witness Tessa Scott testified that "[defendant] would normally buy one ounce of powder Cocaine and cook it into crack" and that she had seen defendant "on 15 or more occasions cooking crack cocaine at . . . Shirley Road." We hold that there was, therefore, overwhelming evidence that defendant was guilty of possessing drug paraphernalia. *See State v. Wade*, 198 N.C. App. 257, 273, 679 S.E.2d 484, 494 (2009) (holding evidence of 0.7 grams of cocaine and glass smoking pipe found on the defendant was "simply overwhelming" in support of paraphernalia conviction).

Defendant also contends that without Investigator Burns' testimony that he found cocaine using the NIKs, there was "not sufficient evidence that [defendant] maintained this dwelling for the purpose of keeping or selling controlled substances." N.C. Gen. Stat. § 90-108(a)(7) (2013) prohibits "knowingly keep[ing] or maintain[ing] any . . . dwelling house . . . or any place whatever . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." "In determining whether a defendant maintained a dwelling *for the purpose of selling illegal drugs*, this Court has looked at factors including the amount of drugs present and paraphernalia found in the dwelling." *State v. Battle*, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005).

In addition to the overwhelming evidence that defendant possessed drug paraphernalia, Ms. Scott further testified that "[defendant] made a living selling crack cocaine" and that she was "not happy about telling the truth [about defendant selling crack cocaine] . . . [b]ecause I care about [defendant]. I don't want him to go to prison."

Thus, even without the field tests indicating the presence of cocaine at the Shirley Road residence, the evidence overwhelmingly supported defendant's conviction for maintaining the Shirley Road residence to sell crack cocaine. *See State v. Cummings*, 113 N.C. App. 368, 374-75,

438 S.E.2d 453, 457 (1994) (holding "[t]he State presented overwhelming evidence on defendant's charge[] of . . . maintaining a place to keep or sell controlled substances" where "defendant controlled the cocaine found . . . [,] defendant was involved in selling cocaine from his house, and . . . defendant possessed items of obvious drug paraphernalia, some of which were found to have cocaine residue on them"). Consequently, the admission of the evidence regarding the NIKs amounted to harmless error.

V

[5] Finally, defendant argues that the trial court erred in admitting two items into evidence: a photograph containing an image of an identification card issued to defendant by the North Carolina Department of Correction ("ID card photo") and the actual Department of Correction ID card ("DOC ID card"). The ID card photo portrayed an image of the DOC ID card lying in a wooden box along with a marijuana "roach." Defendant argues that because "FELON" was written across the bottom of the ID card and the word "INMATE" was written across the top, the admission of the DOC ID card and the ID card photo was improper because it unfairly prejudiced him and was prohibited by Rules 403 and 404(b) of the Rules of Evidence.

At the outset, we note that the State, relying on the photo in the record on appeal, argues that the jury did not necessarily see the words "FELON" and "INMATE" written across the exhibit. However, the actual exhibit maintained by the Clerk of Superior Court shows that the words "FELON" and "INMATE" appear very clearly in the exhibit. Moreover, the ID card photo was published to the jury by being displayed using an overhead projector. The question, therefore, remains whether the trial court committed prejudicial error in allowing the admission of the ID card photo and the DOC ID card. We hold that even assuming, without deciding, that the trial court erred in admitting the evidence without redacting the words "FELON" and "INMATE," any error was harmless.

In addition to the extensive evidence presented supporting defendant's drug-related convictions, defendant also chose to testify and, therefore, was subjected to cross-examination regarding his prior convictions. When asked whether, within the past 10 years, he had been convicted of or pled guilty to any crimes that carried a "possible jail sentence of 60 days or more," defendant responded "[d]rugs, trafficking" and, then, when asked to identify the specific offenses, stated: "I was convicted of trafficking, attempt to sell." He further confirmed that he has been convicted of "trafficking cocaine by sale of more than

28 grams." Given this testimony, which essentially told the jury he had been previously convicted of being a drug trafficker, defendant has not shown that there is a reasonable possibility that the jury would have found defendant not guilty of his drug-related charges in the absence of the admission of the DOC ID card and the ID card photo.

Conclusion

We, therefore, reverse defendant's conviction for resisting a public officer, but find no error with respect to his remaining convictions. Defendant's conviction for resisting a public officer was consolidated with his felony conviction for maintaining a dwelling to sell a controlled substance and his other misdemeanor convictions. Our Supreme Court has held that because "it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). We, therefore, remand for resentencing.

No error in part; reversed and remanded in part.

Judges STEPHENS and ERVIN concur.

STATE OF NORTH CAROLINA
v.
JARMAL FLOOD

No. COA14-179

Filed 18 November 2014

1. Evidence—findings of fact—sufficiency of evidence

The trial court did not err in a child sex offense case by making its findings of fact numbers 24–31 since they were accurate and supported by competent evidence.

2. Evidence—findings of fact—sufficiency of evidence—use of word "recommend"

The trial court did not err in a child sex offense case by making finding of fact number 32. the trial court's finding that An agent

implicitly acknowledging that her use of the word "recommend" could have been misconstrued by defendant" was supported by competent evidence.

3. Evidence—findings of fact—sufficiency of evidence—failure to mention break in time

The trial court did not err in a child sex offense case by making finding of fact number 34. Failure to mention a brief break in finding of fact 34 did not so misconstrue the timing of events as to render it unsupported by competent evidence.

4. Confessions and Incriminating Statements—motion to suppress—non-custodial interview—child sex offense investigation—voluntariness—improper promises by law enforcement—totality of circumstances

The trial court erred by granting defendant's motion to suppress his incriminating statements during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. Although an agent made improper promises to defendant which appeared to have encouraged defendant to make incriminating statements, under the totality of circumstances defendant's statements were not rendered involuntary by law enforcement as a matter of law. Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer.

Appeal by the State from order filed 20 December 2013, *nunc pro tunc* 30 August 2013, by Judge Richard T. Brown in Superior Court, Hoke County. Heard in the Court of Appeals 9 September 2014.

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

Paul F. Herzog for Defendant.

McGEE, Chief Judge.

The State appeals the trial court's order allowing Defendant's motion to suppress incriminating statements made by Defendant during a non-custodial interview with law enforcement that implicated him in a child sex offense investigation. We reverse.

I. Background

Defendant previously served in the New Hanover County Sheriff's Office for four years as a deputy sheriff, courtroom bailiff, and custody deputy, and he also completed Basic Law Enforcement Training. Defendant was arrested in 2007 and subsequently was convicted for sex by a substitute parent, on a charge unrelated to the present case. Defendant went to prison for that conviction and was on probation and receiving treatment as a sex offender when the following events occurred.

Detective Donald Schwab ("Detective Schwab") of the Hoke County Sheriff's Office received a report in early December 2011 that Defendant had sexually abused some children ("the children"). Defendant voluntarily met with Detective Schwab on 12 December 2011 at the Pender County Sheriff's Office, and Defendant denied committing the offenses. Defendant subsequently agreed to undergo a polygraph examination.

Agent Kelly Oaks ("Agent Oaks"), a certified polygraph examiner with the North Carolina State Bureau of Investigation ("SBI"), met with Defendant on 20 December 2011 at the Pender County Sheriff's Office. Agent Oaks conducted a polygraph examination with Defendant ("the polygraph"). Throughout this process, Defendant was not in custody, was given multiple breaks, and was told he was free to leave at any time. Defendant was even informed that he would not be arrested that day, no matter what he said to law enforcement.

Defendant failed the polygraph, and Agent Oaks interviewed Defendant about why he had not passed the polygraph ("the interview"). Defendant repeatedly denied that he had done anything wrong, but Agent Oaks pressed him on the issue for about fifty minutes. During the interview, Agent Oaks made numerous statements that she and Detective Schwab might help Defendant or make "recommendations" to the District Attorney's office, including recommending treatment rather than jail time, if Defendant confessed. At times, Agent Oaks indicated that the District Attorney's office would have discretion as to what it would do with their recommendations. Agent Oaks also stated that any offer to help Defendant would expire once their conversation ended.

Detective Schwab joined Agent Oaks and Defendant a little over forty minutes into the interview. Detective Schwab talked about Defendant's former role as a law enforcement officer. He also spoke to Defendant about sparing Defendant's mother from having to hear the details of the crime at trial, as well as sparing the children from having to testify. After almost five minutes of listening to Detective Schwab, Defendant asked

to speak to his mother on the phone. Agent Oaks again admonished that any offer to help Defendant would expire once their conversation ended. Nonetheless, Detective Schwab obliged Defendant's request and lent Defendant his cell phone. All three then took a brief break and left the interrogation room.

During the break, Defendant spoke to his mother on the phone and then to Detective Schwab outside the interrogation room; Defendant asked Detective Schwab what he should do, and Detective Schwab repeated the same sentiments he had previously conveyed to Defendant in the interrogation room. Agent Oaks, Detective Schwab, and Defendant then reentered the interrogation room, and Defendant began making incriminating statements regarding his having had sexual contact with a child.

Defendant was indicted on 30 July 2012 for rape of a child by an adult, first-degree rape, taking indecent liberties with a child (seven counts), attempted first-degree rape, sexual activity by a substitute parent (three counts), first-degree sexual offense (two counts), and first-degree sexual exploitation of a minor (two counts). Defendant filed a motion on 30 May 2013 to suppress the statements he had made to Agent Oaks and Detective Schwab during the interview on 20 December 2011. In his motion to suppress, Defendant asserted that, during the interview, Agent Oaks made improper promises that she and Detective Schwab would help Defendant if he confessed, which deceived him and rendered Defendant's subsequent incriminating statements involuntary. Defendant argued, in part, that this violated his rights under the due process clause of the United States Constitution.

Defendant's motion to suppress was heard on 19 August 2013. The trial court orally allowed Defendant's motion to suppress and subsequently entered a written order ("the order"). The State appeals.

II. Standard of Review

> On appeal from a suppression hearing, this Court will review the trial court's factual findings to determine if they are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. The trial court's conclusions of law are fully reviewable on appeal.

State v. Bordeaux, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010) (internal citations and quotation marks omitted).

III. Trial Court's Findings of Fact

[1] The State first challenges the trial court's findings of fact 24–31 in the order:

> 24. That Agent Oaks, upon telling the Defendant that he had failed the polygraph, told him on numerous occasions that he needed to tell the truth in order to unburden himself of guilt, to avoid a public trial for himself, his family and the victim, and to help himself in connection with the charges.
>
> 25. That Agent Oaks also told the Defendant that she and Detective Schwab would or could make "recommendations" to the District Attorney and that, if he cooperated and told the truth, they would advise the District Attorney accordingly.
>
> 26. That Agent Oaks used the terms "recommend" or "recommendation" on numerous occasions and indicated to the Defendant that she and Detective Schwab could make recommendations in the cases.
>
> 27. That Agent Oaks also asked the Defendant if he wanted her "help" and advised him that, if he did want her help, he needed to "tell the truth," because she knew from the polygraph results, the Defendant's body language and the look in his eyes, that he had committed the offenses.
>
> 28. That, early in the interview, after the Defendant had taken the polygraph and had again denied the allegations, Agent Oaks discussed the Defendant's future and sentencing possibilities and stated, essentially, "I would recommend treatment and extension of probation."
>
> 29. That numerous references to "recommend" and "help" were thereafter made by Agent Oaks.
>
> 30. That, as the interview progressed, Agent Oaks further explained that, while she and Detective Schwab could make recommendations to the District Attorney, she could only speculate about the results in the cases.
>
> 31. That, by the time Agent Oaks explained the limits of any "recommendation" to the District Attorney, the

> Defendant had been told numerous times about possible recommendations and help, including a recommendation for "further treatment and probation."

The State argues that findings of fact 24–31 "deprive the words Agent Oaks used [during the interview] of their context." In support of this assertion, but without providing further explanation, the State presents this Court with numerous statements made by Agent Oaks during the interview that supposedly provide this missing "context." Given its rather conclusory nature, we question whether the State's argument here is a genuine challenge to the competency of the trial court's findings of fact. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274 (holding that the State waived its challenge to the facts from a trial court's order granting a defendant's motion to dismiss because "the State never *directly* contend[ed] that the trial court's findings of fact [were] not supported by competent evidence[.]" (emphasis added)). Even assuming *arguendo* that the State has presented this Court with an actionable argument, upon reviewing the statements provided by the State, we conclude that the trial court's findings of fact 24–31 are accurate and supported by competent evidence.

[2] The State next challenges the trial court's finding of fact 32: "That Agent Oaks, an experienced agent and polygraph examiner, acknowledged in her testimony that her use of the word 'recommend' was a poor choice of words, implicitly acknowledging that it could have been misconstrued by the Defendant." Specifically, the State takes issue with the trial court's finding that Agent Oaks "implicitly acknowledge[d] that [her use of the word 'recommend'] could have been misconstrued by the Defendant." To support its challenge to this finding, the State points only to Agent Oaks' testimony during the suppression hearing. Agent Oaks testified that her use of the word "recommend" was merely meant to convey to Defendant that she was gathering information to share with the District Attorney's Office.

Even if that were what Agent Oaks meant to convey, Agent Oaks' intentions during the interview are irrelevant. *Cf. Moran v. Burbine*, 475 U.S. 412, 423, 1142, 89 L. Ed. 2d 410, 422 (1986) ("[T]he state of mind of the police is irrelevant to the question of the . . . voluntariness of respondent's election to abandon his rights.") (in the *Miranda* waiver context); *United States v. Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002) ("We engage in the same inquiry when analyzing the voluntariness of a *Miranda* waiver as when analyzing the voluntariness of statements under the Due Process Clause.") (citing *Colorado v. Connelly*, 479 U.S. 157, 169, 93 L. Ed. 2d 473 (1986)). Instead, the question of whether Defendant's

incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him. *See State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("[If] 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.' " (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26, 36 L. Ed. 2d 854, 862 (1973))). During the suppression hearing, Agent Oaks testified that her use of "recommend" during the interview was "a poor choice of words." Thus, the trial court's finding that Agent Oaks "implicitly acknowledge[d] that [her use of the word 'recommend'] could have been misconstrued by the Defendant" is supported by competent evidence.

[3] Finally, the State challenges finding of fact 34: "That, after Agent Oaks reiterated the possibility of [her making] recommendations to the District Attorney, although at this time she did use the phrase, 'but it is up to them,' and shortly after Detective Schwab joined the interview, the Defendant did make certain incriminating statements." The State contends that this finding "does not accurately portray the time sequence in which the events it recounts occurred." Specifically, the State argues that finding of fact 34 "makes it sound like [D]efendant made incriminating statements after Agent Oaks reiterated the possibility of recommendations to the District Attorney and shortly after Detective Schwab joined the interview, without making it sound like there was any break between those events." Notably, there was a break between those events; Defendant took a short break to call his mother after Detective Schwab joined the interview, but before making the incriminating statements at issue.

However, the State never directly contends that the trial court's findings of fact are not supported by competent evidence or that the order of events described are incorrect. *Cf. Bordeaux*, 207 N.C. App. at 648, 701 S.E.2d at 274–75 (holding that the State waived its challenge to the facts from a trial court's order granting a defendant's motion to dismiss because "the State never directly contend[ed] that the trial court's findings of fact [were] not supported by competent evidence or that the officers conducting the interview were misquoted."). The State does argue that finding of fact 34 "does not accurately portray the time sequence in which the events it recounts occurred." However, findings of fact 8 and 9 in the trial court's order state that Defendant took brief breaks

throughout his meeting with Agent Oaks and Detective Schwab on 20 December 2011. That the trial court did not mention this particular brief break in finding of fact 34 does not so misconstrue the timing of events as to render it unsupported by competent evidence. For these reasons, the trial court's findings are supported by competent evidence and are binding on appeal.

IV. Trial Court's Conclusions of Law

[4] The State next argues that the trial court's conclusions of law are in error because Defendant's incriminating statements were voluntary. Under the Fifth Amendment of the Constitution of the United States, no one "shall be compelled in any criminal case to be a witness against himself". U.S. Const. Amend. V. "The self-incrimination clause of the Fifth Amendment has been incorporated in the Fourteenth Amendment and applies to states." *State v. Linney*, 138 N.C. App. 169, 178, 531 S.E.2d 245, 253 (2000). It is well-established that "obtaining confessions involuntarily denies a defendant's fourteenth amendment due process rights." *State v. Jones*, 327 N.C. 439, 447, 396 S.E.2d 309, 313 (1990) (citing *Ashcraft v. Tennessee*, 64 S. Ct. 921, 88 L. Ed. 1192 (1944)). Generally, to be admissible, a defendant's "confession [must be] the product of an essentially free and unconstrained choice by its maker[.]" *Bustamonte*, 412 U.S. at 225, 36 L. Ed. 2d at 862. When reviewing a defendant's confession, this Court must determine whether the statement was made voluntarily and understandingly. *See State v. Davis*, 305 N.C. 400, 419, 290 S.E.2d 574, 586 (1982). The voluntariness of a defendant's confession is based upon the totality of the circumstances. *State v. Greene*, 332 N.C. 565, 579, 422 S.E.2d 730, 738 (1992). Factors considered by courts making this determination include, but are not limited to:

> 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.

*State v. Hyd*e, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000); *see also State v. Martin*, 315 N.C. 667, 680–81, 340 S.E.2d 326, 334 (1986) (cognitive capacity of the suspect); *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (age of the suspect). In making this determination, the court "may not rely upon any one circumstance standing alone and in

isolation." *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986) (citation and quotation marks omitted).

The question before this Court is whether improper promises were made to obtain Defendant's incriminating statements and whether Defendant was deceived therefrom or had his will overborne so as to render his incriminating statements involuntary. In its order, the trial court concluded

> 1. That the repeated use of the terms "recommend" and "recommendation" and "help" by an experienced law enforcement officer, particularly in view of admonitions from our appellate courts that such terms should not be used during interrogations or interviews, induced a hope or promise of reward or benefits, specifically treatment and probation, by the Defendant.
>
> 2. That, under the totality of the circumstances, even though the agent at times sought to explain or limit her use of the term "recommend" or "recommendation," the aforesaid hope or promise of reward rendered the Defendant's incriminating statements involuntary, and that the overall import of the use of those terms was to induce a hope of benefit or reward for a lighter sentence.
>
> 3. That the agents statements to the Defendant exceeded a mere indication of willingness of the agent to discuss the Defendant's cooperation with the District Attorney.

The State claims that Agent Oaks' statements to Defendant during the interview on 20 December 2011 were permissible. In support of this contention, the State argues that this case is much like *State v. Bailey*, 145 N.C. App. 13, 548 S.E.2d. 814 (2001). In *Bailey*, a suspect, who was later prosecuted, voluntarily participated in a polygraph examination as part of a child sex offense investigation. *Id.* at 16–17, 548 S.E.2d at 816–17. The suspect failed the polygraph, and the SBI agent administering it made statements to the suspect that "everything would probably have a little less consequence to it" and "[t]hings would probably go easier" if he confessed, which he then did. *Id.* at 17, 548 S.E.2d at 817. In spite of these statements by law enforcement, this Court held that the confession was voluntary because "there were no promises made to [the suspect], and it was made clear to [the suspect] that the district attorney,

rather than [law enforcement], would ultimately determine how to handle the case." *Id.* at 18, 548 S.E.2d at 817.

The State also cites *State v. Williams*, 67 N.C. App. 144, 312 S.E.2d 501 (1984), for the contention that Agent Oaks' use of the words "recommend" and "recommendation" did not render her statements to Defendant improper. In *Williams*, officers used the words "recommend" and "recommendation" when speaking to a suspect but they clearly and consistently indicated to the suspect that they could only tell the District Attorney's office that the suspect cooperated; the officers also never suggested that the suspect might gain anything in exchange for his confession. *See id.* at 147, 312 S.E.2d at 503. In total, the officers in *Williams* did nothing improper except use the words "recommend" and "recommendation" during their interrogation of the suspect. However, even then, this Court admonished "law enforcement officers to avoid entirely use of words such as 'recommend' and 'recommendation,' which in some circumstances . . . could render a confession involuntary." *Id.*

Agent Oaks' actions in the case before this Court are distinguishable from *Bailey* and *Williams*, as they delve deeper into the realm of impermissible conduct by law enforcement. During the interview, Agent Oaks suggested she would work with and help Defendant if he confessed and that she "would recommend . . . that [defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Agent Oaks further suggested to Defendant that

> if you admit to what happened here . . . [Detective Schwab is] going to probably talk to the District Attorney and say, "hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?" and talk about it.

At one point, Agent Oaks asked Defendant directly: "Do you want my help?" Agent Oaks also threatened that any possibility of help from her or Detective Schwab would cease after their conversation with Defendant ended, once even after Defendant asked to speak to his mother on the phone.

Although Agent Oaks' statements to Defendant are peppered with occasional references to the District Attorney's Office having discretion as to what it might do with her and Detective Schwab's potential "recommendations," it is clear that the purpose of Agent Oaks' statements

to Defendant was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed. *See State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975) ("[An] improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.") (citations omitted). Indeed, Agent Oaks' statements appear to promise that she and Detective Schwab would work with the District Attorney's Office on Defendant's behalf -- if he confessed -- in order to lessen the consequences of the charges that would likely be filed against him. Such promises are improper. *Cf. State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967) (confession rendered involuntary where law enforcement officer told the suspect that the officer would testify on the suspect's behalf if he cooperated). At the very least, Agent Oaks' actions fall outside the best practices that law enforcement officers should follow when interviewing suspects. *See State v. Branch*, 306 N.C. 101, 110, 291 S.E.2d 653, 659–60 (1982) ("[L]aw enforcement officers . . . should always be circumspect in any comment they make to a [suspect], particularly in connection with any confession the [suspect] is to give or has given. The better practice would be for law enforcement officers not to engage in speculation of any form with regard to what will happen if the [suspect] confesses.").

Given that Agent Oaks made improper promises to Defendant, which appear to have encouraged Defendant to make incriminating statements, we now continue the totality of the circumstances analysis to determine whether Defendant was deceived thereby or had his will overborne and, therefore, was induced to make the incriminating statements involuntarily. Generally, a suspect's confession can be rendered involuntary when induced by an officer's statements that it would be harder for the suspect if he did not cooperate or that the suspect might obtain some material advantage by confessing. *See e.g.*, *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102 (statements inadmissible where "officers repeatedly told [the suspect] that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around' "); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (statements inadmissible where an officer offered to testify on the suspect's behalf if he cooperated). However, such statements by law enforcement generally tend to render a suspect's confession involuntary only when they are preceded by other circumstances which might provoke fright in the suspect or otherwise overbear his will. *See e.g.*, *Pruitt*, 286 N.C. at 449, 458, 212 S.E.2d at 97, 102 (suspect in custody and interrogation was conducted in a "police-dominated atmosphere"); *Fuqua*, 269 N.C. at 228, 152 S.E.2d at 72 (suspect in custody);

but see Richardson, 316 N.C. at 604, 342 S.E.2d at 831 ("Promises or other statements indicating to [a suspect who is not in custody and has 'considerable experience' in the criminal justice system] that he will receive some benefit if he confesses do not render his confession involuntary *when made in response to a solicitation by the* [*suspect*]." (emphasis added)).

Such additional circumstances are largely absent in the present case. It appears uncontroverted that, at the time of the interview, Defendant was a competent adult; he was not in custody, and there were no *Miranda* issues; Defendant was not held incommunicado; the length of the interview was reasonable; there were no physical threats or shows of violence against Defendant; Defendant was told repeatedly that he could leave at any time and was given multiple breaks; Defendant was even told that he was not going to be arrested that day, no matter what he said to law enforcement; and Defendant had extensive experience with the criminal justice system -- both through four years of serving as a trained sheriff's deputy and for a prior conviction of an unrelated sex offense against a child.

The Supreme Court of North Carolina was presented with a similar defendant in *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). In *Richardson*, the defendant was a competent adult with an extensive history with the criminal justice system. *Id.* at 604, 342 S.E.2d at 831. He voluntarily met with North Carolina law enforcement and subsequently confessed to committing crimes within the state, although at the time he was out on bond for a pending attempted burglary charge in Tennessee, was a suspect in several states for a string of related criminal activity, and was concerned that he might be convicted of being an habitual felon in Tennessee, which carried with it a life sentence. *Id.* at 596–97, 342 S.E.2d at 826. Much like in *Fuqua* where a suspect's confession was rendered involuntary, an officer agreed to testify on the *Richardson* defendant's behalf if he cooperated with the other investigations. *Id.* at 604, 342 S.E.2d 831. However, in distinguishing *Fuqua*, the *Richardson* Court held that the defendant's confession was not involuntary because he initiated and "engaged in hard-headed bargaining" with the authorities in exchange for the officer's testimony. *Id.* at 604, 342 S.E.2d at 831.

The present case largely falls between *Fuqua* and *Richardson*. As in both cases, law enforcement made promises to work on Defendant's behalf if he confessed. However, *Fuqua* is distinguishable because Defendant was not in custody at the time those promises were made, nor is there any indication that the *Fuqua* defendant had extensive

experience with the criminal justice system. *Richardson* is distinguishable because Defendant did not initiate and engage in active negotiations with law enforcement before making his incriminating statements, although this is slightly balanced out by the unique pressures that the *Richardson* defendant was under to cooperate with law enforcement to mitigate his circumstances. *See id.* at 596–97, 342 S.E.2d at 826.

Thus, the present case is more like *Richardson* than it is like *Fuqua*. Defendant was not in custody when he made his incriminating statements and had extensive experience in the criminal justice system. Defendant arguably had even more experience in the criminal justice system than the *Richardson* defendant whose only previous experience involved being investigated and prosecuted for crimes he had committed; Defendant not only had previous experience as a defendant in another child sex offense case, he also had four years of experience as a trained law enforcement officer. This, combined with the non-custodial nature of the interview, strongly pushes this Court towards finding Defendant's incriminating statements voluntary. Indeed, although Agent Oaks' statements were improper, taking all of these factors into account, we cannot say that the circumstances leading up to and surrounding Defendant's confession were such as to overbear Defendant's will or deceive him.

This Court is mindful of the need to "apply well-recognized rules of law impartially to easy and hard cases alike[,] lest we make bad law which will erode constitutional safeguards [that have been] jealously guarded" by North Carolina courts. *See Pruitt*, 286 N.C. at 458-59, 212 S.E.2d at 103. We arrive at our conclusion attentive to the fact that any totality of the circumstances analysis is more difficult when both sides of the scale of voluntariness are weighted heavily. Under the totality of the circumstances, Defendant's incriminating statements during the interview were not rendered involuntary by law enforcement as a matter of law.

Reversed and remanded.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
GILES BRANTLEY FLOYD, DEFENDANT

No. COA14-190

Filed 18 November 2014

Criminal Law—postconviction motion for DNA testing—properly denied

The trial court did not err by denying defendant's postconviction motion for DNA testing pursuant to N.C.G.S. § 15A-269. While the results from DNA testing might have been considered relevant, had they been offered at trial, they are not material in this postconviction setting. Furthermore, the court was not required to conduct an evidentiary hearing.

Appeal by Defendant from an order entered 4 September 2013 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 13 August 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel S. Hirschman, for the State.

Mark Hayes, for the Defendant.

DILLON, Judge.

Giles Brantley Floyd ("Defendant") appeals from an order denying his postconviction motion for DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2012). We affirm.

I. Background

Defendant was convicted of murdering his wife after her body was discovered by their daughter in their utility shop behind their home. His conviction was upheld by this Court. *State v. Floyd*, 143 N.C. App. 128, 545 S.E.2d 238 (2001), *disc. review denied*, 353 N.C. 730, 551 S.E.2d 111 (2001), *cert. denied sub nom*, *Floyd v. North Carolina*, 534 U.S. 1092, 122 S. Ct. 838, 151 L. Ed.2d 717 (2002), *reh'g denied*, 535 U.S. 952, 122 S. Ct. 1353, 152 L. Ed.2d 255 (2002).

On 22 October 2012 – fourteen years after his conviction - Defendant filed a motion in the trial court seeking postconviction DNA testing of

items that were collected from the utility shop by investigators. Following a non-evidentiary hearing on the matter, the trial court entered an order denying the motion.

Defendant now appeals from that order. For the reasons set forth below, we affirm the order.

II. Analysis

A defendant may request postconviction DNA testing of evidence pursuant to N.C. Gen. Stat. § 15A-269, which allows for a court to order such testing if certain conditions are met. One of these conditions is that the evidence sought "[i]s material to defendant's defense." N.C. Gen. Stat. § 15A-269(a)(1) (2012). A defendant seeking the DNA testing "carries the burden to make the showing of materiality[.]" *State v. Gardner*, __ N.C. App. __, __, 742 S.E.2d 352, 356 (2013), *disc. review denied*, 749 S.E.2d 860 (2013). We have held that evidence is "material" for purposes of the statute if "there is a *reasonable probability* that its disclosure to the defense would result in a different outcome in the jury's deliberation." *State v. Hewson*, 220 N.C. App. 117, 122, 725 S.E.2d 53, 56 (2012) (internal marks omitted) (emphasis added).

In the present case, Defendant sought DNA testing of five cigarettes and a beer can that were found in the utility shop where the victim's body was discovered. Defendant has contended that he did not kill his wife and that he believed that Karen Fowler, with whom he had had an adulterous affair for a number of years, or Ms. Fowler's two sons, committed the murder. In his postconviction motion, he argued that the testing may show the presence of DNA from Ms. Fowler or her sons at the crime scene, which would support his theory.

We believe, however, that the trial court did not err in concluding that there was not a "reasonable probability" that the results from any DNA testing would result in a more favorable outcome in a trial, based on the evidence in the record pointing to Defendant's guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there. *See State v. McLean*, __ N.C. App. __, __, 753 S.E.2d 235, 240 (2014) (stating that whether DNA evidence is material "can only be determined after . . . the judge has had an opportunity to compare [the] DNA evidence against the cumulative evidence presented at trial."). Here, as we pointed out in our prior opinion in this case, the evidence pointing to Defendant's guilt is overwhelming: The victim's blood was found splattered on the Defendant's boots and jeans on the day of the murder. Defendant had an affair for many years with Ms. Fowler, living with her at various times during his marriage to the

victim. The victim had filed a divorce complaint against him approximately six weeks before her murder, but apparently reconciled with him a week later, whereupon they agreed that if she ever suspected him of renewing the affair, Defendant would vacate the home and would pay her $500.00 per month in alimony. Witnesses testified hearing Defendant state within a month of the murder that he would be doing something in a couple of weeks that "you'll read about . . . in the paper"; that he missed having sex with Ms. Fowler and still loved her; and that he would "rather go to jail before he paid [his wife] any money." Telephone records reveal twelve calls between Defendant's and Ms. Fowler's home within nine days leading up to the murder, as well as five calls made to Ms. Fowler's home after the murder. *See Floyd*, 143 N.C. App. at 129-31, 545 S.E.2d at 239-40.

While the results from DNA testing *might* be considered "relevant," had they been offered at trial, they are not "material" in this postconviction setting. *See McLean*, __ N.C. App. at __, 753 S.E.2d at 239-40 (holding that a showing of materiality is a higher burden than a showing of relevancy under N.C. Gen. Stat. § 15A-267).

Defendant argues that the trial court erred in making findings in the order that he "failed to offer any evidence as to why the DNA testing is material to [his] defense" and that he "failed to offer any evidence as to why the said items of evidence are related to the homicide," because the trial court was holding a non-evidentiary hearing. We agree that these findings were erroneous; however, we hold that the error is harmless because these findings are not needed to support the trial court's conclusion. We have stated that the statute at issue "contains no requirement that the trial court make specific findings of facts, and we decline to impose such a requirement." *Gardner*, __ N.C. App. at __, 742 S.E.2d at 356. A trial court's order is sufficient so long as it states that the court reviewed the defendant's motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met. *Id.* at __, 742 S.E.2d at 356-57. Accordingly, this argument is overruled.

Defendant also argues that the contents of his motion were sufficient to require the trial court to conduct an evidentiary hearing. While a trial court may conduct an evidentiary hearing, it is not required to do so in every case. Indeed, we have affirmed denials of motions for postconviction DNA testing where the trial court did not even conduct any hearing. *See, e.g.*, *Gardner*, *supra*. In the context of a motion for appropriate relief, we have held that in determining whether an evidentiary hearing

is necessary, "the ultimate question that must be addressed [by the trial court] . . . is whether the information contained in the record *and* presented in the [] motion . . . would suffice, if believed, to support an award of relief." *State v. Jackson*, 220 N.C. App. 1, 6, 727 S.E.2d 322, 328 (2012) (emphasis added). We hold that for motions brought under N.C. Gen. Stat. § 15A-269, a trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

Here, Defendant indicates in his motion some evidence he would offer at a hearing. While such evidence *might* indicate how the results of DNA testing would produce "relevant" evidence, Defendant failed to show how DNA testing would produce "material" evidence; that is, he failed to show how such testing would produce evidence sufficient to create a reasonable probability of a different result, given the evidence already in the trial record. Rather, even if the DNA testing showed the presence of DNA from Ms. Fowler or her sons, the motion did not indicate how such results would create a *reasonable probability* that the verdict would have been any different. Accordingly, the trial court was not required to conduct an evidentiary hearing; and, therefore, this argument is overruled.

AFFIRMED.

Judges HUNTER, Robert C. and DAVIS concur.

STATE v. GENTILE

[237 N.C. App. 304 (2014)]

STATE OF NORTH CAROLINA
v.
JAMES JOSEPH GENTILE

No. COA14-438

Filed 18 November 2014

1. Search and Seizure—motion to suppress—illegal drugs—drug paraphernalia—anonymous tip—unlawful search of curtilage

The trial court did not err by granting defendant's motion to suppress illegal drugs and drug paraphernalia seized as the result of an unlawful search. When the detectives smelled the odor of marijuana, their purported general inquiry about the information received from an anonymous tip was a trespassory invasion of defendant's curtilage.

2. Appeal and Error—preservation of issues—failure to argue at trial

Although the State contended that the trial court erred by granting a motion to suppress even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful since it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause absent the odor of marijuana, the State waived this argument by failing to raise it at trial.

Appeal by the State from order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

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

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

ELMORE, Judge.

The State appeals from an order entered 4 November 2013 by Judge Reuben F. Young in Johnston County Superior Court granting defendant's motion to suppress evidence seized as the result of an unlawful search. After careful consideration, we affirm.

I. Facts

On 14 September 2012, James Joseph Gentile (defendant) filed a motion to suppress illegal drugs and drug paraphernalia seized by law enforcement officers from his residence. During the 9 September 2013 session of Johnston County Superior Court, the trial court heard defendant's motion and made the following pertinent findings of fact:

> 2. On September 9, 2011, Detective Rodney Langdon received an anonymous complaint that there was a marijuana grow operation in a detached garage adjacent to the residence located at 3236 Jackson-King Road, Willow Spring, Johnston County, North Carolina 27592.
>
> . . .
>
> 5. After verifying ownership of the residence, Detective Langdon conducted surveillance on the 3236 Jackson-King Road residence on the dates of September 13, 15, and 17 of 2011. He testified that he observed no vehicles on the property on these dates or any persons outside the residence. However, the landscaping to the residence was maintained and it appeared as though the residence was occupied because on September 13, 2011, Detective Langdon, along with Detective Jay Creech, observed that no exterior lights were on, but on September 15 and 17 of 2011, Detective Langdon observed that each of the lights affixed beside the front door to the residence were illuminated.
>
> 6. On September 21, 2011, Detectives Langdon and Creech, at approximately 11:10 a.m., went to the address of 3236 Jackson-King Road to conduct a knock and talk investigation.
>
> 7. Detectives Langdon and Creech arrived at the residence in an unmarked patrol vehicle and parked near the entrance where the electronic gate was located on the driveway.
>
> 8. Detective Langdon pushed the button to the electronic gate in an attempt to make contact with someone at the residence; however, after pushing the button next to the key pad numerous times, nothing happened and he eventually heard what sounded like a dial tone through

the intercom speaker. He announced "Sheriff's Office" several times but no response was noted. The dial tone led the detective to believe that the intercom to the electronic gate was not functioning properly.

9. After pushing the button several times to the dial pad and not receiving any response, Detective Langdon observed vehicle tracks next to the left hand side of the electronic gate. Based on the detective's training and experience, it appeared as though numerous vehicles had been traveling around the gate based on the track impressions observed in the grass on the left hand side of the gate. Detective Langdon testified that when he saw the track impressions on the grass next to the gate, this also led him to believe that the gate was broken as well.

10. Detective Langdon testified that the electronic gate was positioned only on the paved portion of the driveway and did not surround the entire property. There was an open field to the left of the gate looking toward the residence. There were no "No Trespassing" or any other signs positioned on the gate indicating that it was private property.

11. After observing the track impressions to the left of the electronic gate, Detectives Langdon and Creech then walked around the gate on the grass along the vehicle tracks on the left hand side of the gate. Detective Langdon testified that he and Detective Creech then walked the rest of the way up the paved portion of the driveway leading to the front door, which was approximately five hundred (500) feet in distance.

12. Detective Langdon testified that the residence was fairly large in size and had a detached two-car garage located directly at the end of the driveway next to the residence. The two-car detached garage was connected to the residence by a paved walkway.

13. Detective Langdon approached the front door to the residence and knocked multiple times. While waiting at the door, Detectives Langdon and Creech heard dogs barking, but testified that they could not tell from which direction the dogs were barking.

14. After efforts to reach someone at the front door were unsuccessful, Detectives Langdon and Creech walked through what both detectives described as a "privacy fence" around a paved pathway to the backyard, thinking that since they had heard dogs barking, that the owner could be in the backyard, having not heard the knocking at the front door. However, the [sic] Detective Langdon stated in his affidavit that he "could hear several dogs barking towards the rear of the residence."

15. Detective Langdon testified that he knocked on the backdoor, but was unable to make contact with anyone. While standing at the back door, Detective Langdon testified that he heard an air conditioner unit running near the rear of the two-car detached garage.

16. The weather on September 21, 2011 was cool and brisk and the temperature was approximately 72 degrees according to the temperature gauge on the patrol vehicle. Detective Langdon testified that since an air conditioner unit was not running to the main residence, but was running to the two-car detached garage, he believed that the two-car detached garage could be occupied.

17. While standing at the back door to the residence, Detective Langdon instructed Detective Creech to go stand in front of the house for officer safety purposes, and to see if he could locate anyone on the property while he walked to the two-car detached garage.

18. Using the paved walkway that connected the house to the backyard, as well as the two-car detached garage, Detective Langdon testified that he walked to the door of the detached garage and knocked in an attempt to locate the owner or any other persons on the property. Detective Langdon observed while knocking at the door that there were two surveillance cameras on the garage, neither of which faced the main residence.

19. Unable to make contact with anyone at the door to the two-car detached garage, Detective Langdon testified that as he was turning to leave the property, Detective Creech told him that he detected the odor of marijuana emitting from the front of the two-car detached garage.

> Detective Creech testified that while standing on the driveway approximately eight to ten feet from the front of the two-car detached garage, he immediately detected the overwhelming odor of marijuana and informed Detective Langdon.
>
> 20. Detective Langdon then stepped to Detective Creech's location at the front of the detached garage on the driveway and detected the "overwhelming pungent odor of marijuana" emitting from the front of the two-car detached garage.
>
> 21. Based upon the overwhelming "pungent odor of marijuana" and their training and experience the detectives left the residence and applied for a search warrant for the address of 3236 Jackson-King Road.
>
> 22. During the execution of the search warrant, the Detectives located two hundred twenty-eight (228) pounds, or one hundred forty-three (143) marijuana plants and approximately three (3) ounces of psilocybin along with digital post scales, gallon Ziploc bags and other miscellaneous drug paraphernalia items.

Based on these findings of fact, the trial court concluded that the evidence seized pursuant to the search warrant had been unconstitutionally obtained because "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." Thus, the trial court granted defendant's motion to suppress the seized evidence.

II. Analysis

[1] The State argues that the trial court erred in granting defendant's motion to suppress because it erroneously concluded as a matter of law that "when the detectives smelled the odor of marijuana, they were not in a place in which they had a right to be." We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

"The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Weaver*, __ N.C. App. __, __, 752 S.E.2d 240, 244 (2013) (citation and quotation marks omitted). A search "conducted outside the judicial process, without prior approval by judge or magistrate, [is] per se unreasonable under the [f]ourth [a]mendment—subject only to a few specifically established and well-delineated exceptions." *State v. Rhodes*, 151 N.C. App. 208, 213, 565 S.E.2d 266, 269 *writ denied*, *review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002) (citations and quotation marks omitted).

> One such exception is the plain [smell] doctrine, under which a seizure is lawful when the officer was in a place where he had a right to be when the evidence was discovered and when it is immediately apparent to the police that the items [smelled] constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause.

State v. Pasour, __ N.C. App. __, __, 741 S.E.2d 323, 324-25 (2012) (citations and internal quotation marks omitted).

The fourth amendment generally protects "persons, houses, papers, and effects[.]" U.S. Const. amend. IV. Fourth amendment protections also extend to the curtilage of an individual's home. *Rhodes*, 151 N.C. App. at 215, 565 S.E.2d at 271. In this state, the curtilage "will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

However, "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house. It is well established that entrance by law enforcement officers onto private property for the purpose of a general inquiry or interview is proper." *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011) (citations and internal quotation marks omitted). However, where officers have no reason to believe that entering a homeowner's curtilage will produce a different response than knocking on the residence's front door, the Fourth Amendment is violated. *Pasour*, __ N.C. App. at __, 741 S.E.2d at 325-26.

Here, the detectives had far exceeded the scope of their right to generally inquire about the information received from the anonymous tip at the time they smelled the marijuana. When the detectives initially reached the house, they knocked on the front door for a "couple [of]

minutes" but received no human response. They only proceeded to the back of the house because they heard barking dogs, and believed that an occupant might not have heard the knocks. However, the detectives could not determine from which direction the dogs were barking. There was no evidence of any vehicles on the property, persons present, lights illuminated in the residence, or furniture in the house, and the detectives believed that no one resided there. Accordingly, the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage. *See Florida v. Jardines*, __ U.S. __, __, 185 L. Ed. 2d 495 (2013) (noting that a law enforcement officer without a search warrant may merely "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave").

As a result, when the detectives smelled the odor of marijuana, their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location. Accordingly, the subsequent search of the residence based, in part, on the odor of marijuana was unlawful. Thus, the trial court did not err by granting defendant's motion to suppress.

b.) Remaining Portions of Search Warrant Affidavit

[2] Next, the State argues that even if the detectives' entry onto constitutionally protected areas of defendant's property was unlawful, the trial court erred by granting the motion to suppress because it failed to examine the remaining portions of the search warrant affidavit to determine if the warrant was still supported by probable cause, absent the odor of marijuana. We disagree.

As defendant correctly points out, the State failed to preserve this issue on appeal. During the motion to suppress, the State argued that because the detectives were conducting a general inquiry about the information received from the anonymous tip and smelled the marijuana while on the driveway, they were in a place in which they had a right to be when they smelled the marijuana. Accordingly, the State argued that the motion to suppress should be denied. However, the State never argued before the trial court that the motion to suppress should be denied because even if the detectives had no legal right to be on the driveway when they smelled the marijuana, the remaining portions of the search warrant were nevertheless sufficient to establish probable cause. Thus, we dismiss this argument because the State did

not preserve this issue for appellate review. *See State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) ("[W]here a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court.").

III. Conclusion

In sum, we affirm the trial court's order granting defendant's motion to suppress because the evidence seized from defendant's residence was obtained as a result of an unlawful search.

Affirmed.

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA
v.
DEXTER DURANE HENRY

No. COA14-561

Filed 18 November 2014

1. Appeal and Error—preservation of issues—failure to object at trial on the same grounds

The issue of whether defendant's Fourth Amendment rights were violated by an officer's excessive force was not heard on appeal where defendant did not object at trial on those grounds.

2. Search and Seizure—frisk—reasonable suspicion

Although a defendant in a prosecution for cocaine possession and resisting a public officer did not preserve for appeal the argument that the officer lacked reasonable suspicion for a frisk, the officer had reasonable suspicion to conduct a frisk for weapons to ensure his safety. Moreover, his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights.

3. Drugs—constructive possession—struggle outside patrol car

The State's evidence was sufficient to prove that defendant actually or constructively possessed the cocaine an officer found after their struggle on the ground near defendant's rental car in a prosecution for possession of cocaine and resisting a public officer.

Considered collectively, the patrol car video of the traffic stop, the officer's check of the area immediately before his initial contact with defendant, the absence of another person, the location of the cocaine, and defendant's repeated refusal to open his hand provided sufficient evidence to survive defendant's motion to dismiss.

4. Indictment and Information—no variance with evidence—plural and singular usage

The trial court did not err by denying defendant's motion to dismiss the charge of resisting, obstructing, or delaying a public officer due fatal variances between the indictment and the evidence. Defendant's motion was based on the indictment's statement that defendant refused to drop what was in his "hands," while the evidence was that he refused to drop what was in his right "hand." Not every variance that involves an essential element of the offense charged is necessarily material.

5. Indictment and Information—no variance with evidence—resisting an officer—when a traffic stop is complete

Although defendant did not properly preserve the issue for appellate review, there was not a fatal variance between the indictment and the evidence on a charge of resisting a public officer where defendant contended that a traffic stop was over before any resistance occurred. The officer had not yet returned defendant's license and registration at the time he ordered defendant out of his vehicle to conduct a frisk for weapons.

Appeal by Defendant from judgment entered 30 October 2013 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 6 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

William D. Spence for Defendant.

STEPHENS, Judge.

Defendant Dexter Durane Henry was convicted in Johnston County Superior Court of one count of possession of cocaine and one count of resisting a public officer. He then pled guilty to having attained habitual felon status. Defendant appeals from the trial court's denial of his motion to suppress evidence that he alleges was obtained in violation of his

Fourth Amendment rights, as well as from the trial court's denial of his motions to dismiss the charges against him for insufficient evidence and fatal variances between the indictment and the evidence presented at trial. After careful review, we hold that the trial court did not err in denying Defendant's motion to suppress or either of his motions to dismiss.

Facts and Procedural History

On 5 March 2012, Defendant was indicted on one count of possession of cocaine and one count of resisting a public officer, arising from an altercation that ensued after Defendant's vehicle was stopped for a safe movement violation along Buffalo Road in Johnston County on 1 February 2012. The evidence introduced at Defendant's trial, which began on 28 October 2013, tended to show that, at approximately 10:00 a.m. on 1 February 2012, Johnston County Sheriff's Deputy Greg Collins ("Deputy Collins") was patrolling for traffic violations when he saw a gray Hyundai suddenly come to a complete stop in the middle of a blind curve. The posted speed limit was 45 miles per hour, and Deputy Collins later testified that he and three or four other motorists behind the Hyundai were forced to stop abruptly to avoid hitting it. While the cars were stopped, Deputy Collins watched as a female ran out from a cemetery beside the road and climbed into the Hyundai's passenger seat. At that point, Deputy Collins ran a check on the vehicle's license plate, which "came back to a leased vehicle" from Charlotte. When the Hyundai continued driving north, Deputy Collins followed it for about a mile, then activated his blue lights to conduct a traffic stop as the car turned into a driveway.

As Deputy Collins approached the driver's side of the vehicle, he looked around at his surroundings to ensure his own safety and confirmed that nothing had been thrown on the ground from the vehicle. Then Deputy Collins reached the driver's side door and recognized Defendant as the driver, based on "a lot of involvement dealing with him" on multiple occasions involving narcotics during Deputy Collins's previous employment with the Selma Police Department. Deputy Collins noticed Defendant "seemed nervous" and "was sitting there shaking." When Deputy Collins asked Defendant for his license and registration, Defendant reached over with his left hand to open the vehicle's glove box while keeping his right arm in a position where Deputy Collins could not see it. Then Deputy Collins asked Defendant where he and his female passenger were going; Defendant said nothing but his passenger said they were headed to an ATM, which struck Deputy Collins as odd, given that the car had been traveling in the opposite direction of the closest available ATM. The passenger replied that Defendant was driving her

to pick up her ATM card, but Deputy Collins noticed that although they claimed to be friends, neither Defendant nor his passenger appeared to know each other's names.

After Deputy Collins asked Defendant to step out of the vehicle, he "noticed there was something in [Defendant's] right hand, [but] couldn't tell what it was" because Defendant had his right hand "closed with his thumb and index finger rubbing it together" in a clinched fist. Deputy Collins asked Defendant if he was holding his car keys, but Defendant said they were still in his car, which Deputy Collins confirmed. Deputy Collins asked Defendant multiple times to open his hand, but Defendant repeatedly refused. This led Deputy Collins to suspect Defendant might be carrying a weapon, so he ordered Defendant to turn around and place his hands on top of the vehicle in order to conduct a *Terry*-style frisk. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). When Defendant partially complied with this order but still refused to drop what was in his hand, a scuffle ensued, which was captured by the video camera in Deputy Collins's patrol car and during which Deputy Collins "was able to get both [Defendant's] hands up above the car and pin [Defendant] against the car." At that point Defendant "started lunging across the cab of the vehicle and extending his right hand" but still refused to open it and "kept saying there's nothing in my hand." Eventually, Deputy Collins "took [Defendant] off his balance, spun him around and dropped him, put him on the ground[,]" where the two men continued to struggle. After refusing still more requests to open his hand, Defendant stated, "there's a tissue in my hand," but nevertheless refused to drop it until Deputy Collins "had to force [Defendant's] right hand behind his back and forcibly removed the item that was in his hand." The item Defendant had been holding was, in fact, a tissue.

Deputy Collins placed Defendant under arrest for resisting a public officer, then conducted a search incident to arrest to ensure that Defendant had no weapons. Once the immediate area was secured, Deputy Collins continued his search and found a plastic baggie containing an off-white rocky substance near the left rear driver's side of the vehicle where he and Defendant had been struggling. Subsequent SBI testing showed the substance to be approximately 0.55 grams of crack cocaine.

Before his trial, Defendant filed a motion to suppress the evidence against him, alleging it was the fruit of an unreasonable search that violated his Fourth Amendment rights. Although he did not object to the constitutionality of the traffic stop, Defendant contended Deputy Collins lacked reasonable suspicion to conduct a *Terry* frisk, arguing primarily that the mere fact of his previous drug convictions was insufficient to

justify a search for contraband. However, at a hearing on 29 October 2013, Deputy Collins testified that he had initiated a *Terry* frisk out of concern for officer safety because, in addition to Defendant's suspicious behavior inside the car, he knew Defendant was a convicted felon, he knew Defendant's prior convictions involved drug offenses, and he knew, based on his training and experience, that drug offenders often possess weapons. Deputy Collins further testified that he knew, based on his training and experience, that "[w]eapons come in all different sizes and shapes . . . [,] a lot of times they [are] conceal[ed,]" and "[a] weapon is most dangerous in a person's hand."

In addition to Deputy Collins's testimony about his concern for officer safety, the trial court also considered this Court's decision in *State v. Summey*, 150 N.C. App. 662, 564 S.E.2d 624 (2002). In *Summey*, we held that officers who stopped a vehicle reported to have just been involved in a drug transaction did not violate the Fourth Amendment when they forced a passenger who had suspiciously hidden her hand underneath a piece of fabric to open her hand, based in part on their training that "until [the officers] see an open palm they have reason to believe a suspect could be armed with a weapon." *Id.* at 667, 564 S.E.2d at 628. Here, given the totality of the circumstances, the trial court concluded that Deputy Collins did have reasonable suspicion to conduct a *Terry* frisk and, accordingly, denied Defendant's motion to suppress.

Later that same day, a jury found Defendant guilty of the Class I felony of possession of cocaine and the Class 2 misdemeanor of resisting, delaying, or obstructing a public officer. On 30 October 2013, Defendant pled guilty to having attained habitual felon status, thereby enhancing his punishment for the felony possession conviction from Class I to Class E.[1] Defendant was sentenced within the presumptive range for a Class E habitual felon at his prior record level to an active term of 38 months minimum and 58 months maximum imprisonment, with the sentence for his Class 2 misdemeanor conviction consolidated therein. Defendant gave timely oral notice of appeal.

I. Motion to Suppress

[1] Defendant first argues that the trial court erred in denying his motion to suppress the crack cocaine, which he alleges Deputy Collins obtained as the result of an unreasonably intrusive search. Specifically, Defendant alleges his Fourth Amendment rights were violated because Deputy Collins used excessive force in taking Defendant to the ground

1. In the transcript of plea, Defendant reserved his right to appeal "all other matters."

and opening his hand, which resulted in an unreasonable seizure. We disagree.

This Court has set forth the appropriate standard of review for a motion to suppress as follows:

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which [the] defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724, *appeal dismissed*, __ N.C. __, 664 S.E.2d 311 (2008) (citations, internal quotation marks, and brackets omitted). However, our Supreme Court has made clear that, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1) (providing the process by which issues are preserved for appellate review). Where a theory argued on appeal was not raised before the trial court, the appellate court will not consider it because "[a] defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). While recognizing "the fact that these evidentiary rules may seem at times technical," our Supreme Court has explained that the rationale for them is "bottomed on strong policy foundations and on the principle that the trial judge is present at the trial, and to him is entrusted the conduct of the trial." *State v. Ward*, 301 N.C. 469, 478, 272 S.E.2d 84, 89 (1980).

In the present case, Defendant's argument to this Court is that the trial court erred in denying his motion to suppress because Deputy Collins used excessive force, rendering the search unconstitutionally intrusive and the subsequent seizure unreasonable. In support of his argument, Defendant cites *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d 908 (1966) (holding that a substantially intrusive search

may render a seizure unreasonable), and also attempts to distinguish the facts of this case from those present in *Summey* by emphasizing that the actions and conduct of Deputy Collins were more forceful and more intrusive than those of the officer who merely applied pressure to the back of the female defendant's hand to force it open in *Summey*. Defendant's argument before the trial court, however, was that Deputy Collins lacked reasonable suspicion that Defendant was armed and dangerous to justify a *Terry* frisk for weapons. Although the trial court gave Defendant an opportunity to distinguish this case from the facts present in *Summey*, Defendant never raised the issue of excessive force to the trial court.

Because Defendant failed to raise excessive force as an issue in the trial court at the hearing on his motion to suppress, the issue is not properly before this Court on appeal, and we therefore will not consider it. *See Easo*n, 328 N.C. at 420, 402 S.E.2d at 814; *Benson*, 323 N.C. at 321, 372 S.E.2d at 519.

[2] Moreover, by failing to raise it on appeal, Defendant has also waived his original argument that Deputy Collins lacked reasonable suspicion for a *Terry* frisk. In any event, given this Court's holding in *Summey* and the totality of the circumstances present here, we conclude the trial court was correct in finding there was reasonable suspicion to conduct a *Terry* frisk. In *Summey*, police officers had been informed that the vehicle the defendant was riding in had recently been involved in a drug transaction, saw the defendant hide her hand "in such a manner which was clearly indicative of her having either a small weapon or drugs closed in her palm[,]" and asked her to open it multiple times "to alleviate their concern that she might be concealing a weapon" before forcing her to open her hand. 150 N.C. App. at 669, 564 S.E.2d at 629. In the present case, Deputy Collins knew Defendant had prior convictions for drug offenses, observed Defendant's nervous behavior inside his vehicle, and saw him deliberately conceal his right hand and refuse to open it despite repeated requests. Furthermore, he knew from his training and experience that people who deal in narcotics frequently carry weapons, and that many weapons are small enough to conceal within a person's hand. Thus, like the officers in *Summey*, Deputy Collins had a reasonable suspicion to conduct a *Terry* frisk for weapons to ensure his safety.

Furthermore, even if Defendant had properly preserved his excessive force argument for appellate review, it too would fail in light of our decision in *Summey*. In applying the framework set forth by the United States Supreme Court in *Schmerber*, the *Summey* Court concluded that the officers' "use of pressure to open [the] defendant's hands was

justifiable in view of the officers' need to ensure that [the] defendant was not in possession of a weapon capable of inflicting injury" and found no evidence indicating the amount of force used was so overly intrusive as to render the seizure unreasonable. *Id.* In the present case, although Deputy Collins used more force than the officers in *Summey* did, our case law indicates that his actions were not so unreasonably intrusive as to violate Defendant's Fourth Amendment rights. *See*, *e.g.*, *State v. Smith*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996) (holding that requiring the defendant to pull his pants down in the middle of an intersection so that police might search for cocaine was not intolerable in intensity and scope such that the search was unreasonably intrusive); *State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995) (holding police officer's application of pressure to the defendant's throat causing him to spit out three plastic baggies containing crack cocaine was not unreasonably intrusive in light of the risk of losing evidence and the potential health risk to the defendant). Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress.

II. Motion to Dismiss for Insufficient Evidence

[3] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine at the close of all the evidence on the grounds that the State failed to present sufficient evidence to establish every element of the offense charged. Specifically, Defendant alleges that the State's evidence was insufficient to prove that he actually or constructively possessed the cocaine Deputy Collins found after their struggle on the ground near the rear driver's side of Defendant's rental car. We disagree.

In reviewing a defendant's challenge to a denial of his motion to dismiss based on insufficient evidence, this Court determines "whether the State presented substantial evidence in support of each element of the charged offense." *State v. Barnhart*, __ N.C. App. __, __, 724 S.E.2d 177, 179 (2012) (citation omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, *cert. denied*, 531 U.S. 994, 148 L. Ed. 2d 459 (2000) (citation omitted). In determining whether substantial evidence exists, "the question for the trial court is not one of weight, but of the sufficiency of the evidence." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). Moreover, "[i]n this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that

evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citation and internal quotation marks omitted). Thus, "contradictions and discrepancies do not warrant dismissal of the case [but instead] are for the jury to resolve." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). Even circumstantial evidence "may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Mann*, 355 N.C. at 301, 560 S.E.2d at 781. Where the evidence presented is circumstantial, the court must consider "whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances" and if it does, "then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Scott*, 356 N.C. 591, 596, 573 S.E.2d 866, 869 (2002) (citation and internal quotation marks omitted; alterations in original). Ultimately, "if substantial evidence exists to support each essential element of the crime charged and that [the] defendant was the perpetrator, it is proper for the trial court to deny the motion." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). However, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Our Supreme Court has held that "[t]o obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) [the] defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007). Possession may be either actual or constructive. *See State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both the power and intent to control its disposition or use, even though he does not have actual possession." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation and internal quotation marks omitted). If a controlled substance is found "on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). If, however, the defendant does not have exclusive control of the premises, then "other incriminating circumstances must be established for constructive possession to be inferred." *Id.* Nevertheless, this Court has held that "[t]he State is not required to prove that the defendant owned the

controlled substance, or that [the] defendant was the only person with access to it." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citation omitted). Indeed, "the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession." *State v. Harvey*, 281 N.C. 1, 12–13, 187 S.E.2d 706, 714 (1972) (citation and internal quotation marks omitted).

In the present case, Defendant argues the trial court erred in denying his motion to dismiss because he did not have exclusive control of the premises where the cocaine was found and the State failed to establish "other incriminating circumstances" sufficient to infer constructive possession. To support his argument, Defendant relies on our Supreme Court's holding in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), that a strong suspicion of constructive possession alone is not sufficient to survive a motion to dismiss. *Id.* at 311, 154 S.E.2d at 344. Defendant correctly notes that his car was stopped at the residence of his female passenger, which was not a premises under his exclusive control, and emphasizes that the State presented no DNA or fingerprint evidence to link him directly to the baggie of crack cocaine Deputy Collins found there. Defendant further contends that neither his nervousness, his prior drug convictions, nor the fact Deputy Collins had reasonable suspicion to search him for weapons provides evidence of his actual or constructive possession, and he also suggests that the crack cocaine could just as easily have been dropped on the ground by his female passenger, or even tossed there by a passing motorist. Although he concedes that the location the baggie was found at the rear driver's side of his vehicle where he struggled with Deputy Collins is indeed an incriminating circumstance, Defendant maintains that this amounts to no more than "mere association or presence[] linking [him] to the [crack cocaine]" and that more is required to establish constructive possession under these circumstances given this Court's decision in *Alston*. 131 N.C. App. at 519, 508 S.E.2d at 318.

However, Defendant's argument ignores crucial distinctions between the facts of his case and those present in the cases he cites, such as *Alston* and *Chavis*, where the evidence was held insufficient to establish constructive possession. In *Alston*, we held the trial court erred in denying the defendant's motion to dismiss the charge that he was a felon in possession of a firearm because the handgun in question was purchased and owned by his wife and there was no other evidence he ever possessed it apart from the fact it was found lying on the console next to

his seat in a car he did not own that his wife was driving. 131 N.C. App. at 519, 508 S.E.2d at 319. In *Chavis*, our Supreme Court held there was no constructive possession where police saw a defendant walking on a sidewalk wearing a hat that was later found discarded nearby containing marijuana because there was no evidence the marijuana was in the hat when the defendant possessed it, nor did the officers see him remove or discard the hat. 270 N.C. at 311, 154 S.E.2d at 344. The common thread that runs through these and similar cases is that the police never saw the defendant possess or discard the contraband which, because it was found in an area that the defendant did not maintain exclusive control over, could have been present there as the result of possession by someone else. *See also*, *e.g.*, *State v. Lindsey*, 219 N.C. App. 249, 725 S.E.2d 350, *reversed and remanded on other grounds*, 366 N.C. 325, 734 S.E.2d 570 (2012) (reversing conviction for constructive possession where an officer observed the defendant flee his vehicle through a restaurant parking lot but did not witness him taking any action consistent with disposing of marijuana and cocaine in two separate locations in the parking lot from which drugs were recovered); *State v. Acolaste*, 158 N.C. App. 485, 581 S.E.2d 807 (2003) (reversing conviction for constructive possession where police lost sight of the defendant while chasing him through an area over which he did not maintain exclusive control, saw him make a throwing motion toward some bushes, but found nothing there and instead recovered drugs from the roof of a detached garage located in the opposite direction from the bushes).

By contrast, in the present case, there is far less room to doubt that the baggie of crack cocaine came directly from Defendant's clinched right fist. During the hearing on Defendant's motion to suppress, the trial court extensively reviewed video footage of the traffic stop taken by the camera in Deputy Collins's squad car, which showed that while the two men were struggling on the ground, Defendant's hand dropped something that looked like an "off-white rock substance" that "bounce[d] and hit the ground" in the same location beside the rear driver's side of the vehicle where Deputy Collins found the baggie of crack cocaine. Although the video did not show the baggie at the precise instant it came out of Defendant's hand or as it fell through the air, Deputy Collins did testify that he checked the area immediately before his initial contact with Defendant and found nothing, and there was no evidence that anyone else had access to the area between that time and the time Deputy Collins found the crack cocaine. Considered collectively with the location where the crack cocaine was found, which even Defendant concedes is an incriminating circumstance, and given Defendant's refusal to open his hand after repeated requests, we conclude the State provided

evidence of additional incriminating circumstances sufficient to establish an inference of constructive possession and to survive Defendant's motion to dismiss. Moreover, when taken in the light most favorable to the State, the video also provides at least circumstantial evidence of actual possession sufficient to support a reasonable inference of Defendant's guilt and send the case to the jury. *See Scott*, 356 N.C. at 596, 573 S.E.2d at 869. Therefore, because the State presented evidence "which places [Defendant] within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession," *see Harvey*, 281 N.C. at 12–13, 187 S.E.2d at 714, we hold that the trial court did not err in denying Defendant's motion to dismiss the charge of possession of cocaine based on insufficient evidence.

III. Fatal Variance

[4] Finally, Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting, obstructing, or delaying a public officer due to what he alleges are fatal variances between the indictment and the evidence introduced at trial. We disagree.

It is well established that "[a] defendant must be convicted, if at all, of the particular offense charged in the indictment" and that "[t]he State's proof must conform to the specific allegations contained" therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). Thus, "a fatal variance between the *allegata* and the *probata*" is properly the subject of a motion to dismiss for insufficiency of the evidence to sustain a conviction. *State v. Nunley*, 224 N.C. 96, 97, 29 S.E.2d 17, 17 (1944). The rationale for this rule is "to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because "[i]n 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." *Id.* (citation omitted). This Court has previously recognized that "an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how [the] defendant resisted the officer." *State v. Swift*, 105 N.C. App. 550, 553, 414 S.E.2d 65, 67 (1992).

In the present case, Defendant moved to dismiss at the close of the State's evidence based on fatal variance because "the indictment alleged that [he] had refused to drop what was in his hands (plural) and the evidence at trial showed [he] had refused to drop what was in his right

hand (singular)." Defendant contends the trial court erred in denying his motion because this variance was material since it involved an essential element of the offense charged, specifically the manner in which he resisted Deputy Collins. Essentially, Defendant's argument is premised on the logic that because a fatal variance must be material, and a material variance must involve an essential element, any variance that involves an essential element must be material and therefore fatal. This argument is without merit.

Contrary to Defendant's logic, this Court's case law makes clear that not every variance that involves an essential element of the offense charged is necessarily material. For example, in *State v. McKoy*, this Court rejected a defendant's argument that there was a fatal variance between the indictments against him for second-degree rape and second-degree sexual offense and the evidence introduced at his trial because even though the indictments identified the victim by her initials, they failed to state her full name and were not punctuated by periods, which he contended were essential elements because both offenses must be committed against "another person." 196 N.C. App. 650, 653, 675 S.E.2d 406, 409, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). In upholding the conviction, the *McKoy* Court emphasized that the fatal variance rule was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments, and ultimately rooted its holding in the rule's rationale that indictments must "provide[] sufficient notice to [the d]efendant for [the d]efendant to prepare his defense and protect him from double jeopardy." *Id.* at 659, 675 S.E.2d at 412.

Here, Defendant attempts to support his argument with citations to our holdings in *State v. Skinner*, 162 N.C. App. 434, 590 S.E.2d 876 (2004) and *State v. Langley*, 173 N.C. App. 194, 618 S.E.2d 253 (2005), *disc. review denied*, 360 N.C. 366, 630 S.E.2d 447 (2006). These cases are easily distinguished from the present facts insofar as they demonstrate what actually makes a variance "material." In *Skinner*, this Court found a fatal variance where the defendant was tried for assault with a deadly weapon based on an indictment that did not correctly identify what type of deadly weapon he used to commit the assault; although the indictment alleged that he beat the victim with his hands, the evidence introduced at trial showed that he beat the victim with a hammer. 162 N.C. App. at 445, 590 S.E.2d at 884. In *Langley*, we found a fatal variance where the defendant was indicted for possession of a firearm by a felon but the evidence introduced at trial showed he actually possessed a sawed-off shotgun, which under our State's then-extant scheme for classifying firearms could not constitute sufficient proof of the offense

charged. 173 N.C. App. at 196, 618 S.E.2d at 255. In both cases, these variances were material because they fundamentally altered the nature of the offense charged, which disadvantaged their respective defendants in preparing for their trials and, if uncorrected, could have potentially exposed them to double jeopardy.

In sum, we conclude that the alleged fatal variance urged by Defendant—the difference between "hand" (singular) and "hands" (plural)—is more like the *McKoy* victim's unpunctuated initials than the difference between "hand" vs. "hammer" in *Skinner* or the difference between "handgun" vs. "sawed-off shotgun" in *Langley*. It is difficult to discern how the mistaken addition of the letter "s" prevented the indictment from providing Defendant sufficient notice of the general manner in which he resisted Deputy Collins or how it could leave Defendant exposed to double jeopardy. Further, apart from his bald assertion that the variance was material, Defendant offers no elaboration as to any prejudice he might have suffered as a result. We therefore conclude that the trial court did not err in denying his motion to dismiss for fatal variance.

[5] Defendant also attempts to raise a second fatal variance argument, contending that although the indictment alleged that Deputy Collins was attempting to discharge an official duty by conducting a traffic stop, the evidence at trial proved that the traffic stop was already over before any resistance by Defendant occurred. However, because Defendant did not specifically raise this argument before the trial court, it has not been properly preserved for appellate review. *See Eason*, 328 N.C. at 420, 402 S.E.2d at 814; *see also* N.C.R. App. P. 10(b)(1). In his brief, Defendant attempts to invoke this Court's jurisdiction pursuant to Rule 2 of our Rules of Appellate Procedure, but even if we agreed to suspend or vary our typical requirements, Defendant's argument would fail. This Court has previously held that a traffic stop is not terminated until after the officer returns the driver's license or other documents to the driver. *See State v. Kincaid*, 147 N.C. App. 94, 555 S.E.2d 294 (2001); *State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). In the present case, although Defendant had provided his license and registration, Deputy Collins had not yet returned them at the time he ordered Defendant out of his vehicle to conduct a *Terry* frisk for weapons. Because the traffic stop had not yet ended, we find no fatal variance between the indictment and the evidence presented on this ground either.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
STEVEN KEITH JASTROW, DEFENDANT

No. COA14-276

Filed 18 November 2014

1. Robbery—attempted—two counts—two people in residence—separate rooms

There was sufficient evidence to support defendant's two separate attempted robbery convictions where defendant argued that the evidence showed that he robbed a single residence in the presence of two people, but, when the robbery occurred, the two victims were in different rooms.

2. Robbery—attempted—two counts unexpected person in house

The trial court did not err by denying defendant's motion to dismiss a conviction for attempted robbery with a dangerous weapon where defendant argued that he only participated in the plan to rob one of the two residents of the house. If two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime, and is also guilty of any other crime committed by the other in pursuance of the common purpose. Viewed in the light most favorable to the State, the facts were sufficient to show that the robbery of the unexpected person was pursuant to the group's common purpose.

3. Constitutional Law—right to counsel—pro se appearance—colloquy with defendant

The trial court did not err by allowing defendant to proceed pro se where the colloquy between the trial court and defendant was not as cogent as in most cases. That was because defendant repeatedly interrupted the court or refused to answer straightforward questions, apparently from his belief that he was not bound by the laws of North Carolina and the United States and that the trial court could not exercise jurisdiction over him. When the record is reviewed as a whole, the trial court's discussion with defendant was sufficient to satisfy the statutory criteria. However, in most cases, the best practice is for trial courts to use the 14 questions approved in *State v. Moore*, 362 N.C. 319, and set out in the Superior Court Judges' Benchbook.

STATE v. JASTROW

[237 N.C. App. 325 (2014)]

Appeal by defendant from judgment entered 16 September 2013 by Judge Ted S. Royster, Jr. in Davie County Superior Court. Heard in the Court of Appeals 11 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

Michael E. Casterline, for defendant-appellant.

DIETZ, Judge.

Defendant Steven Keith Jastrow appeals from his conviction and sentence on two counts of attempted robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon.

Jastrow served as the "inside man" in a scheme to rob a known drug dealer at his home. On the night of the robbery, the drug dealer's brother also was present, forcing Jastrow's co-conspirators to split up and separately confront both brothers to demand drugs and money. Jastrow argues that one of his attempted robbery convictions must be set aside because, although there were two victims, there was only one attempted robbery, not two separate ones. He also argues that he cannot be held responsible for the separate robbery of the drug dealer's brother, which he contends was not part of the conspirators' original plan. Finally, Jastrow argues that the trial court erred by granting his request to represent himself without first conducting the proper statutory inquiry.

For the reasons set forth below, we hold that there was sufficient evidence to support Jastrow's conviction on two separate counts of attempted robbery with a dangerous weapon. We also hold that the trial court conducted a proper inquiry under N.C. Gen. Stat. § 15A-1242 before permitting Jastrow to represent himself. Accordingly, we find no error.

Facts and Procedural History

In September 2011, Jastrow lived at home with his mother, stepfather, and half-brother, along with two other men, Ryan Bernatz and Kyle Horton. Bernatz and Horton were drug users and had begun running low on money and drugs. Jastrow, Bernatz, and Horton hatched a plan to rob one of Jastrow's friends, Patrick Smith. Jastrow occasionally bought marijuana from Patrick and believed Patrick would be a good person to rob because he was young, did not have a gun, and would not fight back. Jastrow also told his co-conspirators that the front door of Patrick's house always was left unlocked.

Horton testified that the group discussed the planned robbery between five and seven times. They decided Jastrow would be the "inside man" for the robbery because he knew Patrick and had previously been to his house. Jastrow drew Bernatz and Horton a map of Patrick's house and illustrated where Patrick's bedroom was located and where the money and drugs would be found.

On 3 October 2011, Horton gave Jastrow twenty dollars to purchase marijuana from Patrick in order to scope out Patrick's home. Once inside, Jastrow texted Bernatz and told him that Patrick's brother, Hugh Smith, also was present at the home and was sitting on the couch in the living room.

After waiting in the car for about an hour, Bernatz, armed with a machete, and Horton, carrying a gun, made their way to the front door of the house. Horton opened the front door and immediately approached Hugh on the couch. Bernatz went straight to the back bedroom where Jastrow and Patrick were located. Horton approached Hugh with the gun drawn and told him to "[g]ive up the stuff. Get on the ground. Don't make a move. Get on the ground. Give up the stuff." Horton testified that by "stuff," he meant "[d]rugs and money. Basically this is a robbery." When Hugh did not comply, Horton hit him on the head with the gun. When Hugh continued to resist, Horton yelled for Bernatz saying "[g]et in here before I have to hurt this guy."

At the same time that Horton first approached Hugh, Bernatz went straight back to Patrick's bedroom and opened the door. Bernatz pointed the machete at Patrick and asked him "[w]here is it?" and told him to "[g]ive it up. I know you have it. Where is it[?]"

After hearing Horton yell for help from the living room, Bernatz exited Patrick's bedroom and hit Hugh on the head with the blunt end of the machete. Patrick then jumped on Bernatz's back and an altercation broke out between Horton, Bernatz, Patrick, and Hugh. During the altercation, Horton fired his gun at Patrick. He then fired his gun three more times at Hugh. Horton and Bernatz fled from the house into the woods.

Jastrow was not involved in this violent melee and left the house either during the fight or just after it ended. Bernatz called Jastrow, attempting to locate him, but Bernatz's cell phone died shortly into the conversation. All three men eventually made it back to Jastrow's house. The next day, Jastrow spoke to the police, portrayed himself as an innocent bystander, and told the police he did not know the men who robbed Patrick and Hugh.

In early October 2011, law enforcement received an anonymous phone call naming Bernatz and Horton as potential suspects in the robbery. Officers went to Jastrow's school to speak with him about Bernatz and Horton. While interviewing Jastrow at his school, the officers realized that Jastrow was lying because his story had changed from his initial statement. The police later executed a search warrant at Jastrow's home and recovered incriminating evidence.

On 10 September 2012, the State indicted Jastrow on two counts of felony attempted robbery with a dangerous weapon, two counts of attempted murder, and one count of felony conspiracy to commit robbery with a dangerous weapon. The State later dismissed the two counts of attempted murder, but Jastrow went to trial on the remaining charges.

At the close of the State's evidence, Jastrow moved to dismiss one charge of robbery with a dangerous weapon for insufficient evidence, but the court denied the motion. Jastrow did not present any evidence at trial.

The jury found Jastrow guilty of all charges and he was given consecutive sentences of 64 to 86 months for one count of attempted robbery with a dangerous weapon and 64 to 86 months for conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon. Jastrow timely appealed.

Analysis

I. Sufficiency of the Evidence

[1] Jastrow first argues that the trial court erred in denying his motion to dismiss one of the counts of attempted robbery with a dangerous weapon because there was insufficient evidence to support two separate attempted robbery convictions.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

When a defendant moves to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Barnes*,

334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Jastrow was charged with two counts of attempted robbery with a dangerous weapon. The statute governing this offense criminalizes "attempts to take personal property from another" as well as attempts to take personal property "from any place of business, residence, or banking institution or any other place where there is a person or persons in attendance." N.C. Gen. Stat. § 14-87(a) (2013).

Jastrow argues that the evidence at trial shows that he robbed a single residence in the presence of two people, rather than separately robbing two people at a residence. Jastrow relies on *State v. Potter*, 285 N.C. 238, 204 S.E.2d 649 (1974), and similar cases to support his theory that, although there were two people in the house, only one robbery took place.

The cases on which Jastrow relies are readily distinguishable: they involve defendants who robbed a *business* of its personal property by taking it from multiple employees present on the business premises. In *Potter*, for example, our Supreme Court held that only one robbery took place where the defendant obtained the bank's property from two tellers at two different cash registers. 285 N.C. at 254, 204 S.E.2d at 659.

That is not the situation here. To be sure, the evidence suggests that Jastrow and his co-conspirators initially planned to rob only Patrick, whom they knew to have drugs and money. But when the robbery occurred, the two victims, Patrick and Hugh, were in different rooms. One armed robber, wielding a machete, went into Patrick's bedroom and demanded drugs and money from him. At the same time, the second robber, wielding a gun, approached Hugh and likewise demanded drugs and money.

This case thus presents different facts from *Potter* because "the persons threatened were not employees of one employer victimized by the taking of the employer's property. Each person threatened was a victim, each being robbed of his personal property." *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974) (distinguishing Potter).

In sum, viewing the evidence in the light most favorable to the State, and giving the State the benefit of every reasonable inference, we hold that there was sufficient evidence to support two separate attempted robbery convictions. From this evidence, the jury could have concluded that Jastrow and his co-conspirators attempted to rob Hugh of his own drugs, money, or other personal property in addition to whatever drugs and money they hoped to rob from Patrick.

[2] Jastrow also argues that there is insufficient evidence to support the second conviction for attempted robbery with a dangerous weapon because Jastrow only participated in the plan to rob Patrick, not Hugh. This argument conflicts with our case law.

In *State v. Ferree*, this Court held that "[a] defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design." 54 N.C. App. 183, 184-85, 282 S.E.2d 587, 588 (1981). Thus, if two or more persons join together to commit a crime, "each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose." *Id.* at 185, 282 S.E.2d at 588.

There was sufficient evidence to convict Jastrow on two separate counts of attempted armed robbery under F*erree*. On the night of the robbery, Jastrow entered Patrick's house and secretly communicated with his co-conspirators through text messages, informing them that Patrick was not alone and that Hugh also was in the house. He did not ask his co-conspirators not to rob Hugh, nor did he try to call off the robbery. To the contrary, one of the co-conspirators testified that after learning Hugh was present, Jastrow indicated a desire to follow through with the plan, texting messages such as "where are you guys at? Are you guys coming in or not? It's getting late. Okay?" More importantly, after discovering that Patrick was not alone and that Hugh also was present, Jastrow began texting his co-conspirators about the drugs and money that he saw inside the house, referring now to what "they" both had, rather than just to what Patrick had.

Viewed in the light most favorable to the State, and giving the State the benefit of every reasonable inference, these facts are sufficient to show that the attempted robbery of Hugh was in pursuit of the group's common purpose to plan and execute a robbery to acquire drugs and money from both Patrick and Hugh. Accordingly, the trial court did not err in denying Jastrow's motion to dismiss.

II. Jastrow's Request to Represent Himself

[3] Jastrow next argues that the trial court erred in allowing him to proceed *pro se* because the trial court failed to make a proper inquiry into whether his waiver of counsel was knowing, intelligent, and voluntary. Specifically, Jastrow argues that the trial court failed to satisfy the statutory requirements of Section 15A-1242 of the General Statutes, which governs a trial court's decision to permit self-representation.

"Before allowing a defendant to waive in-court representation by counsel . . . the trial court must insure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). "A defendant must first clearly and unequivocally waive his right to counsel, and elect to proceed *pro se*. Thereafter, the trial court must determine whether the defendant knowingly, intelligently and voluntarily waived his right to in-court representation by counsel." *State v. Anderson*, 215 N.C. App. 169, 170, 721 S.E.2d 233, 234 (2011), *aff'd per curiam*, 365 N.C. 466, 722 S.E.2d 509 (2012) (internal citations and quotation marks omitted).

To assist with this determination, the General Assembly enacted a statute that requires trial courts to inquire about the defendant's intent to represent himself and conclude that the defendant satisfies a three-factor test:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2013). In assessing the adequacy of this statutory inquiry, "the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). Our Supreme Court has

held that the inquiry required by N.C. Gen. Stat. § 15A–1242 satisfies constitutional requirements. *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476.

Here, Jastrow clearly and unequivocally expressed his desire to fire his appointed counsel and represent himself during this criminal proceeding. Before the trial began, the court addressed Jastrow's request to represent himself. The court discussed with Jastrow the benefits of keeping his appointed attorney and the potential harmful consequences of self-representation, as required by Section 15A-1242. To be sure, this colloquy between the trial court and Jastrow is not as cogent as in most cases. But that is because Jastrow repeatedly interrupted the court or refused to answer straightforward questions. Jastrow's behavior apparently stems from his belief that he is not bound by the laws of North Carolina and the United States, and that the trial court could not exercise jurisdiction over him.

For example, as the court attempted to explain to Jastrow the benefits of his appointed counsel, the following exchange took place, which is representative of Jastrow's overall behavior:

> THE DEFENDANT: For the record, I do not transverse. I am juris property in personam. I am me. Therefore, no one else can represent me.
>
> THE COURT: You are saying you don't want anybody else?
>
> THE DEFENDANT: For the record, I do not transverse. I am me. Nobody can represent me.
>
> THE COURT: We would be in a lot of trouble if I didn't transverse. We would not get anything done.
>
> THE DEFENDANT: I do not transverse. I am only here on special appearance to challenge subject matter jurisdiction and personal jurisdiction. Can this court show it has subject matter jurisdiction? Once jurisdiction is challenged, it cannot be decided and must be decided underneath legal precedence. I would like to state for the record once jurisdiction is challenged, the Court cannot proceed when it appears that the Court lacks jurisdiction. The Court has no authority but to reach authority and to dismiss merits. Melrow versus United States. There's no discretion to lack jurisdiction under Julius versus U.S. What's challenged jurisdiction cannot be assumed, it must be proved to exist. This would be Stuck versus Medical Examiners. All of these legal precedence showing that jurisdiction subject

> matter or personal jurisdiction, once challenged cannot just be assumed, it must be decided. It must be proven. In this courtroom, this commercial court, this admiralty maritime law court is not a common law court. It is a commercial court. Underneath General Statutes it is the color of the law, regulations of color of the law on that.

Simply put, Jastrow's obstinate behavior and his insistence that the trial court had no jurisdiction over him made it difficult for the court to succinctly walk through the Section 15A-1242 factors. But we are satisfied that, when the record is reviewed as a whole, the trial court's discussion with Jastrow was sufficient to satisfy the statutory criteria.

First, the trial court informed Jastrow that his appointed counsel was willing to continue representing him and described the benefits of keeping his counsel, emphasizing that his counsel was "a very competent attorney. He represents his clients diligently to the best of his ability."

Second, the trial court fully informed Jastrow of the charges he faced and the possible range of punishment he could receive if convicted, stressing that he could receive "up to 201 months" for the Class D felonies and "up to 85 months" for the class E felony.

Finally, Jastrow's responses to the trial court indicated that he understood and appreciated the consequences of waiving his right to counsel at trial. Jastrow was unsatisfied with the arguments his appointed counsel put forward in his defense, and wished to represent himself to assert what he believed were meritorious legal defenses, but were in fact a series of frivolous arguments about the trial court's jurisdiction and the government's ability to prosecute Jastrow in a court of law.

Viewed objectively, it was certainly not in Jastrow's interests to proceed *pro se* and assert these arguments. But the Sixth Amendment does not permit a trial court to deny a request for self-representation simply because the defendant would be better off keeping his lawyer. As the U.S. Supreme Court explained in *Faretta v. California*, "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. 806, 834 (1975). Nevertheless, when a defendant knowingly, voluntarily, and intelligently chooses to reject his Sixth Amendment right to counsel and to represent himself, "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Id.* (internal quotation marks and citation omitted).

Here, Jastrow's conduct and his responses to the court's questions demonstrated that he understood the consequences of waiving counsel

and that he chose to do so because he believed his own legal arguments and defense at trial would be better than those provided by his appointed counsel. That decision was knowing, intelligent, and voluntary. Accordingly, we hold that the trial court conducted the necessary inquiry and properly permitted Jastrow to represent himself under N.C. Gen. Stat. § 15A-1242.

We note that Jastrow's conduct later in the case confirmed that his request to represent himself was knowing, intelligent, and voluntary. During jury selection, Jastrow questioned jurors to ensure that "me being my own counsel, being in personan [sic]" would not affect their decision. In his opening statement, Jastrow told the jury "[t]here is not many times you will see an individual stand up before the jurists competent to handle his own affairs and represent himself." Finally, during trial, Jastrow continued to assert legal arguments concerning the court's jurisdiction and his belief that he could not be subjected to prosecution by the State. These facts confirm the trial court's conclusion—based on its colloquy with Jastrow before trial—that Jastrow's decision to represent himself was knowing, intelligent, and voluntary. That decision was part of a strategy Jastrow employed to appear sympathetic to the jury and to raise legal arguments (albeit frivolous ones) that his counsel was unwilling to assert.

Although we find no error in the trial court's Section 15A-1242 colloquy, we take this opportunity to remind trial courts that our Supreme Court has approved a series of 14 questions that can be used to satisfy the requirements of Section 15A-1242. *See State v. Moore*, 362 N.C. 319, 328, 661 S.E.2d 722, 727 (2008). "While these specific questions are in no way required to satisfy the statute, they do illustrate the sort of 'thorough inquiry' envisioned by the General Assembly when this statute was enacted and could provide useful guidance for trial courts when discharging their responsibilities under N.C.G.S. § 15A-1242." *Id.*

The trial court in this case did not ask many of the questions the Supreme Court approved in *Moore*. Given Jastrow's refusal to answer even the most straightforward questions from the court, and his tendency to launch into lengthy, nonsensical tirades about jurisdiction and sovereignty, it is unlikely that asking the *Moore* questions in this case would have added to the trial court's inquiry.[1] But in most cases, the best

1. Indeed, in the middle of trial, Jastrow was arraigned on other, unrelated charges and again insisted on representing himself. In that colloquy, the trial court asked the *Moore* questions and Jastrow, predictably, refused to answer most of them, stating that "I do not acknowledge anything that the Court is trying to tell me and I do not transverse."

practice is for trial courts to use the 14 questions approved in *Moore*, which are set out in the Superior Court Judges' Benchbook provided by the University of North Carolina at Chapel Hill School of Government. This will ensure that the court addresses each of the statutory criteria and also will assist with appellate review.

Conclusion

For the foregoing reasons, we hold that there was sufficient evidence to support Jastrow's conviction on two counts of attempted robbery with a dangerous weapon. We also hold that the trial court conducted the required inquiry under N.C. Gen. Stat. § 15A-1242 and properly permitted Jastrow to represent himself. Accordingly, we find no error.

NO ERROR.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA
v.
BILLY FRANK LARKIN

No. COA14-321

Filed 18 November 2014

1. Search and Seizure—motion to suppress—vehicle search—inevitable discovery

The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to suppress evidence that resulted from a search of his vehicle. The State proved inevitable discovery based on the information contained in the search warrant and the detective' testimony that he would have searched for defendant's vehicle, no matter the location.

2. Burglary and Unlawful Breaking or Entering—jury instruction—recent possession

Although defendant contended that the trial court erred in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by instructing the jury on the doctrine of recent

possession with respect to the Breese offenses, the trial court actually submitted the instruction in connection with the Johnson offenses. Defendant did not challenge the application of the doctrine to the Johnson offenses.

3. Burglary and Unlawful Breaking or Entering—motion to dismiss—sufficiency of evidence—shoeprint evidence

The trial court did not err in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to dismiss the charges for the Breese offenses. The State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, was sufficient to support defendant's convictions.

4. Criminal Law—joinder—motion to sever cases

The trial court did not abuse its discretion in a first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering case by denying defendant's motion to sever the cases into three trials. Because defendant did not challenge the fairness and impartiality of the jury, joinder of the cases did not prevent defendant from receiving a fair trial.

Appeal by defendant from judgments entered on or about 19 September 2013 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy A. Cooper, III by Assistant Attorney General John F. Oates, Jr., for the State.

Brock & Meece, P.A. by C. Scott Holmes, for defendant-appellant.

STROUD, Judge.

Billy Frank Larkin ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of two counts of first-degree burglary, felonious larceny pursuant to burglary, felonious breaking or entering, and felonious larceny after breaking or entering, offenses arising from three separate incidents. Defendant argues that the trial court erred by (1) denying his motion to suppress evidence that resulted from a search of his vehicle; (2) instructing the jury on the doctrine of recent possession with respect to one of the incidents; and (3) denying

his motion to sever the cases into three trials. Defendant also contends that insufficient evidence supports his convictions arising from one of the incidents. We find no error.

I. Background

A. Johnson Incident

Around 5:00 pm on 5 November 2010, Robbie Johnson left his photography equipment on a couch in his Carolina Beach condominium. This photography equipment included a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera. The following morning, on 6 November 2010, Johnson discovered that his photography equipment was missing from his condominium. That day, defendant sold a 500 millimeter lens, a 70 to 200 millimeter lens, a 17 to 40 millimeter lens, and a Mark II-N camera to a camera store in Raleigh.

On 8 November 2013, Johnson visited the Raleigh camera store after discovering that it had recently acquired photography equipment matching the description of his missing property. Johnson brought registration cards that contained the missing items' serial numbers. Johnson and the store manager discovered that the serial numbers of the photography equipment sold by defendant matched Johnson's serial numbers. The camera store returned all four items to Johnson.

B. Breese Incident

On 7 November 2010, Nancy Breese left her Bose CD changer and radio on a chest in her Kure Beach house. Breese earlier had recorded the serial numbers associated with the Bose CD changer and radio. Breese went to bed that night around 9:00 p.m. During the middle of the night, Breese heard noises and yelled, thinking it was her cat. When Breese rose from bed the next morning, she immediately noticed that her Bose CD changer and radio were missing.

On 7 April 2011, in an investigation unrelated to the Breese incident, police officers conducted a search of defendant's hotel room in Fayetteville and discovered a Bose CD changer and radio. The serial numbers of the Bose CD changer and radio matched the serial numbers recorded by Breese.

C. Madsen Incident

Around 11:00 p.m. on 7 November 2010, Don Madsen went to bed in his Carolina Beach condominium. Around 3:00 a.m., Madsen woke up and saw the shadow of a person. Madsen yelled, jumped out of bed, and chased the intruder. The intruder ran away from Madsen and onto

Madsen's balcony, and Madsen pursued the intruder until he jumped off of Madsen's balcony and ran out of sight. Madsen did not get a good look at the intruder.

Madsen noticed that an envelope containing a set of keys was missing from his condominium. Madsen also noticed a pair of tennis shoes on his patio that were not his. One of the shoes had a car key tied in its laces. At 12:15 p.m. on 8 November 2010, Detective Humphries of the Carolina Beach Police Department ("CBPD") discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the soles of the shoes found on Madsen's patio.

D. Search of Defendant's Corvette

In April 2011, the Wrightsville Beach Police Department ("WBPD") seized defendant's Corvette in Fayetteville and transported it to an impound lot in Wilmington. This seizure was unrelated to any of the incidents described above. Officer James Carl Mobley told Detective Humphries that, while working for the WBPD, he had encountered defendant and remembered that defendant had worn a pair of tennis shoes with a Corvette key interlaced in his right shoe. On or about 20 April 2011, Detective Humphries obtained a search warrant for defendant's Corvette based upon information that he had received from the WBPD, and he tried the car key that had been interlaced in one of the shoes left on Madsen's patio in the seized Corvette. The key fit the Corvette, thus linking defendant to the key found in the shoes.

E. Course of Proceedings

On or about 27 June 2011, a grand jury indicted defendant for felonious breaking or entering and felonious larceny after breaking or entering in connection with the Johnson incident, first-degree burglary and felonious larceny pursuant to burglary in connection with the Breese incident, and first-degree burglary in connection with the Madsen incident. On or about 13 September 2013, defendant moved to suppress evidence resulting from the CBPD's search of his Corvette. On or about 14 September 2013, defendant moved to sever the charges into three trials. On 4 October 2013, *nunc pro tunc* for 16 September 2013, the trial court denied (1) defendant's motion to suppress after concluding that the State had proved that the CBPD would have inevitably discovered defendant's Corvette; and (2) defendant's motion to sever after finding that all three incidents occurred within a three-day span, within 2.5 miles of each other, and involved breaking into a personal beachfront residence to commit a larceny.

Defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. At the close of all the evidence, defendant moved to dismiss all charges. The trial court denied the motion. On or about 19 September 2013, a jury found defendant guilty of all charges. The trial court sentenced defendant to two consecutive terms of 85 to 111 months' imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Evidence

A. Standard of Review

[1] Defendant first contends that the trial court committed plain error in admitting evidence obtained from the CBPD's search of defendant's Corvette. Although defendant moved to suppress this evidence before trial, defendant failed to object to its admission at trial and thus failed to preserve error. *See State v. Stokes*, 357 N.C. 220, 227, 581 S.E.2d 51, 56 (2003). But we may review for plain error the denial of a defendant's pretrial suppression motion, if the defendant specifically and distinctly argues on appeal that the trial court committed plain error. *State v. Harwood*, ___ N.C. App. ___, ___, 727 S.E.2d 891, 896 (2012) (citing N.C.R. App. P. 10(a)(4)); *Stokes*, 357 N.C. at 227, 581 S.E.2d at 56.

> For an appellate court to find plain error, it must first be convinced that, "absent the error, the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988) (citation omitted). "The defendant has the burden of showing that the error constituted plain error." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

State v. Wade, 213 N.C. App. 481, 493, 714 S.E.2d 451, 459 (2011), *disc. rev. denied*, 366 N.C. 228, 726 S.E.2d 181 (2012).

Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and next "that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602, *cert. denied*, 540 U.S. 988, 157 L.Ed. 2d 382 (2003). So, if the defendant has failed to show that the purported error would have led to a different result, we need not consider whether an error was actually made.

Here, apart from Detective Humphries' lay opinion that a shoeprint outside Breese's house matched the shoes left on Madsen's patio, the only evidence that links defendant to the Madsen incident is the evidence that the key found in the shoe operated defendant's Corvette.

It is probable that had this evidence been suppressed, the jury would have reached a different result; thus, we must consider whether the trial court's denial of defendant's suppression motion and admission of this evidence was in error. *See Wade*, 213 N.C. App. at 493, 714 S.E.2d at 459.

"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.

The trial court made the following findings of fact:

> 1. On November 8, 2010, Detective Harry Humphries was employed by the Carolina Beach Police Department as Senior Detective.
>
> 2. On November 8, 2010 Detective Humphries was assigned a burglary case that occurred in Carolina Beach.
>
> 3. During the course of that investigation a pair of tennis shoes and a key, interlaced in the shoes, were seized from the scene of the burglary. At the time of the crime, there were no known suspects.
>
> 4. Detective Humphries determined through conversations with Jeff Gordon Chevrolet that the key was for a Chevrolet Corvette.
>
> 5. Officer Mobley was hired by the Carolina Beach Department in late 2010 while at the same time working as a sworn reserve officer with the Wrightsville Beach Police. He was not assigned to work the November 8, 2010 burglary.
>
> 6. In April 2011, Officer Mobley was assigned to the CID unit of the Carolina Beach Police Department for two weeks as part of a new hire training program.
>
> 7. During that two week time, Detective Humphries had a conversation with Officer Mobley in which Officer Mobley told Detective Humphries that he was involved in the arrest of Billy Larkin.
>
> 8. Officer Mobley told Detective Humphries that at the time of Billy Larkin's arrest, Mr. Larkin was wearing a pair of tennis shoes with a Corvette key interlaced in the right shoe.

9. Officer Mobley told Detective Humphries that he escorted Billy Larkin to the location where his Corvette was located and Billy Larkin took the key out of the laces and opened the Corvette with said key.

10. The State of North Carolina stipulated that in April 2011, Wrightsville Beach Police Department was conducting a parallel investigation of Bill[y] Larkin for burglaries and seized Billy Larkin's 2000 Chevrolet Corvette in violation of the 4th Amendment of the U.S. Constitution from his residence in Fayetteville, North Carolina.

11. As a result of the seizure, Wrightsville Beach Police Department brought the vehicle from Fayetteville, North Carolina to Wilmington, NC and stored it at a local impound lot.

12. Carolina Beach Police Department did not assist or have any connection to the seizure of the vehicle and did not have knowledge of the seizure, at the time it was seized.

13. On April 20, 2011, based upon information received from Officer Mobley as to the observations of Billy Larkin, the type of Corvette he drove, the similar types of cases being investigated by Wrightsville Beach Police Department, and the location of the vehicle at the impound lot, Detective Humphries applied for and received a search warrant for Billy Larkin's 2000 Chevrolet Corvette, Georgia registration ACM 4256.

14. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.

15. Detective Humphries testified he would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC he would have gone to look for it no matter the location.

16. During the course of the search, it was determined that the key Carolina Beach Police seized from the November 8, 2010 burglary matched the 2000 Chevrolet Corvette, Georgia Registration ACM 4256 owned by Billy Larkin.

Based on these findings of fact, the trial court made several conclusions of law including the following:

> 4. The inevitable discovery exception can be applied in this case.
>
> 5. Detective Humphries conducted an independent investigation and procured a search warrant, the validity of which was never questioned in this case, based upon untainted evidence received from Officer Mobley.
>
> 6. Officer Mobley came in contact with Billy Larkin in Wrightsville Beach prior to the seizure of the vehicle. He made his observations about Billy Larkin's shoes, interlaced key, the 2000 Chevrolet Corvette, and the fact that the key in possession of Billy Larkin fit the 2000 Chevrolet Corvette prior to the seizure of that vehicle.
>
> 7. Detective Humphries did not rely on any evidence, if any, gathered by Wrightsville Beach Police Department as a result of their illegal seizure, to procure his search warrant.
>
> 8. Detective Humphries did rely on information from Officer Mobley as to the location of the vehicle.
>
> 9. Detective Humphries would have applied for the search warrant no matter if the vehicle was seized by Wrightsville Beach Police Department. Furthermore, if the vehicle was not in Wilmington, NC, he would have gone to look for it no matter the location.
>
> 10. Based on the preponderance of evidence, the information gained from Detective Humphries' search of the 2000 Chevrolet Corvette owned by Bill[y] Larkin ultimately or inevitably would have been discovered by lawful means, and as therefore should be admissible.

Defendant did not challenge the validity of Detective Humphries' search warrant at the trial court. Although defendant contends on appeal that he challenged the validity of the search warrant at the trial court, after examining the record, we determine that, although he challenged the constitutionality of Detective Humphries' search, he did not challenge the validity of Detective Humphries' search warrant. In other words, he did not challenge the issuance of the warrant itself or the information upon which it was based; he challenged the search only because

the Corvette had been illegally seized by the WBPD before Detective Humphries executed the search warrant. We thus narrow our inquiry to whether the State proved inevitable discovery based on the information contained in Detective Humphries' search warrant and Detective Humphries' testimony that he would have searched for defendant's Corvette, no matter the location. *See State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) ("The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal.").

B. Inevitable Discovery Exception

Under the "exclusionary rule," evidence obtained from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation. *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). Likewise, under the "fruit of the poisonous tree doctrine," evidence that is the "fruit" of the unlawful conduct is also inadmissible. *Id.*, 637 S.E.2d at 872 (citing *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)).

But under the "inevitable discovery" exception, if the State can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful, independent means, then the information is admissible. *See State v. Garner*, 331 N.C. 491, 502, 417 S.E.2d 502, 508 (1992) (citing *Nix v. Williams*, 467 U.S. 431, 444, 81 L.Ed. 2d 377, 387-88 (1984)). The State need not prove an ongoing independent investigation; we use a flexible case-by-case approach in determining inevitability. *Id.* at 503, 417 S.E.2d at 508. If the State carries its burden, thus leaving the State in no better and no worse position than if it had not obtained the evidence unlawfully, we do not consider any question of good faith, bad faith, mistake, or inadvertence. *Id.* at 508, 417 S.E.2d at 511.

It is crucial in this case to distinguish between the information that the CBPD had about defendant's Corvette prior to the execution of the search warrant and the information derived from the search itself. The only important information derived from the actual search—trying the key found on the Madsen patio in the ignition of the Corvette—was that the key operated that Corvette. The CBPD had all of the other information about the Corvette, including the fact that it belonged to defendant, prior to the execution of the search.

Defendant argues that the information regarding "[t]he identity, ownership and location of the vehicle came from the [WBPD] directly as a result of the unconstitutional seizure." Although it may have been

possible for this information to have been derived from the illegal seizure, the evidence supports the trial court's findings of fact that this information was not derived from the illegal seizure of the vehicle. To the extent that there was any conflict in the evidence, the trial court resolved this conflict in favor of the State. Detective Humphries testified that he directly called the WBPD to get the registration information and VIN number. The parties stipulated that the WBPD's seizure of defendant's Corvette in Fayetteville, which arose from a separate investigation, violated the Fourth Amendment. The trial court found that the CBPD did not participate in the unlawful seizure. The trial court also found that Detective Humphries of the CBPD did not rely on any evidence stemming from the WBPD's unlawful seizure in procuring his search warrant. The trial court further found that, had the WBPD not seized the Corvette, Detective Humphries would have applied for a search warrant and would have searched for the Corvette, no matter its location.

As noted above, defendant did not challenge the issuance of the search warrant itself[1]; defendant challenged only the information derived from the search, which was the fact that the key found on Madsen's patio matched defendant's Corvette. The basis for defendant's motion was that defendant's Corvette was located, at the time that the search warrant was issued, in the impound lot, instead of wherever it might have been if it had not been illegally seized. But, based upon the application for the search warrant and the search warrant itself, the CBPD was seeking a "2000 CORVETTE BLACK IN COLOR GA. REG ACM 4256 BELONGING TO MR BILLY LARKIN." Based upon the record before us, the information provided by Officer Mobley about his investigation of defendant for other offenses, including the fact that defendant kept his Corvette key in his shoe strings and the identifying information about defendant and his Corvette, was not obtained from the illegal seizure of the Corvette.

These findings support the trial court's conclusion that the State proved inevitable discovery. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at

1. The Application for Search Warrant in the record appears to be incomplete, as the portion of the application as to the "facts to establish probable cause for the issuance of a search warrant" is cut off mid-sentence. The Application form, AOC-CR-119, Rev. 9/02, notes that "If more space is needed for any section, continue the statement on an attached sheet of paper with a notation saying 'see attachment.'" There is no notation of attachment or attachment in our record. But as defendant has not challenged the issuance of the search warrant itself, the incomplete application does not impair our review. The portion we have clearly identifies the defendant's Corvette.

878. The State had the information identifying both defendant and his particular Corvette and was engaged in seeking that Corvette. Detective Humphries found the Corvette more quickly, since he learned that it was being held in the impound lot in Wilmington and he could execute the warrant there, but he would have done the same thing whether he found the car at defendant's home or if it was located elsewhere by law enforcement on the lookout for this particular vehicle.

Courts have previously considered a discovery of evidence as "inevitable" where the police have sufficient identifying information about the specific item sought and where it appears that in the normal course of an investigation, the item would have been discovered even without the information that was obtained illegally. In *Garner*, pursuant to an unlawful search, police officers discovered the identity of the gun merchant who sold a certain gun. 331 N.C. at 497-98, 417 S.E.2d at 505. In response to the defendant's motion to suppress, the State proffered evidence that this gun merchant filed its sales with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") and that police normally check ATF records after recovering a gun. *Id.* at 503-04, 417 S.E.2d at 509. Because the police had the gun's serial number and would have checked the ATF records had they not previously discovered the gun merchant's identity, the North Carolina Supreme Court held that the State had proved inevitable discovery. *Id.* at 504, 417 S.E.2d at 509.

In *State v. Juniper*, the Ohio Fifth Court of Appeals held that the State had proved that the police inevitably would have discovered the defendant's vehicle where police knew the make, model, identification number, and approximate year of the vehicle and the vehicle was located at the defendant's friend's home, about five to ten minutes from the defendant's home. 719 N.E.2d 1022, 1028-29 (Ohio Ct. App. 1998), *appeal dismissed*, 705 N.E.2d 1242 (Ohio 1999). Similarly, in *U.S. v. Halls*, the Eighth Circuit held that the State had proved inevitable discovery where police had a complete description of the defendant's vehicle and knew the defendant's exact travel route. 40 F.3d 275, 277 (8th Cir. 1994), *cert. denied*, 514 U.S. 1076, 131 L.Ed. 2d 579 (1995).

Like the police in *Juniper* and *Hall*s, the CBPD knew the make, model, registration number, and year of defendant's Corvette. Defendant did not counter with any evidence to suggest that the CBPD would not have easily discovered the Corvette at the time of the warrant's execution; on the contrary, earlier that month, the WBPD had seized defendant's Corvette at defendant's residence in Fayetteville. Suppressing the evidence would impermissibly place the State "in a *worse* position

simply because of some earlier police error or misconduct." *See Nix*, 467 U.S. at 443, 81 L.Ed. 2d at 387. The State thus proved by a preponderance of the evidence that Detective Humphries, armed with the knowledge of the vehicle's make, model, registration number, and year, inevitably would have discovered defendant's Corvette.

Defendant's reliance on *State v. Wells* is misplaced. ___ N.C. App. ___, ___, 737 S.E.2d 179, 181 (2013). There, this Court held that the State failed to prove inevitable discovery because it failed to proffer any supporting evidence. *Id.* at ___, 737 S.E.2d at 182. In contrast, here, the State proffered Detective Humphries' search warrant that contained a complete description of defendant's Corvette and Detective Humphries' testimony that he would have searched for the Corvette, no matter the location. We therefore find that *Wells* is distinguishable. Accordingly, we hold that the trial court did not err in denying defendant's motion to suppress or in its admission of the evidence at trial and thus also did not commit plain error.

III. Jury Charge

[2] Defendant contends that the trial court erred in submitting a jury instruction on the doctrine of recent possession in connection with the Breese offenses. But the trial court did not submit this instruction in connection with the Breese offenses; rather, it submitted it in connection with the Johnson offenses. Defendant does not challenge the trial court's application of the doctrine of recent possession to the Johnson offenses. We therefore hold that the trial court did not commit error in the jury charge.

IV. Motion to Dismiss

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion to dismiss, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must

consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L.Ed. 2d 818 (1995).

B. Analysis

[3] In his argument that the jury charge contained error, defendant also contends that insufficient evidence supports his convictions arising from the Breese incident. Defendant moved to dismiss all charges at the close of all the evidence and thus has preserved error to challenge the sufficiency of the evidence. *See* N.C.R. App. P. 10(a)(3).

In connection with the Breese incident, defendant was convicted of first-degree burglary and felonious larceny pursuant to burglary. Relying on *State v. Hamlet*, defendant contends that his possession of Breese's Bose CD changer and radio five months after they were stolen from Breese's house was insufficient to convict him of the Breese offenses. *See* 316 N.C. 41, 46, 340 S.E.2d 418, 421 (1986).

In *Hamlet*, the defendant possessed a stolen television, property that is "normally and frequently traded in lawful channels[,]" approximately thirty days after the television was discovered to have been stolen pursuant to a breaking or entering. *Id.* at 45, 340 S.E.2d at 421. The North Carolina Supreme Court held that this evidence alone was insufficient to support defendant's convictions of breaking or entering and larceny. *Id.* at 46, 340 S.E.2d at 421. *Hamlet*, however, is distinguishable. Unlike in *Hamlet*, here, the State proffered evidence in addition to evidence of defendant's possession of the stolen goods. Detective Humphries testified that at 12:15 p.m. on 8 November 2010, he discovered a shoeprint in some sand outside Breese's house that, in his lay opinion, matched the soles of the shoes found on Madsen's patio. Accordingly, we examine the sufficiency of the State's shoeprint evidence.

In reviewing the sufficiency of shoeprint evidence, we apply the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

State v. Ledford, 315 N.C. 599, 611, 340 S.E.2d 309, 317 (1986) (quoting *State v. Palmer*, 230 N.C. 205, 213, 52 S.E.2d 908, 913 (1949)). A lay witness may testify as to the identity of a shoeprint and its correspondence with shoes worn by a defendant. *Id.*, 340 S.E.2d at 317. Here, Detective Humphries found the shoeprint in some sand outside of Breese's house, only several hours after the Breese offenses were committed and only several hours after defendant left the corresponding shoes on Madsen's patio a few miles away. Accordingly, we hold that the shoeprint evidence satisfies the *Palmer* "triple inference" test. *See id.*, 340 S.E.2d at 317; *Palmer*, 230 N.C. at 213, 52 S.E.2d at 913. We thus hold that the State's shoeprint evidence, coupled with the evidence of defendant's possession of Breese's stolen goods, is sufficient to support defendant's convictions for the Breese offenses.

V. Motion to Sever

A. Standard of Review

We review a trial court's denial of a motion to sever for an abuse of discretion. *State v. McDonald*, 163 N.C. App. 458, 463, 593 S.E.2d 793, 796, *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 910 (2004). But, if the joined charges possess no transactional connection, then the trial court's decision to join is improper as a matter of law. *State v. Owens*, 135 N.C. App. 456, 458, 520 S.E.2d 590, 592 (1999). A defendant waives his right to sever if he fails to renew his pretrial motion to sever "before or at the close of all the evidence." N.C. Gen. Stat. § 15A-927(a)(2) (2013); *see also State v. Agubata*, 92 N.C. App. 651, 661, 375 S.E.2d 702, 708 (1989) (holding that defendant who moved to sever at the first day of trial but failed to renew his motion at the close of all the evidence waived his right to sever). If a defendant waives his right to sever, our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *State v. Silva*, 304 N.C. 122, 127-28, 282 S.E.2d 449, 452-53 (1981).

Here, defendant renewed his pretrial motion to sever during jury selection, and the trial court again denied it. But defendant did not renew his motion at the close of all the evidence. Consequently, defendant waived his right to sever, and our review is limited to reviewing whether the trial court abused its discretion at the time of its decision to join. *See Agubata*, 92 N.C. App. at 661, 375 S.E.2d at 708; *McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97; *Silva*, 304 N.C. at 127-28, 282 S.E.2d at 452-53.

B. Analysis

[4] Defendant challenges the trial court's denial of his motion to sever. "Two or more offenses may be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2013). Under this rule, we determine (1) whether the offenses have a transactional connection; and (2) whether the defendant can receive a fair hearing on more than one charge at the same trial. *State v. Perry*, 142 N.C. App. 177, 180-81, 541 S.E.2d 746, 748 (2001) (citing *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000)).

In determining whether offenses have a transactional connection, we consider (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case. *State v. Peterson*, 205 N.C. App. 668, 672, 695 S.E.2d 835, 839 (2010); *Perry*, 142 N.C. App. at 181, 541 S.E.2d at 749. Two factors frequently examined are a common *modus operandi* and the time lapse between offenses. *State v. Williams*, 355 N.C. 501, 530-31, 565 S.E.2d 609, 627 (2002), *cert. denied*, 537 U.S. 1125, 154 L.Ed. 2d 808 (2003). If joinder hinders or deprives the defendant of his ability to present his defenses, the trial court should not join the charges. *Williams*, 355 N.C. at 529, 565 S.E.2d at 626; *Silva*, 304 N.C. at 126, 282 S.E.2d at 452. "[T]he test on review is are the offenses so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant." *Peterson*, 205 N.C. App. at 672, 695 S.E.2d at 839.

Defendant was charged with breaking into three personal beachfront residences to commit a larceny therein within 2.5 miles of each other and within a three-day span. The offenses thus have a transactional connection. *See Perry*, 142 N.C. App. at 181, 541 S.E.2d at 749; *Williams*, 355 N.C. at 530-31, 565 S.E.2d at 627.

Defendant contends that the joinder of the cases prejudiced him and mentions that, during jury selection, two venirepersons indicated that it would be difficult for them to be fair and impartial given the number of charges. But defendant did not include a transcript of the jury selection in our record and did not assert that these venirepersons actually served on the jury. Because defendant does not challenge the fairness and impartiality of the jury, we conclude that joinder of the cases did not prevent defendant from receiving a fair trial. Accordingly, we hold that

the trial court did not abuse its discretion in denying defendant's motion to sever. *See Perry*, 142 N.C. App. at 180-81, 541 S.E.2d at 748.

VI. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
PHABIEN DARRELL McCLAUDE

No. COA14-584

Filed 18 November 2014

1. Conspiracy—motion to dismiss—sufficiency of evidence—no agreement

The trial court erred by denying defendant's motion to dismiss the conspiracy charge. The State did not present sufficient evidence of an agreement.

2. Drugs—possession of cocaine with the intent to sell and/or deliver—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the possession of cocaine with the intent to sell and/or deliver charge. Defendant's own statements coupled with his conduct indicated that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support.

3. Witnesses—denial of motion for additional time to locate witness—denial of motion to reopen evidence for witness testimony

The trial court did not err by denying defendant's request for additional time to locate a witness and his motion to reopen the evidence so that the witness could testify. The trial court acted within its authority to expedite the trial proceedings in light of credible information that the witness had not been subpoenaed and

the witness's attorney had indicated that he would not be testifying. Further, defendant failed to advance any argument that he was prejudiced as a result of the trial court's denials.

Appeal by defendant from judgments entered 15 January 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

McCOTTER ASHTON, P.A., by Rudolph A. Ashton, III, for defendant.

ELMORE, Judge.

On 14 January 2014, a jury unanimously found defendant guilty of misdemeanor possession of marijuana, possession of cocaine with the intent to sell and/or deliver (PWISD cocaine), and conspiracy to sell and/or deliver cocaine (conspiracy). The trial court sentenced defendant to consecutive active prison terms of 15-27 months based on the PWISD cocaine conviction and 15-27 months based on the conspiracy conviction. For the possession of marijuana conviction, defendant received a suspended sentence of 20 days imprisonment and was placed on supervised probation for 8 months to be served upon his release from prison. Defendant appeals. After careful consideration, we vacate the conspiracy conviction and remand for resentencing.

I. Facts

On 11 June 2013, Johnston County Deputy Sheriff Billy Britt was on patrol duty at the intersection of N.C. 96 North and N.C. 42 West when he noticed a vehicle cross the center line of the road on two separate occasions. As a result of the traffic violation, Deputy Britt conducted a traffic stop of the vehicle. Deputy Britt approached the vehicle, and he smelled a strong odor of marijuana emanating from the vehicle. He asked the occupants whether any marijuana was inside the vehicle, and Phabien Darrell McClaude (defendant), who was located in the front passenger seat, indicated that he and the driver, Jonathan Hall, had previously smoked marijuana in the car. Upon Deputy Britt's request, defendant and Hall exited the vehicle, and Deputy Britt conducted a protective search of defendant's person. Deputy Britt found a small bag of marijuana in defendant's trouser pocket and subsequently handcuffed

defendant. Both Hall and defendant became visibly nervous, but they indicated that nothing else was inside the vehicle.

Thereafter, Deputy Britt conducted a search of the vehicle. As he began to search the center of the vehicle, Hall appeared increasingly discomposed as he "wring[ed] and twist[ed] . . . all around," and shuffled and tapped his feet. Deputy Britt then pulled out the ashtray and could see the floor panel beneath the center console. Deputy Britt found a black box underneath the console, and after opening the box, he found 7.2 grams of a substance that was later determined to be powder cocaine. At this point, Hall started to walk away from the scene, forcing another deputy to place him in handcuffs.

Deputy Britt re-approached defendant, who then began to make voluntary statements. Defendant proceeded to inform Deputy Britt that he had outstanding child support warrants, concealed marijuana in his underwear, and was "just trying to make a [sic] enough money to pay for . . . child support[.]" Deputy Britt then placed defendant under arrest and transported him to the Johnston County Jail. In relevant part, the State charged defendant with PWISD marijuana, PWISD cocaine, and conspiracy.

At trial, defendant made motions to dismiss these charges for insufficient evidence, each of which was denied by the trial court. Defendant also attempted to present evidence by calling Hall as a witness but was unable to locate him. Defendant requested that he be given additional time to locate Hall, but the trial court denied the request. During jury deliberations, defendant found Hall and made a motion to the trial court to reopen the evidence so that Hall could testify, but the trial court denied defendant's motion. The jury returned with verdicts of guilty of misdemeanor possession of marijuana, PWISD cocaine, and conspiracy.

II. Analysis

a. Motion to Dismiss the Conspiracy Charge

[1] Defendant argues that the trial court erred by denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. Defendant contends the State presented insufficient evidence to establish that he and Hall made an agreement to sell and deliver cocaine. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

To withstand a motion to dismiss the charge of conspiracy to sell and/or deliver cocaine, the State must provide substantial evidence that: 1.) The defendant and at least one other person entered into an agreement; 2.) The agreement was to commit the crime of the sale and/or delivery of cocaine; and 3.) The defendant and the other person(s) intended that the agreement be carried out at the time it was made. N.C.P.I.-Crim. 202.80. However, "the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations and quotation marks omitted).

The State directs us to *State v. Worthington*, in support of the proposition that defendant and Hall had "a mutual implied understanding" sufficient to establish a conspiracy. In *Worthington*, this Court indicated that the State can prove a conspiracy by showing "a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (citation and internal quotation marks omitted). Based on this principle, we held that the State presented sufficient evidence of a conspiracy to withstand a motion to dismiss despite the absence of any evidence of "an express agreement between the defendants[.]" *Id.* at 162, 352 S.E.2d at 703. However, the facts in *Worthington* are markedly dissimilar to those at issue here.

In *Worthington*, an undercover S.B.I. Agent purchased cocaine from the co-conspirator, law enforcement officers discovered the money used to buy the cocaine in the possession of both the defendant and

the co-conspirator, the co-conspirator's name and phone number were written in a notebook found in the defendant's residence, the notebook listed "payments and balances for dated transactions[,]" and the co-conspirator "repeatedly referred to 'his man,' the manner in which 'his man' liked to arrange a drug deal, and 'his man's' ability to transact a half-pound cocaine deal." *Id.* at 152-163, 352 S.E.2d at 697-703. The evidence in *Worthington* that unerringly indicated an implied understanding between the co-conspirator and the defendant is simply lacking in this case.

Instead, we find *State v. Euceda-Valle* controlling. 182 N.C. App. 268, 276, 641 S.E.2d 858, 864 (2007). In *Euceda-Valle* this Court held that the State failed to present substantial evidence of the existence of a conspiracy because "mere suspicion" or a "mere relationship between the parties or association" is insufficient. *Id.* at 276, 641 S.E.2d at 864-65 (citation and internal quotation marks omitted). In that case, an officer conducted a traffic stop. *Id.* at 270-71, 641 S.E.2d at 860-61. The defendant and alleged co-conspirator were seated inside the vehicle, both individuals were nervous, an odor of air-freshener emanated from the vehicle, and after a canine sniff and search of the vehicle, officers located 4.98 kilograms of cocaine hydrochloride in the trunk. *Id.* Importantly, we observed that the State provided no evidence of "conversations between the two men; unusual movements or actions by defendant and/or [alleged co-conspirator]; large amounts of cash on alleged [co-conspirator]; the possession of weapons; or anything else suggesting an agreement." *Id.* at 276, 641 S.E.2d at 864.

Similarly, defendant and Hall never conversed, no cash was found in the vehicle or linked to Hall despite the presence of cocaine, and neither person possessed a weapon. Although Hall was visibly nervous throughout the encounter and made some unusual movements indicating that he might have known that cocaine was in the vehicle, such evidence does not amount to substantial evidence of an agreement to commit the crime of the sale and/or delivery of cocaine. Hall stated only that "[w]e smoked weed and that's it." Moreover, while defendant admitted his own intent to sell cocaine by stating, "I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and I was able to cut it good[,]" nothing expressly or impliedly connected Hall to defendant's admission of his intent to sell the cocaine. In fact, defendant said Hall was merely driving the vehicle because he did not have a license.

Thus, the State did not present sufficient evidence of an agreement to support the conspiracy charge. *See State v. Benardello*, 164 N.C. App.

708, 711, 596 S.E.2d 358, 360 (2004) (holding that the evidence was insufficient to establish the existence of conspiracies to commit murder or to shoot into occupied properties because a phone conversation, the only evidence supporting a conspiracy, discussed resolving a money issue but made "no mention of shooting, killing or violence of any kind"); *compare State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433-34 *aff'd*, 359 N.C. 423, 611 S.E.2d 833 (2005) (ruling that the State presented substantial evidence of the existence of a conspiracy to traffic in cocaine when the defendant was in a truck with two individuals, 79.3 grams of cocaine were located in the vehicle, one of the occupants possessed thousands of dollars in cash, and officers found a loaded firearm in the vehicle). Accordingly, the trial court erred by denying defendant's motion to dismiss the conspiracy charge.

b. Motion to Dismiss the PWISD Cocaine Charge

[2] Next, defendant argues that the trial court erred by denying his motion to dismiss the PWISD Cocaine charge for insufficiency of the evidence. We disagree.

In order to withstand a motion to dismiss the charge of PWISD Cocaine, the State must present substantial evidence that defendant possessed a controlled substance with the "intent to sell or distribute the controlled substance." *State v. Richardson*, 202 N.C. App. 570, 572, 689 S.E.2d 188, 191 (2010) (citation and internal quotation marks omitted). Possession of a controlled substance can be actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005). "A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). Additionally, the State must demonstrate "other incriminating circumstances before constructive possession may be inferred." *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174 (citation and internal quotation marks omitted).

Here, defendant contests the sufficiency of the State's evidence as it relates to the elements of "possession" and the "intent to sell or distribute." However, the evidence shows that Deputy Britt observed defendant in the passenger seat reaching towards the center of the car before the traffic stop, and he located the cocaine in the center console of the vehicle, between the driver and passenger's seat. Moreover, defendant admitted to actually possessing and intending to sell the cocaine, since he stated, "[m]an, I don't sling dope anymore, I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and

I was able to cut it good." Based on Deputy Britt's training and experience, he interpreted this slang to mean "buying an amount of -- in this case cocaine and adding other ingredients to it in some way, shape or form to make it a larger amount." Defendant also revealed to Deputy Britt that he bought one gram of cocaine "and was able to make it into twelve."

Thus, defendant's own statements coupled with his conduct indicate that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support. Accordingly, the trial court did not err by denying defendant's motion to dismiss the PWISD cocaine charge.

c. Request for Additional Time to Locate a Witness and Motion to Reopen Evidence

[3] Defendant also argues that the trial court erred by denying both his request for additional time to locate Hall and his motion to reopen the evidence so that Hall could testify. We disagree.

The standard of review regarding whether a trial court should grant a recess due to a missing witness is reviewed for an abuse of discretion. *State v. Elliott*, 25 N.C. App. 381, 383, 213 S.E.2d 365, 367-68 (1975). Similarly, "[b]ecause there is no constitutional right to have one's case reopened, the decision to reopen a case is strictly within the trial court's discretion." *State v. Hoover*, 174 N.C. App. 596, 599, 621 S.E.2d 303, 305 (2005). This broad discretion stems from the trial court's "inherent authority to supervise and control trial proceedings." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986).

The relevant facts show that after defendant's motions to dismiss were denied, the trial court took a 15 minute break at 10:34 a.m. and excused the jury. During this time, defendant's attorney notified the trial court that he was attempting to make contact with a potential witness, Hall. Hall was not under subpoena but had been present in the courtroom earlier in the day. The prosecutor told the trial court that he had spoken with Hall's attorney who stated that his client was not going to testify. The trial court nevertheless allowed defendant's attorney a "few minutes" to locate Hall. Defendant's attorney was unsuccessful and informed the trial court that he had been unable to locate Hall. The jury returned at 11:03 a.m. and defendant stated that he would not present any evidence. The trial court, defendant, and the State then conducted the charge conference outside the presence of the jury. After the charge conference, defendant's attorney requested additional time to locate Hall, and the following colloquy occurred:

> DEFENDANT'S ATTORNEY: We can't get any additional time to get our witnesses here?
>
> TRIAL COURT: I thought the witness was not going to testify.
>
> DEFENDANT'S ATTORNEY: Plus you've already closed the evidence.
>
> TRIAL COURT: I guess the answer to that question is no. Did you talk to his lawyer?
>
> DEFENDANT'S ATTORNEY: I did speak to his lawyer. His lawyer is in Harnett County.
>
> TRIAL COURT: Okay.

The jury re-entered the courtroom at 11:38 a.m. to hear closing arguments and receive jury instructions. The jury started deliberations at 12:29 p.m. At some point during deliberations, defendant's attorney learned that Hall had returned (although Hall was not in the courtroom), so he made a motion to reopen the evidence so that Hall could testify. The trial court denied the motion, stating:

> Let the record reflect that the witness was earlier here in the courtroom prior to both sides resting. He left this courtroom and did not return.
>
> Let the record further reflect that this witness, as I understand, was not under subpoena to be here but was here this morning on his own, left on his own, and that the Court has been advised that the jury has reached a verdict with regards to this matter. The motion by defense to reopen this case so that the witness can testify is hereby denied.

The trial court did not abuse its discretion by denying both defendant's request for additional time to locate Hall and his motion to reopen the evidence. The trial court acted within its authority to expedite the trial proceedings in light of credible information that Hall had not been subpoenaed (and thus not required to be present), and Hall's attorney had indicated that Hall would not be testifying. Moreover, defendant had ample opportunity to locate Hall during trial. Approximately 30 minutes elapsed from the time defendant's attorney made the trial court aware of his efforts to contact Hall until the moment at which he requested additional time to locate Hall. Over 1.5 hours later, just as the jury reached

a verdict, defendant's attorney made a motion to reopen the evidence, although Hall was still absent from the courtroom.

Additionally, defendant carries the burden of establishing prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2013) (requiring that in non-constitutional matters, defendant show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises").

On appeal, defendant fails to advance any argument in his brief to the effect that he was prejudiced as a result of the trial court's denial of his request for additional time and motion to reopen evidence. Thus, defendant's arguments necessarily fail. *See Davis*, 317 N.C. at 318-19, 345 S.E.2d at 178 (holding that the trial court did not err by denying the defendant's motion to reopen evidence so that he could play a tape for the jury "where counsel for the defense, after more than adequate opportunity, failed timely to produce the necessary equipment to play the tape[,]" and even if the trial court erred, the defendant could not establish prejudicial error).

III. Conclusion

In sum, we hold that the trial court did not err by denying defendant's: 1.) motion to dismiss the PWISD charge, 2.) request for additional time to locate a witness, and 3.) motion to reopen the evidence. However, the trial court erred by denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. Thus, we vacate the conspiracy conviction and remand for resentencing.

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

Judges BRYANT and ERVIN concur.

STATE OF NORTH CAROLINA
v.
WILLIAM McKINLEY RICKS

No. COA14-408

Filed 18 November 2014

Motor Vehicles—driving while impaired—public vehicular area—vacant lot

The trial court erred in a driving while impaired prosecution where there was insufficient evidence that a cut-through on a vacant lot was a public vehicular area. There was no evidence concerning ownership of the vacant lot, nor was there evidence that the vacant lot had been designated as a public vehicular area by the owner; the fact that people walked and bicycled across the vacant lot as a shortcut did not turn the lot into a public vehicular area. Even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C.G.S. § 20-4.01(32)(a).

Appeal by defendant from judgment entered 14 November 2013 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Amanda S. Zimmer for defendant-appellant.

McCULLOUGH, Judge.

William McKinley Ricks ("defendant") appeals from judgment entered upon his conviction for habitual impaired driving. For the following reasons, we reverse.

I. Background

Defendant was arrested on 24 September 2012 and later indicted by a Nash County Grand Jury on 3 December 2012 on a charge of habitual impaired driving. On 13 November 2013, the case was called for jury

trial in Nash County Superior Court, the Honorable Quentin T. Sumner, Judge presiding.

The State's evidence at trial tended to show the following: At approximately 7:30 p.m. on 24 September 2012, T. D. White, a former patrol officer with the City of Rocky Mount Police Department, responded to a call from dispatch reporting a moped accident in the area of South Church Street and Bassett Street. White described the area as a vacant lot at the intersection of South Church Street and Bassett Street surrounded by businesses on both sides. White testified it appeared there had been a building on the lot at some point, but all that remained was a driveway cutting directly across the lot from South Church Street to Bassett Street. White referred to the driveway as a cut through and testified to having seen people walk and ride bicycles across it. White recalled that the driveway appeared to have been paved at one time, but was now dirt. White explained that the foot and bicycle traffic kept the area mowed down. There were no fences or barriers preventing access to the lot or cut through. White testified the cut through was wide enough to drive a motor vehicle through, explaining that he pulled his patrol car into the cut through when dealing with defendant. White also testified that he had seen cars use the cut through to turn around. Yet, it was mostly used for foot and bicycle traffic. White never found out who owned the lot.

The fire department was already on the scene when White arrived. White recalled that the fire truck had pulled up on the sidewalk and was parked on the edge of the vacant lot and the firemen were gathered around a man on a moped in the vacant lot. As White approached, a fireman informed White that the man on the moped, later identified as defendant, had laid the moped down in the lot but appeared uninjured. The fireman added that he believed defendant might be impaired.

When White first encountered defendant, defendant was already back on the moped with the engine running. White asked defendant to turn the moped off and to step off of the vehicle. Defendant complied, but struggled and stumbled as he dismounted the moped. White then asked defendant to take his helmet off. Upon the removal of defendant's helmet, White immediately detected a strong odor of alcohol on defendant's breath. White then asked defendant to produce his I.D. Defendant again complied, but fumbled through his wallet for approximately 30 to 45 seconds to retrieve an I.D. that White could clearly see in the wallet. During their ensuing conversation, defendant informed White that he had consumed one drink earlier in the day around noon. White, however, was suspicious about the accuracy of this statement since he noticed

defendant's speech was slurred and the odor of alcohol was still present on defendant's breath.

White informed defendant that he suspected that defendant was impaired and asked defendant to submit to field sobriety tests. Defendant complied, but did not perform the tests to the satisfaction of White. As a result of defendant's slurred speech, the odor of alcohol, and defendant's poor performance on the field sobriety tests, White formed the opinion that defendant was appreciably impaired by alcohol and arrested defendant for suspicion of DWI. As White took defendant into custody, defendant argued that he was on private property.

Defendant was transported to the police department where Officer David Bowers administered a breath analysis. Bowers testified the results of the breath test revealed defendant had a blood alcohol level of 0.17.

At the conclusion of the State's evidence, defendant moved to dismiss on the basis that the State failed to prove defendant was in a public vehicular area. In response to defendant's motion, the State argued that the vacant lot was "an area used by the public at any time for vehicular traffic[]" and pointed to evidence that the cut through on the vacant lot was used by pedestrians and bicyclists, the cut through was large enough to fit a police cruiser, and there were no signs, fences, or shrubs of any sort to keep the public out. Upon consideration of the arguments, the trial court denied defendant's motion. Defendant did not put on any evidence.

During a brief charge conference, the trial court informed the parties that he would instruct on impaired driving, inserting the following definition of public vehicular area: "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." Neither party objected.

Defendant then attempted to argue the definition of public vehicular area in accordance with N.C. Gen. Stat. § 20-4.01(32), beyond that specified by the trial court in the charge conference. The State objected to defendant's argument on two separate occasions. The trial court sustained those objections.

At the conclusion of the trial, the jury found defendant guilty of driving while impaired. Defendant then admitted to the existence of prior driving while impaired convictions and pled guilty to the charge of habitual impaired driving. Judgment was entered on 14 November 2013 and

defendant was sentenced to a term of 19 to 32 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred in (1) denying his motion to dismiss; (2) instructing the jury concerning the definition of a public vehicular area; and (3) sustaining the State's objections to his closing argument. We address each issue.

Defendant first argues the trial court erred in denying his motion to dismiss because there was insufficient evidence that he was operating the moped in a public vehicular area.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In North Carolina, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area . . . [a]fter having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2013).

In the present case, the only element of impaired driving in dispute is whether defendant was in a public vehicular area; the evidence is clear that defendant was driving a vehicle, had a blood alcohol concentration above 0.08, and was not operating the moped on a highway or street. Now on appeal, defendant argues, just as he did below, that there

was insufficient evidence that the cut through on the vacant lot was a public vehicular area. Specifically, defendant points out that there was no evidence of who owned the property or that the property was dedicated for public use.

In support of his argument, defendant cites *State v. Lesley*, 29 N.C. App 169, 223 S.E.2d 532 (1976) and *State v. Bowen*, 67 N.C. App. 512, 313 S.E.2d 196 (1984). In both cases, this Court addressed whether the trial courts erred in concluding and instructing the juries that the respective defendants were in public vehicular areas when discovered by law enforcement officers. In *Lesley*, this Court reversed the defendant's conviction in a case in which police found the defendant slumped down in the driver's seat of his car which was parked with the engine running in an unobstructed driveway from a public highway to an abandoned Pepsi-Cola Bottling Plant with "for rent" and "for sale" signs posted in the windows. *Lesley*, 29 N.C. App. at 170, 223 S.E.2d at 533. In reversing, this Court opined that there was sufficient evidence from which the jury could find the defendant guilty of operating a motor vehicle under the influence of alcohol from the public highway onto the driveway, but held the "evidence in the record . . . [was] not sufficient to support the trial court's conclusion that the driveway leading from [the public highway] to the Pepsi-Cola Bottling Plaint [was] a 'public vehicular area[.]' " *Id.* at 171, 223 S.E.2d at 533. Similarly in *Bowen*, this court reversed the defendant's conviction in a case in which police "found [the] defendant, apparently asleep, at the wheel of his truck, which was sitting with the engine running in the only driveway into a condominium complex." *Bowen*, 67 N.C. App. at 513, 313 S.E.2d at 196. In reversing, this Court noted the sharply conflicting evidence before the trial court.

> The evidence that [it] was a public vehicular area indicated that there was a "For Sale" sign apparently inviting in the public, and that there appeared to be no obstruction to public access; the officers were unaware that it was a condominium complex. Evidence to the contrary indicated that "No Trespassing" signs were posted, that there was no parking set aside for the public, and that the driveway had not been dedicated for public use.

Id. at 514-15, 313 S.E.2d at 197. As a result of the conflicting evidence, this Court concluded "the evidence did not suffice to support the trial court's conclusion *as a matter of law* that the driveway was a 'public vehicular area' within the meaning of the statute." *Id.* at 515, 313 S.E.2d at 197.

In response to defendant's argument, the State contends that this case is distinguishable from *Lesley* and *Bowen*. The State further contends there is sufficient evidence in this case to show that the cut through on the vacant lot was a public vehicular area.

Upon review of the cases, we agree that *Lesley* and *Bowen* are distinguishable. In those cases, although this Court found the trial courts erred by concluding and instructing the juries that the areas in which the defendants were discovered were public vehicular areas, this Court found there was sufficient evidence to support the impaired driving convictions and granted new trials. *Lesley*, 29 N.C. App. at 171, 223 S.E.2d at 533; *Bowen*, 67 N.C. App. at 515-16, 313 S.E.2d at 197-98. In the present case, the trial court did not remove the issue of whether the cut through was a public vehicular area from the jury's consideration by concluding or instructing that the cut through was a public vehicular area as a matter of law. Instead, the trial court denied defendant's motion to dismiss and allowed the jury to decide the issue. Nevertheless, we hold the trial court erred in this case because there was insufficient evidence that the cut through was a public vehicular area.

In full, a "public vehicular area" is defined in N.C. Gen. Stat. § 20-4.01(32) (2013) as:

> Any area within the State of North Carolina that meets one or more of the following requirements:
>
> a. The area is used by the public for vehicular traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:
>
> 1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.
>
> 2. Any service station, drive-in theater, supermarket, store, restaurant, or office building, or any other business, residential, or municipal establishment providing parking space whether the business or establishment is open or closed.

3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.

d. The area is a portion of private property used by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20-219.4.

In contrast, a "private road or driveway" is defined as "[e]very road or driveway not open to the use of the public as a matter of right for the purpose of vehicular traffic." N.C. Gen. Stat. § 20-4.01(30) (2013).

Both below and now on appeal, the State asserts that, pursuant to N.C. Gen. Stat. § 20-4.01(32)(a), the definition for public vehicular area only requires a showing that "the area is used by the public for vehicular traffic at any time." The State then argues the following evidence is sufficient to allow the jury to decide if the vacant lot was a public vehicular area: White has observed people walking and riding bicycles across the vacant lot; the traffic has maintained a dirt path, or cut through, across the vacant lot connecting South Church Street and Bassett Street; the cut through was wide enough to fit a police cruiser; and there are no barriers or signs preventing access. Upon review, we disagree with the State's interpretation of N.C. Gen. Stat. § 20-4.01(32)(a) and the State's argument that the evidence was sufficient.

Although the examples included in N.C. Gen. Stat. § 20-4.01(32)(a) are listed "by way of illustration and not limitation[,]" they are a component of the relevant definition and cannot be ignored. It is evident from the examples listed that the definition a of public vehicular area set out in N.C. Gen. Stat. § 20-4.01(32)(a) contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas

used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public. Furthermore, N.C. Gen. Stat. § 20-4.01(32)(d) provides that "private property used by vehicular traffic and designated by the private property owner as a public vehicular area" is a public vehicular area. If the State's assertion that any area used by the public for vehicular traffic at any time is a public vehicular area is correct, the remainder of the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32), including subsection (d), is superfluous.

In the present case, there is no evidence concerning the ownership of the vacant lot; nor is there evidence that the vacant lot had been designated as a public vehicular area by the owner. Moreover, a vacant lot is dissimilar to any of the examples provided in N.C. Gen. Stat. § 20-4.01(32)(a) that are generally open to the public. The fact that people walk and bicycle across the vacant lot as a shortcut does not turn the lot into a public vehicular area. In order to show an area meets the definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a), we hold there must be some evidence demonstrating the property is similar in nature to those examples provided by the General Assembly in the statute. There was no such evidence in this case. Thus, we hold the trial court erred in denying defendant's motion to dismiss.

Although we reverse defendant's conviction based on defendant's first issue on appeal, we briefly emphasize that, as noted above, the entire definition of public vehicular area in N.C. Gen. Stat. § 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. Consequently, even assuming there was sufficient evidence to allow the jury to decide whether the vacant lot was a public vehicular area, the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with N.C. Gen. Stat. § 20-4.01(32)(a).

III. Conclusion

For the reasons discussed above, we hold the trial court erred in denying defendant's motion to dismiss, instructing the jury concerning the definition of a public vehicular area, and sustaining the State's objections to defendant's closing argument.

Reversed.

Judges ERVIN and BELL concur.

STATE v. SPENCE

[237 N.C. App. 367 (2014)]

STATE OF NORTH CAROLINA
v.
ROBERT EARL SPENCE, JR.

No. COA14-317

Filed 18 November 2014

1. Appeal and Error—preservation of issues—right to public trial—purpose of objection apparent from context

Defendant preserved for appellate review his argument that the trial court violated his Sixth Amendment right to a public trial when it closed the courtroom during the prosecuting witness's testimony. It was apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom.

2. Constitutional Law—right to public trial—Waller factors

The trial court did not violate defendant's Sixth Amendment constitutional right to a public trial when it closed the courtroom during the prosecuting witness's testimony. The trial court's findings of fact were supported by the evidence, and the findings were adequate to support a courtroom closure pursuant to the four factor test set forth in *Waller v. Georgia*, 467 U.S. 39.

3. Rape—first-degree rape—jury instructions—invited error

Defendant's argument that the trial court committed plain error by instructing the jury in a manner that permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act was dismissed. Any error stemming from the trial court's instructions was invited by defendant.

4. Sexual Offenses—first-degree sex offense charges—insufficient evidence

The trial court erred in a first-degree rape and first-degree sex offense case by denying defendant's motion to dismiss certain first-degree sex offense charges. There was insufficient evidence of each element of the challenged charges.

5. Rape—first-degree rape—prosecuting witness referred to as victim

The trial court did not commit plain error in a first-degree rape case by referring to the prosecuting witness as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to

her as "the victim" in its final jury instructions. The use of the words "the victim" did not have a probable impact on the jury's finding of guilt in this case.

Appeal by defendant from judgments entered 18 June 2013 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 10 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

W. Michael Spivey, for defendant.

ELMORE, Judge.

Robert Earl Spence, Jr. (defendant) appeals from judgments entered upon his convictions for four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative. Defendant was sentenced to three consecutive terms of active imprisonment each for a minimum of 230 months and a maximum of 285 months.

I. Facts

The State indicted defendant on three counts of rape, sex offense, and incest in each of six cases (eighteen counts in total) stemming from alleged sexual misconduct between defendant and his daughter ("Donna[1]"). At trial, the State presented evidence that defendant continually sexually abused Donna when she was five years old until she was twelve. Donna recalled the locations where the abuse occurred but was unable to remember dates or time-frames. The State attempted to establish the time-frames by establishing the years in which defendant lived at the various locations of the alleged abuse. The approximate time-frames established that defendant separated from his wife in 2002, moved out of the family home and briefly lived with his cousin, Dartanian Hinton, followed by his oldest brother, Ellis Rodney McCoy. Defendant lived with McCoy from approximately 2003 until early 2005. Subsequently, defendant lived with his younger brother, David Edison Spence, for the duration of 2005. During the final months of 2005 or early in 2006, defendant resided with ATN Hinton for about five or six months. Thereafter, defendant married and moved into the home of his new wife, Joann Freeman. In July 2006, defendant divorced Ms. Freeman, re-married, and moved into another house with his third wife, Angel Spence.

1. Donna is a pseudonym used to protect the identity of the minor.

During her trial testimony, Donna became nervous, visibly upset, and began to directly ask defendant questions about his conduct towards her. In response, the trial court recessed court and, over defendant's objection, ordered that the courtroom remain closed for the duration of Donna's direct and cross-examination testimony.

At the close of all the evidence, defendant made a motion to dismiss three of the first-degree sex offense charges that were alleged to have occurred in 2001, 2004, and 2005 for insufficiency of the evidence. The trial court denied defendant's motion, and the charges were submitted to the jury.

While reading the jury instructions, the trial court, without any objection by defendant, followed the pattern jury instructions by referring to Donna as "the victim." During deliberations, the jury asked the trial court whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. The trial court, without any objection by defendant, answered, "the use of the word 'any object' refers to parts of the human body as well as inanimate or foreign objects. So that is the definition of the term 'object.' And then under that definition the penis being a part of the human body, that would be within the definition of an object."

The jury returned with unanimous verdicts of guilty of four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative.

II. Analysis

a. Preservation of Constitutional Issue

[1] Defendant first contends that the trial court erred by violating his sixth amendment constitutional right to a public trial when it closed the courtroom during Donna's testimony. The State contends that defendant failed to preserve this issue on appeal. We disagree.

N.C. Appellate Procedure Rule 10(a)(1) mandates that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). Accordingly, "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the reviewing court." *State v. Ellis*, 205 N.C. App. 650, 654, 696 S.E.2d 536, 539 (2010) (citation and quotation marks omitted). This general rule applies to constitutional

questions, as constitutional issues not raised before the trial court "will not be considered for the first time on appeal." *Id.*

Pursuant to the sixth amendment of the United States constitution, a criminal defendant is entitled to a "public trial." U.S. Const. amend. VI.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions. In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Waller v. Georgia, 467 U.S. 39, 46, 81 L. Ed. 2d 31, 38 (1984) (citations and quotation marks omitted).

In order to preserve a constitutional issue for appellate review, a defendant must voice his objection at trial such that it is apparent from the circumstances that his objection was based on the violation of a constitutional right. *State v. Rollins (Rollins I)*, ___ N.C. App. ___, ___, 729 S.E.2d 73, 76 (2012).

Here, the trial court ordered that bystanders in the courtroom, who included people on defendant's witness list, remain outside the courtroom for the remainder of the alleged victim's testimony. Defendant's attorney objected in response to the closure of the courtroom:

> DEFENDANT'S ATTORNEY: Your Honor, just if your Honor could note defendant's objection. People that are here that are on my witness list who have been seated in the audience haven't contributed to this disruption and haven't been making faces or gestures which would in any way cause the upset that the witness has been displaying and I object to them being removed, but I understand the Court has enormous discretion in the matter. I just don't like it. . . . I'm concerned that the jury may feel that somehow my part of the audience had something to do with the witness's behavior and I don't think that's the case and I wouldn't want to let that be inferred or implied in the Court's ruling, so if the Court could fashion some statement to that effect I'd be grateful.

Before defendant cross-examined Donna, the trial court ordered that the courtroom remain closed, and defendant objected to the closure once again.

> TRIAL COURT: All right. I've considered whether there's any particular reason to allow bystanders to be in the courtroom during the cross-examination and I'm inclined to continue the order closing the courtroom during the remainder of this witness's testimony, including cross-examination, so that would be for the same reasons and findings of fact that I made previously. That would be my intention. . . . [D]o you want to be heard?
>
> DEFENDANT'S ATTORNEY: Just an objection, but if I could go out for a minute and tell my people they don't need to stick around.
>
> TRIAL COURT: Again, clarify that once she is off the stand they would be welcome back.

It is apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicates defendant's constitutional right to a public trial. Thus, we hold that defendant preserved this issue on appeal. *See State v. Comeaux*, __ N.C. App. __, __, 741 S.E.2d 346, 349 (2012) *review denied*, __ N.C. __, 739 S.E.2d 853 (2013) (ruling that the "[d]efendant's objection to 'clear[ing] the courtroom' " preserved the defendant's argument on appeal that his constitutional right to a public trial was violated); *see also Rollins I*, __ N.C. App. at __, 729 S.E.2d at 76 (holding that the defendant preserved appellate review of an alleged violation of his constitutional right to a public trial "based on his contention [at trial] that '[c]ourt should be open' ").

b. Constitutional Right to a Public Trial

[2] We now address the merits of defendant's argument that the trial court violated defendant's constitutional right to a public trial. For the reasons set forth below, we hold that the trial court did not violate defendant's constitutional right.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively

binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))). This court reviews alleged constitutional violations *de novo*. *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007).

"[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45, 81 L. Ed. 2d at 38. In accordance with this principle, N.C. Gen. Stat. § 15-166 (2013) permits the exclusion of certain persons from the courtroom in cases involving rape and other sexually-based offenses:

> In the trial of cases for rape or sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge may, during the taking of the testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case.

However, when deciding whether closure of the courtroom during a trial is appropriate, a trial court must: (1) determine whether the party seeking the closure has advanced "an overriding interest that is likely to be prejudiced" if the courtroom is not closed; (2) ensure that the closure is "no broader than necessary to protect that interest"; (3) "consider reasonable alternatives to closing the proceeding"; and (4) "make findings adequate to support the closure." *Waller*, 467 U.S. at 48, 81 L. Ed. 2d at 39. The findings regarding the closure must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 45, 81 L. Ed. 2d at 38 (citation and quotation marks omitted). In making its findings, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *State v. Rollins (Rollins II)*, __ N.C. App. __, __, 752 S.E.2d 230, 235 (2013) (citation omitted).

Here, the trial court originally issued oral findings of fact in support of its decision to close the courtroom:

> THE COURT: Outside the presence of the jury, in my discretion I determined that it would be in the best interest of justice to exclude all bystanders from this courtroom while Ms. Spence continues with her testimony. I have no complaint about the way that the bystanders are conducting themselves. It's simply that there are approximately, I would say, thirty adults, many of whom are friends or family members, who appeared at this trial that are obviously -- have an interest in these proceedings in the gallery. I've also observed that Ms. Spence is nervous and upset as she testifies and as essentially may be expected. In any event, in my discretion and in my judgment simply allowing this courtroom to be as free from distractions as possible would be in the best interest of justice, so what I've done is simply required that all bystanders remain outside for the remainder of this witness's direct testimony. I'll revisit this after we take our lunch recess and I'll revisit it at the close of the direct testimony of this witness, but that would be my order at this time.

When the trial court re-visited its ruling after the close of the alleged victim's direct testimony, it stated:

> TRIAL COURT: All right. I've -- I will say that since the audience members were asked to leave the courtroom I do think that the testimony has been easier to -- for the jurors to understand anyway. There's been less crying and less nervousness, so I'm going to continue in my discretion to continue that order throughout the remainder of the direct examination.

The trial court's original findings of fact relating to its decision to close the courtroom are supported by competent evidence. During the alleged victim's testimony, she exhibited nervousness and cried, such that her testimony was difficult to understand. She eventually became so upset that she asked defendant directly, "[w]hy did you do this to me? Why? Why?" The trial court determined that the numerous adult bystanders in the courtroom, in part, contributed to the alleged victim's emotional state, and in order to re-establish courtroom order, the trial court recessed the trial for a few minutes.

Under the first *Waller* factor, the trial court articulated that the overriding interest that was likely to be prejudiced absent a courtroom closure was courtroom order, the alleged victim's emotional well-being, and the jury's ability to hear the alleged victim's testimony. The trial court also considered the second *Waller* factor, ensuring that the closure was not too broad, as it only ordered closure during the alleged victim's testimony once courtroom order was threatened and re-visited its ruling after the lunch recess and before cross-examination.

However, the trial court's original order did not indicate that it considered reasonable alternatives to the closure. As such, the absence of findings on the third *Waller* factor prevented us from conducting a proper review of the propriety of the closure.

Therefore, we remanded this matter for the trial court to enter a supplemental order containing supported findings of fact and conclusions of law related to the third *Waller* factor. In its supplemental order, the trial court addressed the third *Waller* factor:

> 10. The Court considered reasonable alternatives to the closure of the courtroom.
>
> 11. In considering reasonable alternatives, having previously observed that taking a recess to allow the alleged victim to compose herself did not have any beneficial effect on her emotional state or the ability of the Court and jurors to hear and understand her testimony, the Court concluded that the taking of additional recesses would not likely lead to a different outcome.
>
> 12. The Court considered, as an alternative to closing the courtroom, arranging for the remote testimony of the victim via closed circuit television. However, the Court excluded that possibility because the alleged victim did not appear to be emotionally distressed by the physical proximity of the Defendant and a remote testimony arrangement would impair the Defendant's rights to confront the alleged victim and would impair the ability of the jury to fully assess her credibility. Therefore, the Court found that closure of the courtroom to all nonessential personnel was the most reasonable alternative.

These supplemental findings are supported by competent evidence in light of the trial court's own observations of the victim and other individuals inside the courtroom.

In sum, the trial court's orders together considered Donna's young age, nature of the charges, familial relationship with defendant, other non-essential personnel present in the courtroom, necessity of Donna's non-hearsay testimony, limited time and scope of the courtroom closure, and consideration of reasonable alternatives to closing the courtroom. Thus, the findings were adequate to support a courtroom closure pursuant to the fourth *Waller* factor. Accordingly, the trial court did not violate defendant's constitutional right to a public trial.

c. Jury Instructions

[3] Defendant also argues that the trial court committed plain error by instructing the jury in a manner that permitted the jury to convict defendant of both first-degree rape and first-degree sex offense based upon one act of penile vaginal penetration. Specifically, defendant argues that "the error occurred because the trial court erroneously instructed the jury that a penis could be considered an 'object' for purposes of establishing a sexual act by either genital or anal penetration." As a result, defendant contends that the jury became confused about whether a penis was an "object" for the purposes of "penetration" to support the counts of first-degree sex offense. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1443(c) (2013), "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." Accordingly, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Hope*, ___ N.C. App. ___, ___, 737 S.E.2d 108, 111 (2012), *review denied*, 366 N.C. 438, 736 S.E.2d 493 (2013) (citation and internal quotation marks omitted).

Our Supreme Court has addressed the concept of "inviting error" within the context of jury instructions. *State v. Sierra*, 335 N.C. 753, 759-60, 440 S.E.2d 791, 795 (1994). In *Sierra*, the defendant, on appeal, argued that the trial court should have instructed the jury on second-degree murder. *Id.* At trial, however, the defendant specifically declined the trial court's offer to provide such an instruction on two separate occasions. *Id.* Our Supreme Court held that "defendant is not entitled to any relief and will not be heard to complain on appeal" despite any possible error by the trial court because he acquiesced to the trial court's jury instructions. *Id.*

Similarly, in *State v. Weddington*, the defendant argued to our Supreme Court that the trial court erred by failing to properly clarify a jury question regarding the time at which the intent to kill must be formed for the charge of first-degree murder. 329 N.C. 202, 210, 404

S.E.2d 671, 677 (1991). At trial, however, defendant agreed with the trial court's decision to merely reinstruct the jury on each element of the offense. *Id.* Our Supreme Court held that "[t]he instructions given were in conformity with the defendant's assent and are not error. The defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law and in a manner requested by the defendant." *Id.* (citation omitted).

Comparable to *Sierra* and *Weddington*, the jury in the case at bar asked whether "the penis is considered an object" for the purposes of "penetration" for the charge of first-degree sex offense. In deciding how to answer the jury, the trial court stated, in relevant part:

> TRIAL COURT: What I'm inclined to say is that the legal definition of an object is any object, inanimate or animate, so part of the body may be an animate object or some other item would be an inanimate object. The definitions of sexual acts have been provided to the jury. They include some specific sexual acts such as anal intercourse, which is penetration by the penis into the anus, and then rape, which is penetration of the vagina by the penis, so those are where there's a more specific definition, that's the definition that should be used.

The trial court then asked defendant's attorney about his thoughts on the issue, and defendant's attorney responded, "I agree. . . . [O]r the Court can reinstruct them on that count, just see what happens." The trial court then responded:

> TRIAL COURT: I'm just going to read the definition[,] and under that definition of penis [sic] is a part of body and so as a matter of law, since the Supreme Court has said that any object embraces parts of the human body as well as inanimate or foreign objects, and the answer to the question is yes, the penis is considered an object.

In response to the trial court's proposed answer to the jury question, defendant's attorney stated, "[t]hat's fine." After the trial court answered the jury's question in the exact manner proposed above, he asked the parties, "I didn't go on to distinguish between vaginal intercourse and sexual intercourse offense, but do either of you feel that further clarification is needed for the jury?" Defendant's attorney responded, "[n]o."

Thus, defendant's attorney actively participated in crafting the trial court's response to the jury question, overtly agreed with the trial court's

interpretation that a penis could be considered an "object," and denied the trial court's proposed clarification between vaginal intercourse and a sexual act for purposes of a sexual offense. Accordingly, we rule that defendant invited any error stemming from the trial court's instructions and dismiss this issue on appeal. *See Hope*, ___ N.C. App. at ___, 737 S.E.2d at 113 (dismissing issue on appeal because the defendant invited error by "objecting to the correct instruction, requesting the incorrect instruction, and by choosing to forgo a self-defense instruction"); *see also State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996) (ruling that the defendant invited error and declining to review issue on appeal "because, as the transcript reveal[ed], defendant consented to the manner in which the trial court gave the instructions to the jury").

d. Motion to Dismiss

[4] Next, defendant argues that the trial court erred by denying his motion to dismiss certain first-degree sex offense charges (11 CRS 226769, 11 CRS 226773 and 11 CRS 226774) for insufficiency of the evidence. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

In relevant part, an individual is guilty of a first-degree sex offense if the person "engages in a sexual act . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.4(a)(1) (2013). A "sexual act" is defined as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." Importantly,

a "sexual act" is also "the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1 (2013). An "object" for the purposes of this statute "embrace[s] parts of the human body as well as inanimate or foreign objects." *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981).

First-degree rape requires an individual to "engage[] in vaginal intercourse . . . [w]ith a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]" N.C. Gen. Stat. § 14-27.2 (2013). Vaginal intercourse is defined as "penetration, however slight, of the female sex organ by the male sex organ." *State v. Combs*, __ N.C. App. __, __, 739 S.E.2d 584, 586 (2013) *review denied*, __ N.C. __, 743 S.E.2d 220 (2013).

Because the crime of first-degree sex offense excludes vaginal intercourse, and vaginal intercourse is a specific element of first-degree rape that requires penile penetration, a "sexual act" of penetration by "any object into the genital" opening under N.C. Gen. Stat. § 14-27.4 constitutes first-degree rape if the "object" is a penis. *See State v. Leeper*, 59 N.C. App. 199, 202, 296 S.E.2d 7, 9 (1982) (holding that "[w]here one statute deals with a subject in detail with reference to a particular situation . . . and another statute deals with the same subject in general and comprehensive terms[,]" the particular statute will control "unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto").

Here, each of the first-degree sex offense indictments subject to defendant's motion to dismiss alleged that defendant "unlawfully, willfully and feloniously did engage in a sex offense with D.SP., by force and against that victim's will." 11 CRS 226769 alleged that the offense occurred between 1 January and 31 December of 2001, 11 CRS 226773 alleged that the offense occurred between 1 January 2004 and 31 December 2004, and 11 CRS 226774 alleged that the offense occurred between 1 January 2005 and 31 December 2005.

With regard to 11 CRS 226769, the only evidence that a sex offense had occurred was when Donna read an entry from her journal that chronicled her prior abuse and other witnesses testified about statements Donna made to them prior to trial. This evidence indicated that the sexual abuse by defendant began in 2001 in Donna's parents' home when she was five or six years old. In one particular instance, defendant penetrated Donna's anal opening and engaged in anal intercourse with her in a trailer. While the State purported to use this evidence to corroborate Donna's testimony, it could not use the testimony for substantive

purposes. *See State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000) ("It is well established that . . . prior statements admitted for corroborative purposes may not be used as substantive evidence."). The trial court appropriately instructed the jury:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict with or be consistent with testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made and that it conflicts with or is consistent with the testimony of the witness at this trial you may consider this and all facts and circumstances bearing on the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

Although the State provided evidence of vaginal intercourse during this time period, such conduct was sufficient to support defendant's first-degree rape conviction, not a first-degree sex offense. Thus, the State failed to provide substantial evidence of a first-degree sex offense in 2001, and the trial court erred by denying defendant's motion to dismiss this charge in 11 CRS 226769.

Similarly, Donna's in-court testimony shows that in 2004 and 2005, defendant engaged in vaginal intercourse with her on numerous occasions. Such conduct was sufficient evidence of first-degree rape, and defendant was convicted of such charges. Although Donna's journal entry and other witness testimony about statements made by Donna before trial indicated that defendant committed a "sexual act" through anal intercourse with Donna at McCoy's house between 2004 and 2005, there is no substantive evidence that during this time period, defendant committed a "sexual act" by way of cunnilingus, fellatio, analingus, anal intercourse, or penetration by any object (other than a penis) into Donna's genital or anal opening. *Leeper*, *supra*. Accordingly, the State failed to provide substantial substantive evidence of a "sexual act" for the first-degree sex offense charges in 11 CRS 226773 and 11 CRS 226774.

We also note that in its brief, the State points to substantial evidence at trial to support first-degree sex offenses occurring in 2006, but fails to cite any substantive evidence in the record of such conduct in 2001, 2004, or 2005. Nevertheless, the State argues that we should apply the rule of leniency to the case at bar.

Generally, "[t]he date given in the bill of indictment is not an essential element of the crime charged and the fact that the crime was in fact committed on some other date is not fatal." *State v. Pettigrew*, 204 N.C. App. 248, 253, 693 S.E.2d 698, 702 (2010) (internal citation and quotation marks omitted). With regard to child sexual abuse cases, the courts of this State "are lenient . . . where there are differences between the dates alleged in the indictment and those proven at trial." *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002) (citation omitted). The rationale for this relaxed standard is "in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence." *Id.* (citation and internal quotation marks omitted). This policy of leniency applies unless defendant "demonstrates that he was deprived of his defense because of lack of specificity[.]" *Id.* (citation and internal quotation marks omitted).

We do not believe the rule of leniency is applicable to the case at bar. The State mischaracterizes the issue as one of time variance, when it is, in fact, a question of sufficiency of the evidence. Had the State, at trial, shown that the specific sexual offense *conduct* that was alleged to have occurred in 2001, 2004, and 2005 happened on a different date, the rule of leniency would apply. However, the first-degree sexual offense indictments contain identical language and lack specificity as to particular conduct. The only substantive evidence of sexual-offense conduct elicited at trial occurred in 2006, and defendant was convicted of that offense. Thus, the State's theory on appeal would require us to impute the conduct in 2006 to 2001, 2004, and 2005, which would result in punishing defendant more than once for the same conduct in violation of the double jeopardy clause of the U.S. constitution. *See State v. Gardner*, 315 N.C. 444, 454, 340 S.E.2d 701, 708 (1986) ("[W]hen a person is . . . convicted and sentenced for an offense, the prosecution is prohibited from . . . sentencing him a second time for that offense[.]").

e. Referring to Donna as "the victim"

[5] Finally, defendant argues that the trial court erred by referring to Donna as the "alleged victim" in its opening remarks to the jury and then repeatedly referring to her as "the victim" in its final jury instructions. We disagree.

Defendant concedes on appeal that he never objected to the trial court referring to Donna as "the victim." Thus, we review this issue for plain error, not *de novo* as a statutory violation. *See State v. Phillips*, ___

N.C. App. ___, ___, 742 S.E.2d 338, 341 (2013), *review denied*, ___ N.C. ___, 753 S.E.2d 671 (2014) and *review dismissed*, ___ N.C. ___, 753 S.E.2d 671 (2014) ("[W]here our courts have repeatedly stated that the use of the word 'victim' in jury instructions is not an expression of opinion, we will not allow defendant, after failing to object at trial, to bring forth this objection on appeal, couched as a statutory violation, and thereby obtain review as if the issue was preserved."). "In deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Richardson*, 112 N.C. App. 58, 66, 434 S.E.2d 657, 663 (1993) (citation omitted).

Pursuant to N.C. Gen. Stat. § 15A-1232, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2013).

Defendant relies on *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *review allowed, writ allowed*, ___ N.C. ___, 753 S.E.2d 666 (2014) and *review denied*, ___ N.C. ___, 753 S.E.2d 667 (2014), in support of his argument that the trial court erred in referring to Donna as "the victim," as it was an expression of an improper opinion to the jury. We are unpersuaded.

In *Walston*, the trial court, over defendant's repeated objections, used the word "the victim" instead of "the alleged victim" in its jury instructions, which followed the pattern jury instructions. *Id.* at ___, 747 S.E. 2d at 727. This Court reviewed the appeal *de novo* because the defendant alleged a statutory violation of N.C. Gen. Stat. § 15A-1232. *Id.* This Court held that the trial court committed prejudicial error because "[t]he issue of whether sexual offenses occurred and whether [the complainants] were 'victims' were issues of fact for the jury to decide[,]" defendant was convicted of offenses which contained the word "victim" in the jury instructions, and the pattern jury instructions did not absolve the trial court from giving correct instructions to the jury. *Id.* at ___, 747 S.E.2d at 727-28.

We acknowledge that the case at bar shares some factual similarities to *Walston*. Most importantly, however, this case is distinguishable from *Walston* because we are reviewing this issue on appeal for plain error, not under a *de novo* standard of review. On this basis, defendant's argument fails because "it is clear from case law that the use of the term 'victim' in reference to prosecuting witnesses does not constitute *plain*

error when used in instructions[.]" S*tate v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) (emphasis added); *State v. Carrigan*, 161 N.C. App. 256, 263, 589 S.E.2d 134, 139 (2003); *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 166 (1998); *Richardson*, 112 N.C. App. at 67, 434 S.E.2d at 663. Moreover, upon review of the evidence, we cannot conclude that the use of the words "the victim" had a probable impact on the jury's finding of guilt. Donna testified to constant sexual abuse by defendant for approximately eight years, and her testimony was corroborated by her journal and other witnesses who testified as to her prior statements to them. Additionally, the trial court instructed the jury:

> The law requires the presiding judge to be impartial. You should not infer from anything that I have done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and to render a verdict reflecting the truth.

Thus, we hold that the trial court did not commit plain error by referring to Donna as "the victim" during jury instructions.

III. Conclusion

In sum, we hold that the trial court did not err by 1.) closing the courtroom during Donna's testimony, 2.) answering a jury question about whether a penis could be considered an "object," or 3.) referring to Donna as "the victim" during jury instructions. However, the trial court erred by denying defendant's motion to dismiss the first-degree sex offense charges in 11 CRS 226769, 11 CRS 226773 and 11 CRS 226774. Thus, we vacate those sex-offense convictions and remand for a new sentencing hearing.

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

Judges CALABRIA and STEPHENS concur.

STATE v. SPRUILL

[237 N.C. App. 383 (2014)]

STATE OF NORTH CAROLINA
v.
KAWANA SPRUILL AND RICHARD CONOLEY CHAPMAN

No. COA14-369

Filed 18 November 2014

Gambling—operating electronic sweepstakes—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendants' motion to dismiss charges for operating an electronic sweepstakes in violation of N.C.G.S. § 14-306.4. The jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize.

Appeal by defendants from judgments entered 18 December 2013 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General David J. Adinolfi II, for the State.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for defendant-appellants.

BRYANT, Judge.

Because the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the "reveal" of a prize, we affirm the trial court's denial of defendants' motion to dismiss and find no error in the judgment of the trial court.

On 23 April 2013, a magistrate in Edgecombe County issued arrest warrants for defendants Kawana Spruill and Richard Conoley Chapman on the charge of violating North Carolina General Statutes, section 14-306.4 ("Electronic machines and devices for sweepstakes prohibited"). The matter came on for trial before a jury in Edgecombe County Superior Court on 17 December 2013, the Honorable Walter H. Godwin, Jr., Judge presiding.

The evidence presented at trial tended to show that defendant Chapman was the owner of Past Times Business Center ("Past Times"), an internet café, located at 2100 St. Andrews Street, Tabor City, and defendant Spruill was the manager. An undercover officer with the Tabor City Police Department went to Past Times to determine if the café was operating an electronic sweepstakes in violation of N.C. Gen. Stat. 14-306.4. The undercover officer testified that he went to Past Times on 11 April 2013, equipped with a surveillance camera. The surveillance video was played for the jury while the officer narrated. The officer presented the cashier with $25.00. The cashier presented the officer with a disclaimer which states, in part:

> I understand that I am purchasing computer time to be used at this location. I also realize that I can request to participate in the promotional game for free. . . .
>
> . . .
>
> I understand that I am not gambling. I am playing a promotional game in which the winners are predetermined. The games have no effect on the outcome of the prizes won.

The undercover officer played internet games with the names "Keno," "Lucky's Loot," Lucky's Loot bonus round named "Pot O'Gold," "Lucky Sevens," "Lucky Ducks," and "Lucky Lamb." The undercover officer testified that his understanding was "[y]ou cannot win any more money than what it says you're already going to win before the game starts. So it's irrelevant what you click on." The lead investigator, Detective Sergeant Bruce Edwards, testified that Past Times' electronic games used a pre-reveal system. The pre-reveal system showed the prize amount the patron would win prior to the patron playing a game. Once the game was completed, the prize amount revealed prior to the start of the game would be displayed again. Kevin Morse, a representative from the video game manufacturer Figure Eight, testified that the software used to make the electronic games available in Past Times was developed and controlled by Figure Eight and that Past Time paid a user licensing fee to access the games via the internet. Morse distinguished a "true sweepstakes," where the prize is revealed after the game is completed, from the electronic games used in Past Times, where the prize is revealed before a game is played. At Past Times, the patron has the option of whether to play the game after the prize has been revealed. If the patron does not timely choose to play a game, the system prompts the next reveal opportunity.

At the close of the evidence, the jury returned verdicts against Chapman and Spruill finding each "[g]uilty of operating or placing into operation an electronic machine or device for the purpose of conducting a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize[.]" The trial court entered judgment in accordance with the jury verdicts. Spruill was sentenced to an active term of 45 days. The sentence was suspended, and she was placed on unsupervised probation for a period of 12 months. Chapman was also sentenced to an active term of 45 days. This sentence was suspended, and he was placed on unsupervised probation for a period of 36 months. Both defendants appeal.

On appeal, defendants argue the trial court erred in denying their motion to dismiss. Defendants contend that there was not substantial evidence they conducted a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize in violation of N.C. Gen. Stat. § 14-306.4. We disagree.

"We review denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010) (citation and quotations omitted). "[T]he trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. . . . The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 641 (2011) (citations and quotations omitted).

Pursuant to North Carolina General Statutes, section 14-306.4,

> it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:
>
> (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.
>
> (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.

N.C. Gen. Stat. § 14-306.4(b) (2013). "Entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play . . . ." *Id.* § 14-306.4(a)(3). An entertaining display can be "[a]ny [] video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes." *Id.* § 14-306.4(a)(3)(i). "Sweepstakes" is defined as "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." *Id.* § 14-306.4(a)(5).

Defendants contend that because the prize is revealed to the patron prior to any opportunity to play a game, they have not run afoul of the plain meaning of N.C.G.S. § 14-306.4. Previously, games were used to reveal the sweepstakes prize. But, according to Figure Eight representative Morse, the software accessible from Past Times was changed to incorporate the pre-reveal feature, specifically, to operate in compliance with N.C.G.S. § 14-306.4.

> [N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of the definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited[.] It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

Hest Technologies, Inc. v. State ex rel. Perdue, 366 N.C. 289, 289-90, 749 S.E.2d 429, 430-31 (2012) (citing *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915)), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___ (2013).

It is undisputed that with the use of computers accessing the internet, defendants operated a sweepstakes wherein a prize was revealed to a patron not dependent upon the patron's skill or dexterity in playing a video game. *See* N.C.G.S. § 14-306.4(a)(3)(i). That the video game did not have to be played or played to completion is not determinative. Defendants appear to define "game" only as that interaction between patron and computer which occurs after the sweepstakes prize has been revealed and the patron presses the "game" button. We disagree.

Under the pre-reveal format, entry and participation in the sweepstakes, through the pre-reveal, is a prerequisite to playing a video game. Thus, the sweepstakes takes place during the initial stages of any game played. That the sweepstakes is conducted at the beginning of a game versus its conclusion makes no significant difference: the sweepstakes prize is not dependent upon the skill or dexterity of the patron; it is a game of chance. And, in conjunction, the electronic video game is a display which entices the patron to play.

Section 14-306.4 seeks to prevent the use of entertaining displays in the form of video games to conduct sweepstakes wherein the prize is determined by chance. *See id.* § 14-306.4(b)(1). Therefore, when viewed in the light most favorable to the State, it is clear that the jury was presented with substantial evidence of each essential element of the charge that defendants operated or placed into operation an electronic machine to conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize. *See id.*; *see also Trogdon*, 216 N.C. App. at 25, 715 S.E.2d at 641. Therefore, we affirm the trial court's denial of defendants' motion to dismiss the charge and find no error in the judgment of the trial court. *Mobley*, 206 N.C. App. at 291, 696 S.E.2d at 866. Accordingly, defendant's argument is overruled.

No error.

Chief Judge McGEE and Judge STROUD concur.

STATE v. TURNER

[237 N.C. App. 388 (2014)]

STATE OF NORTH CAROLINA
v.
KARSTEN EUGENE TURNER

No. COA14-318

Filed 18 November 2014

1. Drugs—possession with intent to sell or deliver—jury instruction—possession with intent to manufacture, sell, or deliver—harmless error

The trial court did not commit plain error when it instructed the jury on the charge of possession of cocaine with the intent to manufacture, sell or deliver where defendant had been indicted for possession of cocaine with intent to sell or deliver. The use of the word "manufacture" in its jury instructions was harmless error.

2. Drugs—possession with intent to sell or deliver—jury instruction—reasonable doubt—fair doubt

The trial court did not commit plain error by instructing the jury that a reasonable doubt was a "fair doubt." Although the trial court did deviate from the pattern instruction by using the term "fair doubt" in its preliminary jury instruction to prospective jurors, the charge as a whole was correct.

3. Constitutional Law—effective assistance of counsel—failure to object to jury instruction—no prejudice

Defendant did not receive ineffective assistance of counsel in a prosecution for possession of cocaine with intent to sell or deliver by his attorney's failure to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Even assuming arguendo that defendant's attorney was deficient in failing to object to the trial court's jury instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error.

Appeal by defendant from judgment entered 21 August 2013 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth A. Fisher, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Where defendant's indictment and judgment were for the same offense and a deviation in the trial court's jury instruction as to that offense was not significant, defendant cannot show plain error. The trial court did not err in describing a reasonable doubt as a "fair doubt" in its preliminary jury instruction where the entirety of the trial court's jury charge correctly stated the definition of reasonable doubt to the jury. Where defendant cannot show that his attorney's failure to object to a jury instruction would have resulted in a different outcome at trial, defendant's ineffective assistance of counsel claim will be denied.

On 23 April 2012, defendant Karsten Eugene Turner was indicted on one count each of possession with intent to sell or deliver cocaine and resisting a public officer. On the same date, defendant was separately indicted for being an habitual felon. The charges came on for trial during the 19 August 2013 session of Catawba County Superior Court, the Honorable Nathaniel J. Poovey, Judge presiding. The State's evidence presented during the trial tended to show the following.

On 11 July 2011, Investigator Wes Gardin of the Hickory Police Department conducted surveillance at 442 10th Avenue Drive in Hickory. The surveillance was set-up based on information that a gold-colored Honda Accord would arrive that day at that location for a drug transaction. Shortly after beginning his surveillance, Investigator Gardin saw a gold-colored Honda Accord arrive and park at 420 10th Avenue; Investigator Gardin recognized the driver of the car as defendant.

Investigator Gardin directed a marked unit, operated by Officer Killian and Sergeant Kerley, to pull in behind the Honda and activate its lights to conduct a narcotics investigation. Upon the marked unit activating its lights, defendant exited the car, leaving the driver's side door open, and took off running. Investigator Gardin and Officer Killian engaged in a foot pursuit of defendant; despite ordering defendant to halt, the chase did not end until defendant tripped and fell. As a passenger was observed in defendant's Honda, Sergeant Kerley remained with the car during the pursuit of defendant.

After capturing defendant, the officers returned to the Honda and saw through the open driver's side door a baggie of crack cocaine in the driver's seat. Upon searching the Honda, the officers found a marijuana joint in the center console and a second baggie of crack cocaine in the glove box. Investigator Gardin testified that the baggie found on the driver's seat contained about 5-6 rocks of cocaine, while the baggie

found in the glove box contained over 200 rocks of cocaine. The officer also found about $80.00 cash in the driver's seat of the Honda.

The passenger in the Honda was identified as Victor Wilfong. Defendant and Wilfong were arrested and transported to the Hickory Police Department for processing.

While being held at the Hickory Police Department, defendant voluntarily made a statement to Investigator Gardin that "it's all mine." Investigator Gardin testified that he took defendant's statement "to mean that all the controlled substances found in that vehicle belonged to [defendant]."

On 21 August 2013, a jury convicted defendant of possession with intent to sell or deliver cocaine and resisting a public officer. The trial court found defendant had a prior record level of II, and defendant stipulated to being an habitual felon. After finding that defendant had shown three mitigating factors, the trial court sentenced defendant to 50 to 69 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred (I) in holding that it had jurisdiction to enter judgment against defendant for a charge not alleged in the indictment, and (II) by instructing the jury that a reasonable doubt was a "fair doubt." Defendant further argues (III) that he received ineffective assistance of counsel.

I.

[1] Defendant argues that the trial court erred in holding that it had jurisdiction to enter judgment against him for a charge not alleged in the indictment. Specifically, defendant contends the trial court committed a jurisdictional error because it instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver, rather than the offense for which defendant was indicted, possession of cocaine with intent to sell or deliver, and that as a result, "[t]he State's indictment was fatally defective here as to manufacturing."

However, defendant failed to object to the indictment and failed to object to the jury instruction until after the jury returned its verdict. Pursuant to North Carolina Rules of Appellate Procedure, Rule 10, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." N.C. R. App. P. 10(a)(2) (2013). As such, this Court reviews unpreserved instructional

and evidentiary issues for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516—17, 723 S.E.2d at 333 (citations and quotations omitted).

Defendant was indicted for one count of possession of cocaine with intent to sell or deliver. In its jury instructions, the trial court instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver:

> The defendant has been charged with possessing cocaine with the intent to manufacture, sell or deliver it. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses cocaine when he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.
>
> And, second, that the defendant intended to manufacture, sell or deliver the cocaine. Intent is seldom, if ever, provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.

Defendant did not object to this instruction during either the jury charge conference or when the trial court gave its instructions to the jury. In fact, the discrepancy between the indictment and the jury instructions were discovered only after the jury returned its verdict finding defendant guilty of possession of cocaine with intent to manufacture,

sell, or deliver. After considering the arguments of counsel, the trial court held that the use of the word "manufacture" in the jury instructions was harmless error, noting that the charge required the jury to find only two elements, possession and intent, and that "[t]here wasn't any particular evidence also regarding what constitutes manufacture, what constitutes a sale or what constitutes delivery[]" to affect the jury's finding as to the element of intent. The trial court then sentenced defendant in the mitigated range for the offense for which defendant was indicted: possession of cocaine with intent to sell or deliver.

We agree with the trial court that the use of the word "manufacture" in its jury instructions was harmless error. "[A]n indictment is insufficient to support a conviction if it does not conform to material elements in the jury charge required to support the conviction." *State v. Bollinger*, 192 N.C. App. 241, 245, 665 S.E.2d 136, 139 (2008) (citation omitted). Likewise, "an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime." *Id.* at 246, 665 S.E.2d at 139 (citation omitted). North Carolina General Statutes, section 90-95(a)(1), holds that "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2013). It is well-established that there are two essential elements of this charge: possession and intent. *See State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990) (citation and quotation omitted).

Defendant was charged with possession of cocaine with intent to sell or deliver. N.C.G.S. § 90-95(a)(1) only requires the jury to find one element of intent: an intent to sell, deliver or manufacture. N.C.G.S. § 90-95(a)(1) (emphasis added). The gravamen of the offense of possession with intent to sell or deliver is possession and intent. As long as defendant possessed the cocaine with intent — whether to sell, deliver, or manufacture — he has committed the statutory offense of possession of cocaine with intent to sell or deliver. *See State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127 (1990) (citations omitted). Therefore, even assuming *arguendo* the trial court erred in instructing the jury as to possession of cocaine with intent to manufacture, as well as sell or deliver, this error did not rise to the level of plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("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." (citations

and quotation omitted)). The record shows that the charge of possession with intent to sell or deliver was supported by the evidence, as two baggies of crack cocaine rocks and cash were found in defendant's car, with the cash and smaller baggie of crack cocaine being found in the driver's seat where defendant had been sitting. As such, defendant cannot show plain error where he received a mitigated sentence for the proper, indicted charge of possession of cocaine with intent to sell or deliver. Accordingly, defendant's first argument is overruled.

II.

[2] Defendant next argues that the trial court erred by instructing the jury that a reasonable doubt was a "fair doubt." We disagree.

As defendant failed to object to the trial court's jury instruction that a reasonable doubt was a "fair doubt," we review defendant's second issue on appeal for plain error. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

Defendant contends the trial court erred in instructing the jury that a reasonable doubt was a "fair doubt."

"[A]s a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (citation and quotation omitted).

> The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it[]. . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

Id. at 634, 548 S.E.2d at 505 (citations and quotations omitted). "If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." *State v. Maniego*, 163 N.C. App. 676, 685, 594 S.E.2d 242, 248 (2004) (citation omitted).

The jury instruction of which defendant complains was a preliminary instruction given by the trial court to prospective jurors prior to the commencement of jury selection, as opposed to final instructions

given after the close of evidence at trial. The trial court, in its preliminary instruction, stated the following:

> A reasonable doubt is not a vain nor fanciful doubt. For most things that relate to human affairs are open to some possible or imaginary doubt. A reasonable doubt is a fair doubt based upon reason or common sense arising out of some or all the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Thereafter, a petit jury was selected to hear the evidence in the case. After all the evidence was presented, the trial court instructed the jury as to the definition of reasonable doubt:

> A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Defendant's argument that the trial court erred in its jury instruction on reasonable doubt by describing it as a "fair doubt" lacks merit. It is clear from a review of the trial court's two statements of the reasonable doubt instruction that although the trial court did deviate from the pattern instruction by using the term "fair doubt" in its preliminary jury instruction to prospective jurors, the charge as a whole was correct. *See State v. James*, 342 N.C. 589, 597-98, 466 S.E.2d 710, 715-16 (1996) (the defendant was not prejudiced where the trial court gave an appropriate jury instruction at the close of evidence despite giving an allegedly erroneous preliminary instruction); *State v. Hunt*, 339 N.C. 622, 643-44, 457 S.E.2d 276, 288-89 (1994) (holding that the trial court's jury instruction, which defined a reasonable doubt as "a fair doubt," was not "constitutionally deficient" and did not impermissibly alter the context of the jury instruction); *see also State v. Flowers*,[1] No. COA01-1024, 2002 N.C. App. LEXIS 2208, at *4-6 (July 16, 2002) (the trial court did not commit plain error where it gave an erroneous preliminary jury instruction to prospective jurors but gave the proper jury instruction at the close of evidence at trial); *State v. McElvine*, No. COA01-677,

1. We note that although *Flowers* and *McElvine* are unpublished opinions of this Court, both cases are on point with the instant case.

2002 N.C. App. LEXIS 2124, at *12 (May 21, 2002) (finding the defendant could not show plain error where, "[w]hen taking the entire instruction as a whole and in context, the trial court properly instructed the prospective jurors on the presumption of innocence and the burden of proof on the State. Thus, we find the trial court did not err in its preliminary instructions to the jury."). Defendant's argument is, therefore, overruled.

III.

[3] Defendant also argues that he received ineffective assistance of counsel. We disagree.

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

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

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations and quotation omitted).

> Criminal defendants are entitled to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [the] defendant must satisfy a two part test.
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable.*
>
> In considering [ineffective assistance of counsel] claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Boozer, 210 N.C. App. 371, 382—83, 707 S.E.2d 756, 765 (2011) (citations and quotation omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012).

Defendant contends he received ineffective assistance of counsel because his attorney failed to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Because the record reveals no further investigation is required, we review defendant's ineffective assistance of counsel claim.

Defendant argues that he received ineffective assistance of counsel because, by not objecting to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver, defendant's attorney caused defendant to be convicted of an offense for which defendant was not indicted. We disagree for, as discussed in *Issue I*, the trial court's error did not amount to plain error. Further, defendant did not challenge his indictment (for possession of cocaine with intent to sell or deliver), and the trial court sentenced defendant in the mitigating range for the indicted offense. As such, defendant's ineffective assistance of counsel claim lacks merit.

Moreover, assuming *arguendo* that defendant's attorney was deficient in failing to object to the trial court's jury instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted). Here, where defendant's car was stopped by officers acting on a tip and, in addition to a bag with 5—6 rocks of crack cocaine and cash found on the driver's seat and defendant's voluntary admission that "it's all mine," over 200 rocks of

crack cocaine were found in a baggie in defendant's glove box, there was no reasonable probability that a different result would have been reached by the jury. "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. Accordingly, defendant's argument is overruled, and his claim of ineffective assistance of counsel denied.

No error.

Chief Judge McGEE and Judge STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 NOVEMBER 2014)

BARCLAY v. MAKAROV No. 14-460	Watauga (12CVD395)	Affirmed in part, reversed in part.
BELCH v. KORTHEUER No. 14-461	N.C. Industrial Commission (X80963)	Affirmed
BYRD v. FRANKLIN CNTY. No. 13-1456	Franklin (13CVS6)	Dismissed
COFFEY v. CARLTON No. 14-395	Catawba (08CVD2474)	Affirmed in part, reversed in part.
DICKERSON v. HOWARD No. 14-509	Vance (12CVD593)	Dismissed
DILLARD v. DILLARD No. 14-304	Mecklenburg (13CVD11054)	Affirmed
E. CAROLINA UNIV. FOUND., INC. v. FIRST CITIZENS BANK & TR. CO. No. 14-465	Forsyth (13CVS6135)	Vacated and Remanded in Part, Affirmed in Part.
FAUSTIN v. N.C. BLDG. CODE COUNCIL No. 14-82	Wake (13CVS5798)	Affirmed
IN RE A.G. No. 14-588	Durham (12JT156-159)	Affirmed
IN RE A.J.R. No. 14-536	Mecklenburg (12JT271)	Affirmed
IN RE B.J.G. No. 14-669	Wake (13SP51080)	Vacated and Remanded
IN RE C.D.J. No. 14-614	New Hanover (12JT178) (12JT179)	Affirmed
IN RE C.W. No. 14-610	Orange (09JT137)	Affirmed

IN RE G.J.K. No. 14-668	Haywood (11JT101)	Affirmed
IN RE J.W. No. 13-1251	Cumberland (13JB9)	Vacated
IN RE N.S.R.C. No. 14-303	Yadkin (11JT60)	Affirmed
IN RE ROSEMEIER No. 14-389	Onslow (13SP572)	Dismissed
IN RE S.W. No. 14-432	Vance (13JA20)	Affirmed in part; reversed and remanded in part
MAROTTI v. FORTE No. 14-455	Wake (13CVS7001)	Affirmed
PARKER v. CHARLOTTE PIPE & FOUNDRY No. 14-371	N.C. Industrial Commission (049318)	Dismissed
PASUT v. ROBERTSON No. 13-1245	Pitt (12CVS2523)	Reversed and Remanded
RL REGI N. C., LLC v. LIGHTHOUSE COVE, LLC No. 12-1279-2	New Hanover (10CVS5742)	Reversed in part, No Error in part.
SCBT v. RIMES No. 14-526	Pender (12CVD1033)	Affirmed
SETZLER v. SETZLER No. 14-635	Catawba (12CVD1337)	Dismissed
SMOKY MOUNTAIN SANCTUARY PROP. OWNERS ASS'N, INC. v. SHELTON No. 14-112	Haywood (10CVS1452)	Dismissed
STATE v. BRYANT No. 14-515	Craven (11CRS54426) (13CRS752)	Affirmed
STATE v. CHISHOLM No. 14-237	Mecklenburg (12CRS224066) (12CRS224074) (12CRS42708)	No Error in Part; Judgment Arrested in Part; Remand in Part

STATE v. CLARK No. 14-188	Pitt (12CRS56543) (13CRS187)	No Error in PWISD conviction; Conspiracy to traffic cocaine by possession conviction vacated; Remanded for resentencing.
STATE v. COX No. 14-692	Henderson (12CRS51463-64)	Affirmed
STATE v. DeWALT No. 14-372	Alexander (12CRS165) (12CRS458)	No Error
STATE v. DODD No. 14-503	Haywood (13CRS51144)	No Error
STATE v. GASKINS No. 14-448	Craven (12CRS324) (12CRS50852)	No prejudicial error
STATE v. GILLIKIN No. 14-449	Carteret (09CRS54928)	No Error
STATE v. HARRIS No. 14-350	Guilford (12CRS89900-02)	No Error
STATE v. JONES No. 14-425	Mecklenburg (12CRS222317) (12CRS42714)	No Error
STATE v. LENNON No. 14-354	Durham (12CRS62652)	Judgment for Offenses 51 and 53 Vacated; Remanded. New Trial on Robbery With A Dangerous Weapon.
STATE v. LUCKADOO No. 14-604	Martin (13CRS126)	Vacated and Remanded
STATE v. MESSER No. 14-596	Buncombe (12CRS57868-72) (12CRS908)	Affirmed
STATE v. MURDOCK No. 14-534	Iredell (09CRS57228) (12CRS1086)	No error in part; dismissed in part.
STATE v. PENCE No. 14-502	Brunswick (12CRS4292-93)	No error in part; reversed and remanded in part

STATE v. PERSING No. 14-535	Moore (11CRS50844) (11CRS50845) (11CRS50850) (11CRS50865-66) (11CRS50871) (11CRS50873) (11CRS50975-76)	Affirmed
STATE v. TURNER No. 14-560	Rockingham (12CRS53123) (12CRS53125)	No Error in Part, Reversed in Part.
STATE v. WINKLER No. 14-442	Buncombe (13CRS51036)	Vacated

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