239 N.C. App.—No. 4 Pages 469-574

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 10, 2017

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[4] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 3 MARCH 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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disability. Competent evidence supported the Commission's findings that plaintiff was under partial disability, had made a reasonable but unsuccessful job search, and later became totally disabled as a result of the compensable injury. **Gonzalez v. Tidy Maids, Inc., 469.**

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SCHEDULE FOR HEARING APPEALS DURING 2017

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2017:

January 9 and 23

February 6 and 20

March 6 and 20

April 3 and 17

May 1 and 15

June 5

July None

August 7 and 21

September 4 and 18

October 2, 16 and 30

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December 11

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

GONZALEZ v. TIDY MAIDS, INC.

[239 N.C. App. 469 (2015)]

PRISILA GONZALEZ, EMPLOYEE, PLAINTIFF
v.
TIDY MAIDS, INC., EMPLOYER
ERIE INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA14-18

Filed 3 March 2015

1. Workers' Compensation—findings of fact—timeliness of appeal from administrative order

In an appeal of the order and award of the full Industrial Commission, the Court of Appeals affirmed the Commission's determination that plaintiff timely appealed the administrative order approving defendants' request to terminate payment of benefits. There was competent evidence to support the Commission's finding regarding the date that plaintiff received the administrative order.

2. Workers' Compensation—claim related to compensable injuries—presumption in favor of plaintiff

The full Industrial Commission did not err by concluding that the treatment sought by plaintiff for her back pain was related to her compensable injuries. Because defendants had paid plaintiff and never contested her claim, plaintiff was entitled to the presumption that her current claim was related to her compensable injuries. Defendants presented no evidence that rebutted the presumption.

3. Workers' Compensation—conclusions of law—disability and job search

In an appeal of the order and award of the full Industrial Commission, the Court of Appeals affirmed the Commission's conclusions of law regarding plaintiff's disability. Competent evidence supported the Commission's findings that plaintiff was under partial disability, had made a reasonable but unsuccessful job search, and later became totally disabled as a result of the compensable injury.

Appeal by defendants from opinion and award entered 18 October 2013 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 May 2014.

The Bricio Law Firm, P.L.L.C., by Francisco J. Bricio, for plaintiff-appellee.

McAngus, Goudelock & Courie, PLLC, by Laura Carter and Cassie M. Keen, for defendants-appellants.

GEER, Judge.

Defendants Tidy Maids, Inc. and its workers' compensation insurance carrier, Erie Insurance Group, appeal an opinion and award of the Full Commission reinstating disability compensation to plaintiff Prisila Gonzalez retroactively from 1 August 2011 and granting plaintiff's request for compensation for medical treatment related to pain in her back and her shoulder. Defendants primarily argue that they successfully rebutted the evidentiary presumption under *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), which provides that a plaintiff is entitled to a presumption that her current discomfort and related medical treatment are directly related to her compensable injuries ("the *Parsons* presumption").

Because, however, defendants presented no evidence suggesting that the pain and discomfort for which plaintiff now seeks compensation is unrelated to injuries the defendants accepted as compensable in 2010, we hold that defendants have failed to rebut the *Parsons* presumption. We find defendants' remaining arguments equally unpersuasive and affirm the opinion and award.

Facts

The following facts are undisputed. Plaintiff was born 13 January 1963 and has a sixth grade education received in Mexico. She speaks only a little English. Prior to her employment as a housekeeper with Tidy Maids, plaintiff worked as a housekeeper in hotels, homes, and offices and in the kitchen of a Bojangles.

On 10 September 2010, plaintiff was involved in a car accident while traveling from Tidy Maids' office to a job site. She sustained injuries to her head, neck, back, and right shoulder, and she suffered headaches and vertigo. On 29 September 2010, plaintiff gave notice of her injuries to her employer by filing a Form 18 "Notice of Accident." On 13 October 2010, defendants filed a Form 63, "Notice to Employee of Payment of Compensation Without Prejudice." Defendants commenced paying compensation at $155.00 per week beginning 13 September 2010. Plaintiff has not worked since the accident.

On 1 August 2011, defendants filed a Form 24, "Application to Terminate or Suspend Payment of Compensation," alleging that "plaintiff

is no longer disabled . . . as she has no restrictions on her ability to work at this time." On 7 November 2011, a special deputy commissioner granted defendants' Form 24 request, and defendants immediately ceased payments to plaintiff. On 10 January 2012, plaintiff filed a Form 33, "Request that Claim be Assigned for Hearing." On 19 January 2012, defendants filed a Form 33R, "Response to Request that Claim be Assigned for Hearing," arguing that plaintiff's claim should not be heard because the Form 33 request was untimely. Nonetheless, plaintiff's claim was heard before a deputy commissioner on 3 April 2012.

On 16 July 2012, plaintiff filed a Form 23, "Application for Reinstatement of Disability Compensation." The deputy commissioner granted defendants' Form 24 request and denied plaintiff's Form 23 request in an opinion and award filed 15 February 2013. Plaintiff appealed the deputy commissioner's decision to the Full Commission.

The Full Commission entered an opinion and award reversing the deputy commissioner's decision and entering an award in plaintiff's favor. The Full Commission's opinion and award made the following findings of fact. Plaintiff was injured in a car accident "while on the job" for defendant Tidy Maids on 10 September 2010.

Plaintiff first sought treatment, in September 2010, from Dr. Jeffrey Gerdes, a chiropractor, for neck pain, right shoulder pain with numbness to the right elbow, mid and low back pain, and headaches. Subsequently, in October 2010, she began receiving treatment from Dr. Kapil Rawal, a neurologist, upon referral from the defendant carrier. At that time, plaintiff complained of neck pain, back pain, pain from the shoulder down into the right arm, pain in the right leg, and headaches associated with stabbing pain, nausea, and vomiting on occasions. Dr. Rawal diagnosed plaintiff with neck sprain/strain, lumbar sprain/strain, post traumatic headache, dizziness, insomnia, and thoracic sprain/strain.

On 13 October 2010, defendants filed a Form 63 and began making payments to plaintiff without prejudice for the September 2010 accident, acknowledging that plaintiff's injuries included " 'neck, back, headache, vertigo, [and] rt [sic] shoulder.' " However, defendants subsequently failed to file a Form 61 denying the compensability of plaintiff's claim. As a result, the Commission found, plaintiff's claim "is deemed accepted."

Between 13 October 2010 and 1 August 2011, plaintiff not only saw Dr. Rawal for her back pain, but also, in May 2011, she was evaluated by Dr. Gary Smoot at Cary Orthopedics for lumbar pain. Dr. Smoot performed a physical exam and diagnosed plaintiff as having lumbar sprain

and possible discogenic pain. Dr. Rawal kept plaintiff out of work from 27 October 2010 to mid-December 2010, and then from 19 January 2011 to mid-February 2011.

For problems with her shoulder, plaintiff received treatment from Dr. Brian Szura beginning in March 2011. Dr. Szura diagnosed plaintiff with having a "right rotator cuff strain with a possible tear[,]" as well as "some AC joint arthritis." Dr. Szura restricted plaintiff's use of her right arm but, in June 2011, he noted "maximum medical improvement" and released her to full duty work with respect to her shoulder.

On 12 May 2011, when plaintiff saw Dr. Rawal, he took her out of work for another week and restricted her to light duty work of "lifting no more than five (5) pounds . . . for a period of six (6) weeks[,]" beginning 23 May 2011. Dr. Rawal testified at his deposition that these light duty work restrictions were not intended to be indefinite.

Dr. Smoot did not treat plaintiff or impose work restrictions because he did not have enough information " 'to figure out what was going on.' " Although plaintiff went to a follow-up appointment with Dr. Smoot on 8 June 2011, plaintiff and a nurse had a disagreement, and plaintiff left without seeing Dr. Smoot. Plaintiff did not see Dr. Smoot again after that appointment.

Plaintiff saw Dr. Rawal again on 10 May 2012, complaining of "severe low back pain, headaches, and right arm pain." Dr. Rawal diagnosed plaintiff with "lumbar sprain/strain, neck sprain/strain, post-traumatic stress headache, and dizziness" and kept plaintiff out of work for at least six weeks. The Full Commission further found that Dr. Rawal had testified that plaintiff's continuing back pain was caused by one of three possible conditions: "(1) the L1-2 floating disc herniation, (2) the L5-S1 disc bulge, or (3) the back sprain." In addition, the Commission found, Dr. Rawal expressed his opinion that given the mechanism of injury and findings from an MRI scan, there were likely two underlying pathologies of the pain: (1) the lumbar sprain, and (2) the radiculopathy because of an eccentric disc bulge.

The Commission then concluded that plaintiff was entitled, under *Parsons*, to a presumption that her current back and shoulder conditions were causally related to her compensable injury. The Commission further concluded that defendants had failed to offer any competent medical evidence that plaintiff's present back and shoulder pain were unrelated to her compensable injury and, therefore, defendants had failed to rebut the presumption that her current conditions were related to her compensable accident. Accordingly, the Commission determined

that plaintiff was entitled to further medical treatment for her current back and shoulder conditions. With respect to plaintiff's right shoulder, the Commission also granted plaintiff's request for a second opinion.

Further, the Full Commission found sufficient evidence under *Russell v. Lowes Prod. Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), that plaintiff was disabled from 1 August 2011 through 9 May 2012 and that "Plaintiff . . . conducted a reasonable job search but was unsuccessful in finding employment . . . ." According to the Commission, plaintiff also met her burden under *Russell* of showing that she had been disabled since 10 May 2012 because "Plaintiff has been completely written out of work since May 10, 2012 by Dr. Rawal." The Commission noted further that "Defendants offered no evidence to contradict Dr. Rawal's opinion that Plaintiff was unable to work as of May 10, 2012."

The Full Commission, therefore, concluded (1) that the special deputy commissioner had improvidently granted defendants' Form 24 request, (2) that plaintiff was entitled "to receive medical treatment [for her current conditions] that may reasonably be required to effect a cure, give relief, or tend to lessen Plaintiff's period of disability[,]" (3) that plaintiff was "entitled to a second opinion regarding her ongoing right shoulder pain[,]" and (4) that plaintiff was entitled to reinstatement of her disability compensation, including compensation from 1 August 2011 and continuing until plaintiff returns to work or further order of the Commission. Defendants timely appealed to this Court.

Discussion

"'Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission.'" *Allred v. Exceptional Landscapes, Inc.*, ___ N.C. App. ___, ___, 743 S.E.2d 48, 51 (2013) (quoting *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106 (1992)). The Industrial Commission "is the sole judge of the credibility of the witnesses and the weight of the evidence[,]" *Hassell v. Onslow Cnty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008), and therefore "[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence 'notwithstanding evidence that might support a contrary finding.'" *Reaves v. Indus. Pump Serv.*, 195 N.C. App. 31, 34, 671 S.E.2d 14, 17 (2009) (quoting *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002)). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Allred*, ___ N.C. App. at

___, 743 S.E.2d at 51. "The Commission's conclusions of law are reviewable *de novo*." *Id.* at ___, 743 S.E.2d at 51.

I

[1] We first address defendants' contention that the Full Commission erred in determining that plaintiff timely appealed the special deputy commissioner's administrative order approving defendants' Form 24 request to terminate payment of benefits. The Full Commission found that plaintiff actually received the administrative order on 10 January 2012 and, therefore, her appeal, filed the same date, was timely. Although the finding of fact regarding the date plaintiff received the order is included within a conclusion of law, we still treat it as a finding of fact. *See Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925 (2001) ("The Commission's designation of a finding as either a 'finding of fact' or a 'conclusion of law' is not conclusive.").

Defendants argue that this finding of fact is erroneous because it "is based solely on plaintiff's testimony" and disregards defendants' evidence of a printout of the United States Postal Service website showing that the parcel was delivered to plaintiff's address in August 2011. However, the Commission expressly acknowledged that the Commission file included a U.S. Postal Service receipt and tracking number and that a printout from the web site of the Postal Service showed delivery of the mail piece in zip code 27511 in August 2011. Nonetheless, the Commission further found that a copy of the green card -- which was missing from the Commission file -- would have shown "the individual who received the mail with the tracking number identified, the address where it was delivered, and the date delivered." The Commission further found that defendants did not receive a copy of the administrative decision and order until 7 November 2011.

The Commission then concluded that in the absence of a green card and given the date defendants received the decision, "insufficient evidence exists to determine if then *Pro Se* Plaintiff received the Order" prior to 10 January 2012, the date when the Commission emailed the decision to plaintiff's newly-retained counsel. In arguing that the Commission should have concluded that plaintiff's appeal was untimely based on the Postal Service's website, defendants have cited no authority suggesting that the Postal Service tracking printout is conclusive regarding a party's receipt of an order.

Since plaintiff's evidence is competent to support the Commission's finding that she received the administrative order on 10 January 2012, and only the Commission may determine the weight and credibility of

the evidence, we are compelled to uphold the Commission's determination that plaintiff's appeal was timely. *See Gonzalez v. Worrell*, 221 N.C. App. 351, 355, 728 S.E.2d 13, 16 (2012) (concluding that, although delivery status based on tracking number showed that notice of insurance policy cancellation was delivered, lack of signed green card from intended recipient supported conclusion that service of notice was not completed), *aff'd per curiam*, 366 N.C. 501, 739 S.E.2d 552 (2013); *Goodson v. Goodson*, 145 N.C. App. 356, 363, 551 S.E.2d 200, 205 (2001) (holding party's testimony that she did not receive notice of judicial sale was "competent evidence to support [the trial court's] finding that notice was not given").

II

[2] Defendants next argue that the Full Commission erred in concluding that defendants did not successfully rebut the presumption that plaintiff's current condition is directly related to the compensable injuries she suffered in the September 2010 accident. Defendants do not now contest the compensability of the September 2010 accident. Therefore, "plaintiff was entitled to seek compensation for such injuries as resulted from that accident." *Erickson v. Lear Siegler*, 195 N.C. App. 513, 521, 672 S.E.2d 772, 777 (2009). The Commission noted that the parties stipulated that because defendants filed a Form 63 and commenced payment of compensation without prejudice, but subsequently failed to file a Form 61 denying compensability, they accepted plaintiff's claim for "neck, back, headache, vertigo, rt [sic] shoulder" injuries.

In *Parsons*, this Court explained that once a plaintiff establishes her injuries are compensable, "[l]ogically, defendants [then] have the responsibility to prove the original finding of compensable injury is unrelated to her present discomfort. To require plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." 126 N.C. App. at 542, 485 S.E.2d at 869. Therefore, "[i]f additional medical treatment [for the compensable injury] is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury." *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999).

It is unclear from defendants' brief whether they contend that the *Parsons* presumption does not apply when a defendant is deemed to

have accepted a claim. However, in an unpublished decision, *Williams v. Law Cos. Grp.*, 204 N.C. App. 212, 694 S.E.2d 522, 2010 WL 1957919, at *11, 2010 N.C. App. LEXIS 829, at *29-30 (2010), this Court applied the *Parsons* presumption when, as in this case, a defendant employer filed a Form 63 following the plaintiff's accident but failed to contest the compensability of the plaintiff's injuries within the 90-day statutory period set forth in N.C. Gen. Stat. § 97-18(d) (2009). *Williams* concluded that under those circumstances, the plaintiff "was entitled to a presumption that her medical treatment was related to her compensable injury." *Id.*, 2010 WL 1957919, at *11, 2010 N.C. App. LEXIS 829, at *30.

Although *Williams* is not a published decision, we find its reasoning persuasive and hold that when, as here, a defendant pays a plaintiff pursuant to a Form 63 and never denies the plaintiff's claim, the plaintiff is entitled to rely upon the *Parsons* presumption. Consequently, because defendants in this case filed a Form 63 acknowledging injuries to plaintiff's "neck, back, . . . [and] r[igh]t shoulder" and failed to timely contest the compensability of any portion of plaintiff's claim, the Commission correctly concluded that the *Parsons* presumption applied with respect to those injuries.

Defendants, therefore, bore the burden of showing that plaintiff's current claims regarding her back and right shoulder are not related to her compensable injuries. *See Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136 n.1, 620 S.E.2d 288, 293 n.1 (2005) ("We can conceive of a situation where an employee seeks medical compensation for symptoms completely unrelated to the compensable injury. But the burden of rebutting the presumption of compensability in this situation, although slight, would still be upon the employer.").

Defendants argue that they "rebutted any presumption of compensability with regard to medical treatment for plaintiff's back and shoulder" because "[n]one of plaintiff's physicians provided an opinion to a reasonable degree of medical certainty, or even to a preponderance of the evidence, that plaintiff's current pain and restrictions are causally related to the automobile accident of September 10, 2010." With respect to plaintiff's back pain, they point to testimony from Dr. Rawal that they contend merely established a "temporal connection between [the] accident and the onset of symptoms [which] is not competent evidence of causation[.]" *See Cooper v. BHT Enters.*, 195 N.C. App. 363, 372, 672 S.E.2d 748, 756 (2009) (explaining evidence showing at most that onset of symptoms coincided with accident is " 'inconclusive as to [the] proximate cause' " of a controversial medical condition (quoting *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000))).

However, defendants' argument is simply a claim that they have rebutted the *Parsons* presumption -- which relieves a plaintiff of the burden of proving causation -- by showing that plaintiff has failed to prove causation. Since defendants accepted as compensable plaintiffs' claim for injuries to her back, under *Parsons*, medical causation is presumed, and defendants bore the burden of showing that plaintiff's current back complaints were unrelated to her initial back injury. Defendants misconstrue their burden by overlooking the reasoning behind the *Parsons* presumption, which is to avoid the injustice of requiring a plaintiff to reprove the causation of a compensable injury each time she seeks additional treatment for it. 126 N.C. App. at 542, 485 S.E.2d at 869.

Because the *Parsons* presumption applies to plaintiff's current pain here, defendants needed to present "expert testimony or affirmative medical evidence tending to show that the treatment [plaintiff seeks] is not directly related to the compensable injury[.]" *Perez*, 174 N.C. App. at 137, 620 S.E.2d at 293. The testimony from Dr. Rawal that defendants point to, at best, merely establishes that plaintiff's current symptoms might not be related to her compensable injuries. Further, in their own brief, defendants point to testimony from Dr. Rawal " '[t]hat the pain syndrome that [plaintiff] is suffering with *is a consequence of the trauma* [*of the September 2010 accident*].' " (Emphasis added.)

The Commission properly concluded that this evidence is insufficient to rebut the *Parsons* presumption. *See McLeod v. Wal-Mart Stores, Inc.*, 208 N.C. App. 555, 559, 703 S.E.2d 471, 475 (2010) ("[Doctor's] statements as to 'some correlation' do not satisfy defendants' burden of showing 'that the medical treatment is not directly related to the compensable injury.' " (quoting *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292)); *Perez*, 174 N.C. App. at 137, 620 S.E.2d at 293, 294 (holding defendant failed to rebut *Parsons* presumption when it relied upon either "equivocal" medical testimony or medical testimony that "it was impossible to say" plaintiff's current back problems were related to compensable injuries from original accident, and medical expert admitted to possibility that current symptoms were related to original injuries).

Nonetheless, defendants contend that they rebutted the *Parsons* presumption with testimony from Dr. Smoot who, defendants assert, testified that plaintiff's current pain has a psychological cause. However, even assuming without deciding that this testimony could adequately show that plaintiff's current symptoms are unrelated to her original compensable back injuries, the Commission discredited this testimony, as it was entitled to do. Dr. Smoot admitted in his deposition that he did not have all of plaintiff's medical records and that he only saw plaintiff one

time, whereas Dr. Rawal saw plaintiff multiple times. The Commission noted that Dr. Smoot testified that he needed additional information including information on plaintiff's medications and previous medical records and that he did not assign any work restriction because " 'he didn't have enough information to go on to figure out what was going on.' "

Because the question of Dr. Smoot's credibility was a question solely for the Commission to decide, and because defendants have otherwise failed to point to any evidence showing that plaintiff's current back pain is unrelated to the compensable injuries from her September 2010 car accident, we hold that the Full Commission did not err in concluding that the treatment plaintiff seeks for her current back pain is directly related to her compensable injuries.

We also note that while defendants purport to challenge the Commission's presumption that plaintiff's current shoulder pain is causally related to her compensable injuries, defendants have pointed to no record evidence whatsoever in support of this contention. In this regard, we conclude that defendants have failed to meet their burden on appeal challenging this finding. *See State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 764 (1994) ("[I]t is the *appellant* who has the burden in the first instance of demonstrating error from the record on appeal.").

III

[3] Defendants next challenge the Commission's conclusions regarding plaintiff's disability. Establishing disability is a separate question from establishing the compensability of an injury and "admitting compensability and liability . . . does not create a presumption of continuing disability[.]" *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001).

Under *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted), an employee can establish disability in one of four ways:

> (1) the production of medical evidence that [s]he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to

> seek other employment; or (4) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

Defendants first contend that the Commission erred in concluding that plaintiff met her burden of proving that she was disabled from 1 August 2011 to 9 May 2012 through production of evidence under the second *Russell* option. The Commission determined that plaintiff "conducted a reasonable job search but was unsuccessful in finding employment from August 1, 2011 through May 9, 2012 despite being under a five (5) pound lifting restriction by Dr. Rawal."

Defendants first argue that the "greater weight of the evidence" established that plaintiff had been released to return to full duty work by 4 July 2011. Although Dr. Rawal, on 12 May 2011, had limited plaintiff to light duty work with a five pound lifting restriction and no pushing, pulling, bending, or stooping, defendants point out that this restriction was only supposed to last six weeks, and, further, the Commission found that Dr. Rawal did not intend for his restrictions to be indefinite. Plaintiff did not, however, return to see Dr. Rawal until 10 May 2012, so he never actually lifted the work restriction. Further, Dr. Rawal testified that when he saw defendant again on 10 May 2012, his clinical findings were substantially unchanged from when he saw plaintiff on 12 May 2011. Dr. Rawal expressed his opinion that it would have been unlikely that between May 2011 and May 2012 plaintiff would have been without work restrictions. This evidence supports the Commission's finding that plaintiff was "under a five (5) pound lifting restriction by Dr. Rawal" during the 1 August 2011 to 9 May 2012 time period. Thus, while plaintiff was capable of some work, she was under work restrictions.

Defendants next challenge the Commission's conclusion that plaintiff showed that she had, after a reasonable effort on her part, been unsuccessful in her effort to obtain employment, as required by the second *Russell* method of proof. The Commission, in support of its determination, relied upon plaintiff's testimony that notwithstanding her ongoing pain, she had completed multiple job applications with several employers including, but not limited to, Bojangles, Burger King, Chick-fil-a, Life Centers (a nursing home), Comfort Suites, Golden Corral, and Netcom Hospitality, but she had not received any job offers. Defendants acknowledge that plaintiff's evidence indicates that she applied for 17 positions with 14 employers between 20 December 2011 and 24 March 2012.

Defendants argue that given plaintiff's evidence, the Commission was required to conclude that she had not made a reasonable effort to

try to find employment. However, no general rule exists for determining the reasonableness of an injured employee's job search. Rather, "[t]he Commission [is] free to decide" whether an employee "made a reasonable effort to obtain employment under the second *Russell* option" so long as the determination is supported by competent evidence. *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006). The Commission was free to find that plaintiff's job search was reasonable based on the Commission's finding that plaintiff submitted multiple job applications despite ongoing pain.

Defendants nonetheless contend the holding in *Russell* is controlling. In *Russell*, the Commission concluded that the plaintiff had *not* made a reasonable effort to find employment even though the plaintiff testified "that he made seven or eight job applications and was refused employment in each instance." 108 N.C. App. at 766, 425 S.E.2d at 457. However, the Commission in *Russell* also found the plaintiff's testimony "not credible on the grounds that *Russell* 'was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied[.]' " *Id.* Here, on the other hand, the Commission found plaintiff's testimony concerning her job applications credible.

Defendants also contend, citing *Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 587 S.E.2d 440 (2003), that plaintiff was required to contact two potential employers per week over the 39 weeks she did not work from 1 August 2011 to 9 May 2012, which would result in a required total of 78 possible job contacts. In *Hooker*, the plaintiff testified that the North Carolina Employment Security Commission ("NCESC") required her to "conduct at least two in-person contacts with different employers on different days each week." *Id.* at 117, 587 S.E.2d at 445. This Court upheld the Commission's determination that the plaintiff had made reasonable but unsuccessful efforts to obtain employment because she complied with the NCESC's requirements for receiving unemployment benefits over a period of at least three and a half months. *Id.* at 116-17, 587 S.E.2d at 444-45.

Contrary to defendant's assertion, however, *Hooker* does not stand for the proposition that failure to comply with the NCESC's regulations for obtaining unemployment benefits means an injured employee has not conducted a reasonable search for employment. Indeed, in the past, this Court has not required such exacting evidence to be presented for the Commission to find a reasonable job search under *Russell*. *See, e.g.*, *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 664, 672, 606 S.E.2d 389, 395, 399 (2005) (holding Commission's finding that plaintiff had

"'made reasonable efforts to find suitable employment'" binding on appeal where evidence was that "[a]fter [the plaintiff] resigned . . . [f]or approximately five months, [he] applied for various jobs, both directly and through the Employment Security Commission").

Because competent evidence supports the Commission's findings that plaintiff was under partial disability from 1 August 2011 to 9 May 2012 and, despite her ongoing pain, made a reasonable but unsuccessful job search during that time, we hold that the Commission did not err in concluding plaintiff had met her burden under the second *Russell* option in establishing her disability during that period caused by her compensable injury. *See, e.g.*, *Philbeck v. Univ. of Mich.*, ___ N.C. App. ___, ___, 761 S.E.2d 668, 675 (2014) (upholding Commission's conclusion that plaintiff was disabled under second prong of *Russell* based on plaintiff's testimony regarding her job search, her ongoing pain, and her range-of-motion limitations after being released to work).

Defendants next contend that plaintiff did not meet her burden of establishing her disability since 10 May 2012 under the first *Russell* method of proof. Defendants do not contest the finding that "Plaintiff has been completely written out of work since May 10, 2012 by Dr. Rawal" which is, therefore, binding on appeal. Defendants rely exclusively on their contention that since they rebutted the *Parsons* presumption, the Commission should have concluded that plaintiff failed to prove that her disability was caused by her compensable injury. Because we have already upheld the Commission's conclusion that defendants failed to rebut the Parsons presumption, we hold that the Commission did not err in its conclusion that plaintiff has been totally disabled since 10 May 2012. Consequently, we affirm the Commission's opinion and award.

Affirmed.

Judges BRYANT and CALABRIA concur.

IN RE D.S.B.

[239 N.C. App. 482 (2015)]

IN THE MATTER OF D.S.B.

No. COA14-666

Filed 3 March 2015

Juveniles—violation of probation—notice of legal status and level of commitment

A motion for review provided adequate notice to a juvenile that he was alleged to have violated the conditions of the only term of probation to which he was then subject. Moreover, even assuming that the motion for review failed to provide the juvenile with notice that he could receive a Level III disposition for violation of the conditions of probation, the record and transcript of the hearing established that the juvenile had actual notice of his legal status.

Appeal by juvenile from order entered 3 March 2014 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Mary McCullers Reece for the juvenile.

STEELMAN, Judge.

Where the juvenile was adjudicated delinquent for commission of a class H felony, and received a Level II probationary disposition, the trial court had authority to impose a Level III disposition upon finding, after notice and a hearing, that the juvenile had violated the conditions of probation. Where the motion for review asserted that the juvenile had violated the conditions of probation, accurately stated the date the probation would expire, and listed violations occurring after the juvenile was placed on the probation with the specified expiration date, the motion for review adequately notified the juvenile of his probationary status, even though the motion for review contained a clerical error in that it referenced an earlier expired term of probation. Even assuming, *arguendo*, that, because the motion for review incorrectly referenced an expired term of probation based on commission of a misdemeanor, the motion for review did not provide the juvenile with notice that he could receive a Level III disposition for violation of his probation, the record

establishes that the juvenile had actual notice that a Level III disposition was possible.

I. Factual and Procedural History

On 12 May 2011 a juvenile petition was filed against D.S.B., alleging that he had committed the offense of disorderly conduct, a Class 2 misdemeanor. On 8 August 2011 Judge John Dickson adjudicated D.S.B. delinquent for that offense, and on 1 September 2011 Judge Dickson entered a Level 1 disposition order, placing D.S.B. on probation for one year, subject to certain conditions. On 19 September 2011 a motion for review was filed, alleging that D.S.B. had violated the conditions of his probation by being suspended from school. D.S.B. admitted the violation at a hearing conducted on 18 October 2011, and on 8 November 2011 Judge Dickson entered a Level 2 disposition order placing D.S.B. on probation for a period of one year beginning 18 October 2011. On 24 July 2012, prior to the expiration of this probation, a motion for review was filed, alleging that D.S.B. had violated the conditions of probation. D.S.B. admitted the new violations at a hearing on 20 August 2012, and on 30 August 2012 Judge Dickson ordered D.S.B. "placed on a new Level II probation for one year" beginning on 20 August 2012.

On 22 February 2013 a juvenile petition was filed alleging that D.S.B. had possessed drug paraphernalia. A second petition was filed on 17 April 2013 alleging that D.S.B. had committed the offense of robbery with a dangerous weapon, and a third petition was filed 3 May 2013, alleging that D.S.B. had committed the offense of resisting, delaying, or obstructing a law enforcement officer. On 19 August 2013, prior to the resolution of these petitions, the probation imposed on 20 August 2012 expired. As a result, D.S.B. was not on probation between 20 August 2013 and 9 December 2013, the date that a hearing was conducted on the new petitions.

At the 9 December 2013 hearing, D.S.B. admitted the offense of larceny from the person, a class H felony. Pursuant to a plea agreement, in exchange for D.S.B.'s admission, the State reduced the charge of robbery with a dangerous weapon to larceny from the person, and dismissed the petitions alleging possession of drug paraphernalia and resisting an officer. Judge Edward A. Pone accepted the plea arrangement and adjudicated D.S.B. delinquent based on commission of larceny from the person. On 20 December 2013 Judge Pone entered a disposition order placing D.S.B. on Level 2 probation, beginning 9 December 2013. The disposition order found that D.S.B.'s delinquency level was medium, and

that the offense for which he was adjudicated delinquent was serious. On 20 December 2013, Judge Pone entered an order addressing petitions for review filed on 11 December 2012 and 3 May 2013, alleging violations of D.S.B.'s expired term of probation. Judge Pone "ordered that there be no further court involvement" as to the motions for review of the expired probationary term.

On 31 January 2014 D.S.B.'s juvenile court counselor filed a motion for review of "[D.S.B.'s] progress on probation and to determine whether [D.S.B.] has violated the conditions of probation." The motion for review alleged that D.S.B. had violated the conditions of his probation by being suspended from school on 13 December 2013, failing to maintain a study log, testing positive for THC (the active ingredient in marijuana) on 18 December 2013, and sneaking out of his home without permission on 24 January 2014. The motion for review stated that the term of probation to which D.S.B. was then subject would expire on 8 December 2014. However, the motion for review erroneously referenced the term of probation running from 20 August 2011 to 20 August 2013, which had been based upon the charge of disorderly conduct, rather than his current term of probation entered 9 December 2013, based upon the charge of larceny from the person.

At a hearing conducted on 27 February 2014, D.S.B. admitted violating the conditions of his probation by being suspended from school, leaving home without permission, testing positive for THC, and failing to maintain a study log. The prosecutor reminded the trial court that the last time D.S.B. had been in court, the trial court stated that the next time D.S.B. was in court he would likely be sent to a youth development center ("YDC") of the North Carolina Division of Juvenile Justice. The record does not include a record of the prior court appearance to which the prosecutor referred; however, D.S.B. did not object to this characterization of the previous proceedings.

D.S.B.'s counsel argued that, although D.S.B. "underst[ood] that YDC is on the table," instead of committing D.S.B. to a YDC, "it would be a better benefit for [D.S.B.] if he was placed in some type of program" where he might receive help with substance abuse and anger management issues. His counsel acknowledged the possibility of commitment to a YDC, but requested an alternative disposition:

> [W]e're asking that the Court would consider, as opposed to – even though he is YDC eligible, placing him in some type of program so that he can get the treatment that he needs first, and . . . if that does not work, then . . . [the]

> Court can at that time consider whether YDC would actually be appropriate for him. (emphasis added)

After hearing the arguments of counsel, the trial court proceeded as follows:

> TRIAL COURT: [Defense counsel], your client had an armed robbery charge that was broken down?
>
> DEFENSE COUNSEL: Yes, your Honor. that was a situation that he did plead responsible to that. . . . [H] e felt it was in his best interest to enter into a plea agreement, and it was broken down your Honor.
>
> TRIAL COURT: . . . [T]he Court will find that the juvenile was previously given a Level II disposition and was placed on probation, and that he has violated terms of the probation. That the Court will find that the juvenile has been previously adjudicated for a serious offense, and therefore would order that the juvenile be committed to the Division of Juvenile Justice for placement in a Youth Development Center for a minimum of six months and up until his 18th birthday. . . .

On 3 March 2014 the trial court entered a Disposition and Commitment Order, stating that D.S.B. had been placed on probation on 9 December 2013 for committing the offense of larceny from the person, and thus had "been adjudicated for a violent or serious offense and Level III [disposition] is authorized[.]" The order committed D.S.B. to a YDC for a period of at least six months and not longer than his 18th birthday.

D.S.B. appeals.

II. Commitment to YDC

In his sole argument on appeal, D.S.B. argues that the trial court "exceeded its statutory authority by ordering a Level Three commitment" because the motion for review alleged that D.S.B. had "violated conditions of probation that arose from a minor offense and therefore did not give [D.S.B.] notice that he might receive a Level Three disposition." We disagree.

A. Standard of Review

N.C. Gen. Stat. § 7B-2510 provides in relevant part that:

> (e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has

> violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. . . .
>
> (f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508.

" '[A]ll that is required [in order for the trial court to revoke a juvenile's probation] is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the [juvenile] had, without lawful excuse, willfully violated a valid condition of probation.' " *In re Z.T.W.*, __ N.C. App. __, __, __ S.E.2d __, __ (2014) (2014 N.C. App. LEXIS 1408) (quoting *In re O'Neal*, 160 N.C. App. 409, 412, 585 S.E.2d 478, 481 (2003) (internal citation omitted).

"One's violation of court supervision is not a distinct "crime" like that associated with violations of statutory and common law offenses[, and a] . . . 'probation violation hearing is not a criminal prosecution.' " *In re D.J.M.*, 181 N.C. App. 126, 130, 638 S.E.2d 610, 613 (2007) (quoting *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 335 (1999)). Thus, "a motion for review [is] a form of 'dispositional' hearing with procedural safeguards that differ significantly from those imposed on allegations that a juvenile committed a statutory or common law criminal offense." *D.J.M.*, 181 N.C. App. at 131, 638 S.E.2d at 613. For example, the rules of evidence do not apply to probation revocation proceedings. *Z.T.W.*, __ N.C. App. at __, __ S.E.2d at __ (2014) (citing *State v. Murchison*, 367 N.C. 461, 758 S.E.2d 356 (2014)).

B. Analysis

As noted above, N.C. Gen. Stat. § 7B-2510(e) authorizes the trial court to enter a new disposition if, "after notice and a hearing" the court "finds by the greater weight of the evidence that the juvenile has violated the conditions of probation[.]" On appeal, D.S.B. does not dispute that in December 2013 he received a Level II disposition for commission of a felony, does not challenge the substantive merits of the trial court's ruling that he had violated the conditions of probation, and does not dispute that imposition of a Level III disposition was appropriate given his prior juvenile record. Instead, the juvenile argues that, because the

"motion for review referenced an earlier probation order arising from a minor offense" the motion for review "did not give [D.S.B.] notice that he might receive a level three disposition."

On 31 January 2014, when the motion for review was filed, the only probationary term to which D.S.B. was subject was the Level II disposition imposed on 9 December 2013 for larceny from the person. A "violation" of the earlier probation, which had expired, would not have provided the trial court with authority to enter a new disposition. *See In re: A.F.*, __ N.C. App. __, 752 S.E.2d 245 (2013) (where the juvenile's probationary term expired and was not extended, the trial court could not implicitly or retroactively extend it and thus could not impose record points based on the assumption that the juvenile remained on probation after its expiration).

In addition, the erroneous reference to the earlier term of probation appears only in the section of the motion captioned "facts and circumstances indicating need for review." However, above the "facts and circumstances" section, D.S.B.'s court counselor avers that D.S.B. had violated the conditions of a term of probation that "is scheduled to end on 12/8/2014" (emphasis added). Thus, the motion for review accurately states the expiration date of the juvenile's probation. Moreover, the violations of probation that are listed in the "facts and circumstances" all occurred after he was placed on probation in December 2013. We conclude that the motion for review provided adequate notice to D.S.B. that he was alleged to have violated the conditions of the only term of probation to which he was then subject.

Moreover, even assuming, *arguendo*, that the motion for review failed to provide the juvenile with notice that he could receive a Level III disposition for violation of the conditions of probation, the record and transcript of the hearing establish that D.S.B. had actual notice of his legal status:

> 1. D.S.B. did not object to an order requiring him to be restrained with leg irons at the hearing, based in part on "[t]he nature of the charges," and the need to "prevent the juvenile's escape[.]" This strongly suggests that D.S.B. was aware that the hearing did not pertain to his adjudication for disorderly conduct three years earlier.
>
> 2. During the hearing, D.S.B.'s counsel acknowledged several times that commitment to a YDC was "on the table" but asked the trial court to consider other options.

> 3. During the hearing, D.S.B. did not challenge the prosecutor's assertion that at a prior court appearance the trial court had warned D.S.B. that if he were returned to court, he would face commitment to a YDC.
>
> 4. D.S.B. did not object when the trial court expressly confirmed at the hearing that he was on probation for commission of the felony of larceny from the person, a Class H felony.

Based on the above facts and circumstances, we conclude that D.S.B. had actual notice that violation of the conditions of probation would expose him to a possible Level III disposition.

In seeking to persuade us to reach a contrary result, the juvenile appears to contend that the notice required by N.C. Gen. Stat. § 7B-2510(e) can only come from the motion for review, such that a clerical error in the motion for review "trumps" the juvenile's actual notice of his probationary status. In support of this position, D.S.B. contends that in *In re S.B.*, 207 N.C. App. 741, 701 S.E.2d 359 (2010), this Court "held that the pleadings in the violation report controlled and limited the potential outcome of the probation proceedings." However, the issue in *S.B.* was the interplay between N.C. Gen. Stat. § 7B-2510(f) and N.C. Gen. Stat. § 7B-2508(g). The case did not present any issue regarding whether the "pleadings in the violation report controlled" the outcome of the proceeding.

D.S.B. also argues that he was "prejudiced by the inadequacy of the motion because he did not have notice that he might be subject to a level three disposition when he made the decision to stipulate to several of the violations." We have concluded, however, that D.S.B. did have notice that he was potentially subject to a Level III disposition. In addition, the violations to which D.S.B. stipulated were that he had been suspended from school, had not brought a study log to the meeting with his court counselor, had tested positive for THC, and had left home without permission. D.S.B. does not argue that these violations, which appear to involve straightforward issues of fact, would have been difficult to establish in the absence of a stipulation.

IV. Conclusion

For the reasons discussed above, we conclude that D.S.B. had notice that upon the trial court's finding of a violation of the conditions of probation he might receive a Level III disposition, and that the trial

court did not err by imposing a Level III disposition committing D.S.B. to a YDC.

AFFIRMED.

Judges GEER and STEPHENS concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
ROBERT W. ADAMS, ATTORNEY, DEFENDANT

No. COA14-703

Filed 3 March 2015

1. Attorneys—discipline—trust account—admission of prior audits

In an a proceeding for the discipline of an attorney, the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not violate Rule 404(b) by admitting the results of two prior audits, which indicated several deficiencies in defendant's management of his trust account. The DHC had already determined that defendant had violated the Rules of Professional Conduct in its default judgment at the adjudicatory phase, and, during the disposition phase, the DHC will consider "any evidence relevant to the discipline to be imposed.

2. Evidence—discipline of attorney—trust account mismanagement—prior audits

In an a proceeding for the discipline of an attorney, the probative value of evidence of prior audits indicating deficiencies in defendant's management of his trust account was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence.

3. Attorney—misconduct—trust account—potential significant harm to clients

The finding in a disciplinary proceeding against an attorney that defendant's misconduct involving his trust account resulted in potential significant harm to his clients was supported by the evidence even though no client funds were misappropriated. A third party attempted to draft from the commingled trust account while

the account held client funds, although the transaction failed for insufficient funds. But for the fact that the trust account held insufficient funds, defendant's mismanagement of the trust account would have directly led to the misappropriation of client funds and defendant's misconduct led to potential harm that extends well beyond that attributable to the commingling alone.

4. Attorneys—discipline—potential significant harm to supported by substantial evidence—prior misconduct

In a disciplinary proceeding against an attorney involving his trust account, substantial evidence supported the North Carolina State Bar Disciplinary Hearing Commission's findings of fact that defendant's misconduct created the potential for significant harm to clients and to the public's perception of the legal profession. Defendant had been publicly disciplined on six prior occasions, including several instances of financial mismanagement, and had been the subject of two trust account audits with deficiencies, yet still failed to maintain his trust account properly.

5. Attorneys—discipline—trust account violations—foreseeable harm

Findings of fact by the North Carolina State Bar Disciplinary Hearing Commission adequately supported its conclusions of law in disciplining an attorney for trust account violations. Findings on defendant's long history of mismanaging entrusted funds and defendant's failure to block Alltel's repeated drafting of funds from the trust account supported the conclusion that defendant intended to commit acts where the harm or potential harm was foreseeable and created significant potential harm to client funds.

6. Attorneys—discipline—trust account mismanagement—suspension

Findings of fact and conclusions of law by the North Carolina State Bar Disciplinary Hearing Commission adequately supported its ultimate decision to suspend defendant-attorney's license for mismanagement of his trust account.

Appeal by defendant from order of discipline entered 3 February 2014 by the North Carolina State Bar Disciplinary Hearing Commission. Heard in the Court of Appeals 18 November 2014.

The North Carolina State Bar, by David R. Johnson and Katherine Jean, for plaintiff-appellee.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for defendant-appellant.

STROUD, Judge.

Robert W. Adams ("defendant") appeals from an order of discipline entered by the North Carolina State Bar Disciplinary Hearing Commission ("the DHC"). The DHC found that defendant had mismanaged his trust account and ordered that defendant's law license be suspended. Defendant argues that (1) the DHC erred in admitting evidence of prior audits' results; (2) substantial evidence does not support the DHC's findings of fact; (3) the DHC's findings of fact do not adequately support its conclusions of law; and (4) the DHC's findings and conclusions do not adequately support its level of discipline. We affirm the DHC's order of discipline.

I. Background

Defendant was licensed by the North Carolina State Bar in 1972. On or about 10 November 1991, the Grievance Committee of the State Bar reprimanded defendant for mismanagement of his trust account. On or about 5 May 1994, the Grievance Committee admonished defendant for failure to file proper accountings in an estate and failure to handle a refinancing transaction properly. On or about 9 August 1996, defendant was reprimanded for failure to respond to a grievance filed by a client. On or about 23 September 1996, pursuant to a random audit, a State Bar auditor examined defendant's trust account and informed defendant of several deficiencies in defendant's management of the account. On or about 30 April 1997, the Grievance Committee censured defendant for failure to notify his clients of a deposition, failure to appear for the deposition, and failure to inform his clients of sanctions ordered.

On or about 6 November 1997, the DHC imposed a two-year stayed suspension on defendant for his neglect of a client's case, failure to communicate with a client, and failure to respond to the grievance. On 7 June 1999, the DHC extended defendant's stayed suspension. On 10 May 2000, based upon defendant's failure to file North Carolina individual tax returns for three prior years, the DHC imposed a three-year suspension with an opportunity for defendant to apply for a stay of the remaining period of the suspension after nine months. On or about 10 October 2008, pursuant to another random audit, a State Bar auditor examined defendant's trust account and informed defendant of several deficiencies in defendant's management of the account.

From 1 January 2012 to 1 July 2012, defendant practiced law in Hickory and held client funds in his trust account. Among his areas of practice, defendant represented clients in Social Security Administration cases. Defendant (1) commingled his personal funds with client funds in the trust account, (2) failed to ensure that checks drawn on the trust account showed the client balance, (3) failed to reconcile the trust account quarterly, (4) failed to maintain a record related to the electronic transfers from the trust account showing the name of the client or other person to whom the funds belong, and (5) failed to maintain a ledger containing a record of receipts and disbursements for each person from whom and for whom funds were received and showing the current balance of funds held in the trust account for each such person. *See* Revised Rules of Professional Conduct of the North Carolina State Bar R. 1.15-2(a), 1.15-2(f), 1.15-2(h), 1.15-3(b)(2), 1.15-3(b)(3), 1.15-3(b)(5), and 1.15-3(d)(1) (2012).

Defendant gave Alltel Wireless ("Alltel"), a cell phone company, bank account information for his trust account in order to pay a former client's cell phone bill. Alltel made drafts from the trust account on 30 January 2012, 16 February 2012, 13 March 2012, and 2 April 2012. On 24 May 2012, Alltel attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but the transaction was unsuccessful because the trust account held insufficient funds to cover the draft. Defendant's bank issued a notice of non-sufficient funds to the State Bar. On 25 May 2012, Alltel made a successful draft from the trust account for a much lower amount. But defendant did not misappropriate any client funds, since the attempted 24 May 2012 draft was unsuccessful.

On 10 July 2013, the State Bar filed a complaint against defendant alleging that defendant had mismanaged his trust account from 1 January 2012 to 1 July 2012. Defendant failed to file an answer or any responsive pleading. On 10 December 2013, the DHC entered a default judgment against defendant, thus admitting the State Bar's allegations at the adjudicatory phase. On 10 January 2014, the DHC held a hearing on the disposition phase to determine the appropriate level of discipline. On 3 February 2014, in its order of discipline, the DHC imposed a four-year suspension with an opportunity for defendant to apply for a stay of the remaining period of the suspension after two years if he complies with certain conditions. On 27 February 2014, defendant gave timely notice of appeal.

II. Admission of Evidence

Defendant contends that the DHC erred in admitting the results of two prior audits, in contravention of North Carolina Rules of Evidence 404(b) and 403. N.C. Gen. Stat. § 8C-1, Rules 403, 404(b) (2013).

A. Standard of Review

We review *de novo* the DHC's decision to admit evidence under Rule 404(b). *See State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (discussing Rule 404(b) in the context of a criminal trial); N.C. Gen. Stat. § 8C-1, Rule 404(b). But we review the DHC's Rule 403 determination for an abuse of discretion. *See Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159; N.C. Gen. Stat. § 8C-1, Rule 403. "An 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. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (quotation marks omitted).

B. Analysis

[1] Attorney discipline cases have two phases: (1) an adjudicatory phase in which the DHC determines whether the defendant committed the misconduct; and (2) a disposition phase in which the DHC determines the appropriate discipline. *N.C. State Bar v. Talford*, 356 N.C. 626, 634, 576 S.E.2d 305, 311 (2003). In a hearing before the DHC, the North Carolina Rules of Evidence govern the admissibility of evidence. 27 N.C. Admin. Code § 1B.0114(t) (2014); *N.C. State Bar v. Mulligan*, 101 N.C. App. 524, 527, 400 S.E.2d 123, 125 (1991). Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). This list of permissible purposes is not exclusive, and evidence of other crimes, wrongs, or acts is admissible so long as it is relevant to any fact or issue other than the defendant's character to act in conformity therewith. *State v. Gordon*, ___ N.C. App. ___, ___, 745 S.E.2d 361, 364, *disc. rev. denied*, ___ N.C. ___, 749 S.E.2d 859 (2013).

Defendant argues that the prior audits' results, which indicate several deficiencies in defendant's management of his trust account, were inadmissible under Rule 404(b). Defendant asserts that this evidence was not proffered to show intent, knowledge, or absence of mistake, because, in its default judgment at the adjudicatory phase, the DHC had already determined that defendant had violated the Rules of Professional Conduct.

But during the disposition phase, the DHC will consider "any evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code § 1B.0114(w). "[I]ntent of the defendant to commit acts where the harm or potential harm is foreseeable" is a factor that the DHC considers in imposing suspension, and "a pattern of misconduct" is a factor that the DHC considers in all cases. *Id.* § 1B.0114(w)(1)(B), (3)(F). The prior audits' results were relevant to these two factors and were not used to show defendant's propensity to mismanage his trust account, because the DHC had already determined that defendant had committed that misconduct. Accordingly, we hold that the DHC did not violate Rule 404(b) in admitting this evidence. *See Gordon*, ___ N.C. App. at ___, 745 S.E.2d at 364; N.C. Gen. Stat. § 8C-1, Rule 404(b).

[2] Defendant next contends that the prior audits' results were inadmissible under Rule 403. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, [on] an emotional one." *State v. Cunningham*, 188 N.C. App. 832, 836, 656 S.E.2d 697, 700 (2008).

As discussed above, the prior audits' results were relevant to the factors of "intent of the defendant to commit acts where the harm or potential harm is foreseeable" and "a pattern of misconduct[.]" *See* 27 N.C. Admin. Code § 1B.0114(w)(1)(B), (3)(F). Defendant has not demonstrated an improper basis on which the DHC may have considered this evidence. *See Cunningham*, 188 N.C. App. at 836, 656 S.E.2d at 700. We hold that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that the DHC did not violate Rule 403 in admitting this evidence.

III. Order of Discipline

A. Standard of Review

We review the DHC's order of discipline under the "whole record" test. *Talford*, 356 N.C. at 632, 576 S.E.2d at 309.

> [We] determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law. Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion. The whole-record test also mandates that the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn. Moreover, in order to satisfy the evidentiary requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing. Ultimately, the reviewing court must apply all the aforementioned factors in order to determine whether the decision of the lower body, e.g., the DHC, has a rational basis in the evidence.

Id., 576 S.E.2d at 309-10 (citations, quotation marks, and footnotes omitted).

We consider three questions to determine if the DHC's decision has a "rational basis in the evidence": (1) Is there adequate evidence to support the order's expressed findings of fact? (2) Do the order's expressed findings of fact adequately support the order's subsequent conclusions of law? (3) Do the expressed findings and conclusions adequately support the lower body's ultimate decision? *Id.* at 634, 576 S.E.2d at 311. "[T]he mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the [DHC]." *N.C. State Bar v. Key*, 189 N.C. App. 80, 84, 658 S.E.2d 493, 497 (2008). The DHC determines the credibility of the witnesses and the weight of the evidence. *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 665, 657 S.E.2d 378, 386 (2008).

The DHC must support its punishment choice with written findings that are consistent with the statutory scheme of N.C. Gen. Stat. § 84-28(c). *Talford*, 356 N.C. at 638, 576 S.E.2d at 313; *see also* N.C. Gen. Stat. § 84-28(c) (2013). The order must also include adequate and specific findings that address how the punishment choice (1) is supported

by the particular set of factual circumstances and (2) effectively provides protection for the public. *Id.*, 576 S.E.2d at 313.

B. Findings of Fact

[3] Defendant contends that Findings of Fact Regarding Discipline 7 and 8 are not supported by substantial evidence. Those findings of fact state:

> 7. The Alltel draft on [the trust account] created the potential for significant harm to clients of Defendant with entrusted funds in [that account].
>
> 8. Defendant's failure to comply with the State Bar's regulations related to his trust account has the potential to cause significant harm to clients of Defendant and to the public's perception of the legal profession.

In *Talford*, the North Carolina Supreme Court discussed the difference between "potential harm" and "significant potential harm" within the context of a defendant's mismanagement of his trust account. *Id.* at 640, 576 S.E.2d at 314-15. There, the defendant had commingled his personal funds with client funds in his trust account and had made several withdrawals from the account that were in excess of those funds to which he was entitled. *Id.*, 576 S.E.2d at 314. But no client suffered a loss or a financial setback, since the defendant maintained enough personal funds in the account to cover any amounts due to clients. *Id.*, 576 S.E.2d at 314. The North Carolina Supreme Court held that, within the confines of these circumstances, the defendant's misconduct had created "potential harm" to clients but had not created "a risk of *significant* potential harm" to clients. *Id.* at 640-41, 576 S.E.2d at 314-15. The Court ultimately held that the DHC's order of discipline did not have a "rational basis in the evidence" because (1) the order failed to provide either pertinent findings of fact or conclusions of law that addressed the statutory factors delineated in N.C. Gen. Stat. § 84-28(c); and (2) inadequate evidence supported the findings of fact and conclusions of law that would be necessary to justify the DHC's punishment choice. *Id.* at 642, 576 S.E.2d at 315-16.

The default judgment here established the facts as alleged in the State Bar's complaint that defendant (1) commingled his personal funds with client funds in the trust account, (2) failed to ensure that checks drawn on the trust account showed the client balance, (3) failed to reconcile the trust account quarterly, (4) failed to maintain a record related to the electronic transfers from the trust account showing the name of

the client or other person to whom the funds belong, and (5) failed to maintain a ledger containing a record of receipts and disbursements for each person from whom and for whom funds were received and showing the current balance of funds held in the trust account for each such person. *See* Revised Rules of Professional Conduct of the North Carolina State Bar R. 1.15-2(a), 1.15-2(f), 1.15-2(h), 1.15-3(b)(2), 1.15-3(b)(3), 1.15-3(b)(5), and 1.15-3(d)(1). The default judgment also established that on 24 May 2012, Alltel had attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but that the transaction was unsuccessful only because the trust account held insufficient funds to cover the draft.

Relying on *Talford*, defendant contends that his misconduct did not cause "significant potential harm" as stated in Findings of Fact Regarding Discipline 7 and 8, because no client funds were misappropriated. *See Talford*, 356 N.C. at 640, 576 S.E.2d at 314-15. *Talford*, however, is distinguishable for two reasons. First, in *Talford*, the DHC's order failed to provide either pertinent findings of fact or conclusions of law that addressed the statutory factors delineated in N.C. Gen. Stat. § 84-28(c). *Id.* at 642, 576 S.E.2d at 315-16. To satisfy N.C. Gen. Stat. § 84-28(c), an order imposing suspension or disbarment must show (1) how a defendant's actions resulted in significant harm or significant potential harm; and (2) why suspension and disbarment are the only sanction options that can adequately serve to protect the public from potential future transgressions by the defendant. *Id.* at 638, 576 S.E.2d at 313. In *Talford*, the DHC's order addressed neither statutory factor. *Id.* at 639, 576 S.E.2d at 314. The DHC limited its findings of fact regarding discipline to "six conclusory statements about the aggravating and mitigating factors surrounding defendant's misconduct." *Id.*, 576 S.E.2d at 314.

In contrast, here, the DHC's order includes findings of fact and conclusions of law that satisfy N.C. Gen. Stat. § 84-28(c). *See id.* at 638, 576 S.E.2d at 313. The DHC's order includes findings and conclusions that address the first issue and explain how defendant's actions resulted in significant potential harm:

> [Finding of Fact Regarding Discipline] 4. Defendant's mismanagement of his trust account resulted in numerous violations of the Rules of Professional Conduct.
>
> . . .
>
> 6. The attempt by Alltel to draft $1,458.98 from [the trust account] on May 24, 2012 failed because [the trust

> account], though containing entrusted funds, had insufficient funds to cover the Alltel draft.
>
> 7. The Alltel draft on [the trust account] created the potential for significant harm to clients of Defendant with entrusted funds in [that account].
>
> 8. Defendant's failure to comply with the State Bar's regulations related to his trust account has the potential to cause significant harm to clients of Defendant and to the public's perception of the legal profession.
>
> . . . .
>
> [Conclusion of Law Regarding Discipline] 4. Defendant['s] misconduct resulted in potential significant harm to his clients by placing entrusted client funds at risk of misapplication and misappropriation.
>
> 5. Defendant's failure to properly maintain, manage and handle entrusted funds betrays a vital trust that clients and the public place in attorneys and the legal profession.

The DHC's order also includes conclusions of law that address the second issue and explain why suspension is the only sanction option that can adequately serve to protect the public from potential future transgressions by defendant:

> [Conclusion of Law Regarding Discipline] 6. The [DHC] has considered issuing an admonition, reprimand or censure but concludes that such discipline would not be sufficient discipline because of the factors noted in paragraphs 1 and 3 of this section and the gravity of the potential significant harm to the clients. The [DHC] further concludes that such discipline would fail to acknowledge the seriousness of the offenses committed by Defendant and send the wrong message to attorneys regarding the conduct expected of members of the Bar in this State.
>
> 7. [The DHC] has considered lesser alternatives and concludes that a suspension is appropriate under the facts and circumstances of this case to address the potential for significant harm to Defendant's clients, and for the protection of Defendant's clients and the public.

> 8. For these reasons, the [DHC] finds that an order imposing discipline less than a suspension of Defendant's law license would not be appropriate.

Unlike the order in *Talford*, the DHC's order here includes findings of fact and conclusions of law that satisfy the statutory framework of N.C. Gen. Stat. § 84-28(c). *See id.*, 576 S.E.2d at 313.

Second, in *Talford*, the defendant's misconduct did not result in any potential harm to clients "beyond that attributable to any commingling of attorney and client funds[.]" *Id.* at 640, 576 S.E.2d at 314-15. There, the trust account contained sufficient personal funds belonging to the defendant to cover obligations owed to or on behalf of clients. *Id.*, 576 S.E.2d at 314. In contrast, here, on 24 May 2012, a third party, Alltel, attempted to draft approximately $1,458.98 from the trust account, while the account held client funds, but the transaction was unsuccessful only because the trust account held insufficient funds to cover the draft. But for the fact that the trust account held insufficient funds, defendant's mismanagement of the trust account would have directly led to the misappropriation of client funds. Unlike in *Talford*, defendant's misconduct here led to the potential misappropriation of client funds, potential harm that extends well beyond that attributable to commingling alone. *See id.*, 576 S.E.2d at 314-15. In light of these two distinctions, we hold that *Talford* is distinguishable.

[4] Defendant further contends that substantial evidence does not support Finding of Fact Regarding Discipline 8, because the State Bar proffered no evidence of potential harm to the public's perception of the legal profession. Defendant cites no authority which requires that any particular type of evidence be presented to show potential harm "to the public's perception of the legal profession[,]" nor have we found any such authority. The very purpose of attorney discipline presupposes that attorney misconduct can harm the public and can tarnish the public's perception of the legal profession. *See* 27 N.C. Admin. Code. § 1B.0101 (2014) ("Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession."). In this case, defendant had been publicly disciplined on six prior occasions, including several instances of financial mismanagement, and had been the subject of two trust account audits with deficiencies in both, and yet he still failed to maintain his trust account properly. Defendant's repeated failures to comply with the Rules of Professional Conduct and prior lesser sanctions and the risk of significant harm to clients supports a finding of potential harm

to the public's perception of the legal profession. Because defendant's mismanagement of the trust account directly led to the potential misappropriation of client funds, we hold that substantial evidence supports the DHC's Findings of Fact Regarding Discipline 7 and 8 that defendant's misconduct created "the potential for significant harm" to clients and to the public's perception of the legal profession.

C. Conclusions of Law

[5] Defendant next contends that the findings of fact do not adequately support Conclusion of Law Regarding Discipline 1. This conclusion states:

> The [DHC] has carefully considered all of the different forms of discipline available to it. In addition, the [DHC] has considered all of the factors enumerated in [27 N.C. Admin. Code § 1B.0114(w)(1)] of the Rules and Regulations of the North Carolina State Bar and concludes the following factors warrant suspension of Defendant['s] license:
>
> a. Intent of Defendant to commit acts where the harm or potential harm is foreseeable;
>
> b. Circumstances reflecting the Defendant's lack of honesty, trustworthiness, or integrity;
>
> c. Negative impact of Defendant's actions on client's or public's perception of the legal profession; and
>
> d. Multiple instances of failure to participate in the legal profession's self-regulation process.

Defendant contends that the DHC's findings of fact do not adequately support its sub-conclusion of law that defendant intended "to commit acts where the harm or potential harm is foreseeable[,]" because he did not authorize the 24 May 2012 draft by Alltel. But the default judgment establishes that, in addition to the unsuccessful 24 May 2012 draft, Alltel had made successful drafts from the trust account on 30 January 2012, 16 February 2012, 13 March 2012, 2 April 2012, and 25 May 2012. The DHC found that defendant "had several months to take action with [his bank] to block the drafts but failed to do so."

Additionally, the DHC made other findings of fact to support its sub-conclusion that defendant intended to commit acts where the harm or potential harm is foreseeable:

> [Finding of Fact Regarding Discipline] 1. The State Bar conducted two prior random audits of [the trust account], one in 1996 and the second in 2008. Both audits disclosed deficiencies in Defendant's trust account management practices.
>
> 2. Among other deficiencies, both random audits disclosed that at the time of the audits Defendant: 1) did not maintain ledgers for each person or entity from whom or for who[m] trust money was received; and 2) did not conduct quarterly reconciliations.
>
> 3. After the 1996 random audit, Defendant wrote to the State Bar agreeing to correct the deficiencies in his trust account management practices including maintaining a ledger and conducting quarterly audits; however, those same deficiencies, as well as the others noted above, continued in the present proceeding.
>
> . . . .
>
> 9. Defendant has received prior discipline by the Grievance Committee and the DHC, as follows: 90G0044—Reprimand (noting deficiencies in handling entrusted funds)[.]

In light of its findings on defendant's long history of mismanaging entrusted funds and defendant's failure to block Alltel's repeated drafting of funds from the trust account, we hold that the DHC's findings of fact adequately support its sub-conclusion that defendant intended to commit acts where the harm or potential harm is foreseeable. *See id.* at 634, 576 S.E.2d at 311.

Defendant further argues that the DHC's findings of fact do not adequately support its sub-conclusion that circumstances reflect defendant's lack of honesty, trustworthiness, or integrity, because he "fully complied" with the State Bar's investigation. But defendant's compliance with the State Bar's investigation does not undermine the DHC's findings that defendant repeatedly mismanaged his trust account, even after prior disciplinary proceedings addressing similar issues of financial mismanagement, and exposed his clients to significant potential harm. These findings adequately support the DHC's sub-conclusion that circumstances reflect defendant's lack of honesty, trustworthiness, or integrity. *See id.*, 576 S.E.2d at 311.

Defendant next argues that the DHC's findings of fact do not support its sub-conclusion that defendant's misconduct negatively impacted his clients' or the public's perception of the legal profession. But Finding of Fact Regarding Discipline 8, which states that defendant's misconduct had the potential to cause significant harm to clients and to the public's perception of the legal profession, adequately supports this sub-conclusion. *See id.*, 576 S.E.2d at 311.

Defendant also contends that the DHC's findings of fact do not support its Conclusion of Law Regarding Discipline 4. This conclusion states: "Defendant['s] misconduct resulted in potential significant harm to his clients by placing entrusted client funds at risk of misapplication and misappropriation." But, as discussed above, substantial evidence supports the DHC's Findings of Fact Regarding Discipline 7 and 8 that defendant's misconduct created significant potential harm to client funds. These findings adequately support Conclusion of Law Regarding Discipline 4. *See id.*, 576 S.E.2d at 311. We hold that the DHC's findings of fact adequately support its Conclusions of Law Regarding Discipline 1 and 4. *See id.*, 576 S.E.2d at 311.

D. Level of Discipline

[6] Defendant further contends that the DHC's findings of fact and conclusions of law do not adequately support its ultimate decision to suspend defendant's license. In order to suspend a defendant's license, the DHC's order must show (1) how the defendant's actions resulted in significant harm or significant potential harm; and (2) why suspension is the only sanction option that can adequately serve to protect the public from potential future transgressions by the defendant. *Id.* at 638, 576 S.E.2d at 313. As discussed above, the DHC's order here includes findings of fact and conclusions of law that satisfy this requirement. Accordingly, we hold that the DHC's findings and conclusions adequately support its ultimate decision to suspend defendant's license. *See id.* at 634, 576 S.E.2d at 311.

IV. Conclusion

For the foregoing reasons, we affirm the DHC's order of discipline.

Affirmed.

Judges CALABRIA and McCULLOUGH concur.

SIMS-CAMPBELL v. WELCH

[239 N.C. App. 503 (2015)]

SANDRA SIMS-CAMPBELL, Plaintiff
v.
HARRY L. WELCH, JR., Individually and in his Official Capacity as Register of Deeds of Rowan County, North Carolina, Defendant

No. COA14-938

Filed 3 March 2015

Public Officers and Employees—wrongful termination—county register of deeds—firing for political reasons—intentional infliction of emotional distress

The trial court did not err by dismissing plaintiff assistant register of deed's case challenging her termination after she announced her plans to run against her boss in the next election. County registers of deeds may fire their assistant registers of deeds for political reasons without violating the United States and North Carolina Constitutions or state laws. Further, the mere firing of an employee can never be "extreme and outrageous" conduct sufficient to state a claim for intentional infliction of emotional distress.

Appeal by plaintiff from orders entered 3 June 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 7 January 2015.

Ferguson Chambers & Sumter, P.A., by Christina L. Trice and James E. Ferguson, II, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, L.L.P., by James R. Morgan, Jr., for defendant-appellee.

DIETZ, Judge.

This case requires us once again to delineate when certain government employees may be fired for political reasons. From 2010 to 2014, Defendant Harry L. Welch was the Rowan County Register of Deeds. In February 2014, Plaintiff Sandra Sims-Campbell, who was Welch's Assistant Register of Deeds and second-in-command in the office, announced her plan to run against Welch in the upcoming election. Shortly after that announcement, Welch fired Sims-Campbell. Sims-Campbell sued to challenge her termination. The trial court dismissed her case and she then appealed to this Court.

Government employees generally are protected from termination because of their political viewpoints. But this Court and various federal appeals courts repeatedly have held that deputy sheriffs and deputy clerks of court may be fired for political reasons such as supporting their elected boss's opponents during an election. *See, e.g.*, *Carter v. Marion*, 183 N.C. App. 449, 645 S.E.2d 129 (2007); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997); *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). This exception is necessary because these deputies are authorized to act on behalf of their elected superiors and their actions are binding on their bosses. It would be untenable if employees with these broad-ranging powers could not be terminated when they were also actively working to undermine their superiors for their own political gain.

Assistant registers of deeds have the same authority within their office as deputy sheriffs and deputy clerks of court do in theirs, including the authority to act on behalf of, and bind, their elected bosses. Indeed, the same sections of the General Statutes govern all three positions. Thus, we find our precedent governing deputy sheriffs and deputy clerks of court controlling in this case. Under that precedent, county registers of deeds may fire their assistant registers of deeds for political reasons without violating the United States and North Carolina Constitutions or state laws. We therefore affirm the trial court's dismissal of this action.

Facts and Procedural History

The following recitation of facts represents Plaintiff Sandra Sims-Campbell's version of events, viewed in the light most favorable to her. Because this appeal stems from the trial court's order granting Defendant Harry Welch's motion to dismiss, we must view the allegations in the complaint as true and consider the record in the light most favorable to Sims-Campbell. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

Sims-Campbell began working for the Office of the Register of Deeds of Rowan County on 1 September 1991. After receiving outstanding reviews as a deputy register of deeds, Sims-Campbell accepted a promotion in December 2008 to the position of Assistant Register of Deeds. In this position, Sims-Campbell "acted as the Register of Deeds in the absence of the Register of Deeds."

Welch assumed the office of Register of Deeds in 2010, and Sims-Campbell continued to serve as Assistant Register of Deeds under his direction. She consistently received exceptional performance

evaluations, with Welch once noting, "[Sims-Campbell] is a blessing to my team. She is not only the most knowledgeable[,] but she readily shares with the rest of my staff. She is great with the public."

On 27 February 2014, Sims-Campbell informed Welch of her intention to run against him in the upcoming election for the office of Register of Deeds. Later that day, Welch asked Sims-Campbell to take the following day off, with pay, so that he could consider her announcement. The next day, Welch terminated Sims-Campbell from her position as Assistant Register of Deeds.

Sims-Campbell filed a Verified Complaint and motion for a preliminary injunction on 9 April 2014, asserting claims for wrongful discharge in violation of North Carolina public policy and intentional infliction of emotional distress. In response, Welch moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court entered orders on 30 June 2014 denying Sims-Campbell's motion for a preliminary injunction and granting Welch's motion to dismiss the complaint for failure to state a claim. Sims-Campbell timely appealed to this Court.

Analysis

Sims-Campbell contends that the trial court improperly granted Welch's motion to dismiss her claims. "This 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." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

I. Plaintiff's Constitutional and Statutory Claims

Sims-Campbell first argues that Welch terminated her employment in violation of the United States and North Carolina Constitutions and applicable state law. We disagree.

In North Carolina, employment relationships ordinarily are at-will. *See Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991). As a result, "both employer and employee are generally free to terminate their association at any time and without any reason." *Id.* But the First Amendment (and the analogous provision in our State Constitution) imposes an exception on our State's at-will employment rules: ordinarily, the government cannot terminate public employees for engaging in political speech and activity. *See Jenkins v. Medford*, 119 F.3d 1156, 1160 (4th Cir. 1997).

Nevertheless, courts have recognized that there is a special subset of government jobs where "political party affiliation can be an appropriate requirement for effective job performance." *Jenkins*, 119 F.3d at 1162; *see also Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989). In *Jenkins*, a case from Buncombe County, the U.S. Court of Appeals for the Fourth Circuit held that "political affiliation and loyalty to the sheriff are appropriate job requirements" for deputy sheriffs. 119 F.3d at 1163. The court noted that the General Assembly made deputy sheriffs at-will employees who "serve at the pleasure of the appointing officer" and that they "hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." *Id.* at 1163-64 (internal quotation marks omitted). Their position thus resembles that of "a policymaker, a communicator, or a privy to confidential information." *Id.* at 1164 (internal quotation marks omitted). In light of these important public duties, the court held that "sheriffs may dismiss deputies either because of party affiliation or campaign activity" without violating the First Amendment. *Id.* at 1164-65.

This Court later applied *Jenkins* to deputy clerks of superior court. *Carter v. Marion*, 183 N.C. App. 449, 453-54, 645 S.E.2d 129, 131 (2007). In *Carter*, three Surry County deputy clerks sued the newly elected clerk of court, alleging that the clerk terminated their appointments because they had not supported her in the election. *Id.* at 451, 645 S.E.2d at 129-30. Citing *Jenkins*, we held that it did not violate the United States or North Carolina Constitutions, or public policy of this State, for a clerk of court to terminate his deputies for political reasons. *Id.* at 453-54, 645 S.E.2d at 131-32. We explained that deputy clerks are authorized to carry out acts that "the clerk may be authorized and empowered to do," that "the clerk is responsible for the acts of his deputies," and that "deputy clerks serve at the pleasure of the elected clerk and are appointed by the clerk." *Id.* at 454, 645 S.E.2d at 132. We therefore concluded "that political affiliation is an appropriate employment requirement" for deputy clerks of court. *Id.* at 455, 645 S.E.2d at 132.

Jenkins and *Carter* control the outcome of this case. As Sims-Campbell concedes in her complaint, her job as assistant register of deeds was to "act[] as the Register of Deeds in the absence of the Register of Deeds." As with deputy sheriffs and clerks of court, assistant registers of deeds implement policies of the elected registers of deeds, exercise discretion, and act as agents for registers of deeds, who are bound by, and may be held civilly liable for, the acts of their assistants. *See* N.C. Gen. Stat. § 161-6 (2013). And, as with appointees of sheriffs

and clerks of court, the General Assembly expressly provided that assistant registers of deeds serve "at the pleasure" of their elected superiors. N.C. Gen. Stat. § 153A-103(2) (2013). Accordingly, we hold that a register of deeds may terminate the appointment of an assistant register of deeds for political reasons without violating the federal or state constitution or state public policy.

Sims-Campbell also argues that, even if her firing was not unconstitutional or in violation of public policy, it violated Section 153A-99 of the General Statutes, which provides that "county employees . . . are not restricted from political activities," including "while off duty, . . . attending political meetings, or advocating and supporting the principles or policies of civic or political organizations, or supporting partisan or nonpartisan candidates of their choice in accordance with the Constitution and laws of the State and the Constitution and laws of the United States of America." N.C. Gen. Stat. § 153A-99(a) (2013). The express purpose of this statute is "to ensure that county employees are not subjected to political or partisan coercion while performing their job duties." *Id.*

This argument fails because an assistant register of deeds is not a county employee. Section 153A-99 provides that "'[c]ounty employee' or 'employee' means any person employed by a county or any department or program thereof that is supported, in whole or in part, by county funds." *Id.* § 153A-99(b)(1). Employees of the register of deeds are not "persons employed by a county or any department or program thereof." Section 153A-103 of our General Statutes provides that the elected register of deeds retains the "exclusive right to hire, discharge, and supervise the employees in his office." *Id.* § 153A-103(a)(1). Aside from fixing the number of salaried employees in the office of register of deeds, a county thus lacks *any* authority to supervise or control the details of the work performed by employees in that office. An employer-employee relationship simply cannot exist between a county and employees of the register of deeds where the county has no authority to hire, fire, supervise, or control those employees. *Cf. Hoffman v. Moore Reg'l Hosp., Inc.*, 114 N.C. App. 248, 250-51, 441 S.E.2d 567, 569 (1994) (holding that, as a matter of law, no employer-employee relationship existed because the alleged employer did not have the right to supervise and control the details of the work performed by the alleged employee).

We again find guidance in our cases dealing with the office of sheriff. In a series of cases, this court has held that sheriff's deputies—whose appointments and powers are governed by the same statutes as those for assistant registers of deeds—are not county employees, but rather

employees of the sheriff. *See, e.g.*, *Hubbard v. Cnty. of Cumberland*, 143 N.C. App. 149, 152, 544 S.E.2d 587, 589-90 (2001); *Clark v. Burke Cnty.*, 117 N.C. App. 85, 89, 450 S.E.2d 747, 749 (1994); *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449-50, 368 S.E.2d 892, 894 (1988); *Styers v. Forsyth Cnty.*, 212 N.C. 558, 560, 194 S.E. 305, 306 (1937). Indeed, in *Peele*, this Court noted that N.C. Gen. Stat. § 153A-103, which applies equally to sheriffs and registers of deeds, unambiguously provides that the elected official "has the exclusive right to hire, discharge, and supervise the employees in his office." *Peele*, 90 N.C. App. at 449-50, 368 S.E.2d at 894; N.C. Gen. Stat. § 153A-103(a)(1). In light of the statute's plain language and our analogous case law concerning deputy sheriffs, we conclude that an assistant register of deeds, appointed by and working at the pleasure of the elected register of deeds, is not a "county employee" within the meaning of N.C. Gen. Stat. § 153A-99(b)(1).

Sims-Campbell responds by pointing to two readily distinguishable sources. First, she cites a 1998 advisory opinion of the North Carolina Attorney General which addressed whether § 153A-99 applied to the political activities of elected officials. *See* Opinion of Attorney General to Mr. William R. Gilkeson, Staff Attorney, N.C. General Assembly, 1998 N.C.A.G. 1 (Jan. 14, 1998), *available* at http://www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Opinions/342.aspx. "While opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority." *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998) (internal quotation marks omitted). Here, we are not persuaded by this opinion of the Attorney General, which addressed a different issue, failed to recognize the controlling case law from our Court cited above, and relied instead on a federal district court decision that has since been overturned by the Fourth Circuit. *See Carter v. Good*, 951 F. Supp. 1235 (W.D.N.C. 1996), *rev'd*, 145 F.3d 1323 (4th Cir. 1998).

Sims-Campbell also relies on this Court's opinion in *Venable v. Vernon*, 162 N.C. App. 702, 592 S.E.2d 256 (2004) to support her argument that she was a county employee. But in *Venable*, we explicitly declined to determine whether the plaintiff, a former sheriff's deputy, was "a county employee as defined by N.C. Gen. Stat. § 153A-99." *Id.* at 706, 592 S.E.2d at 258. The *Venable* decision is thus of no value to the issue presented here.

In sum, we hold that an assistant register of deeds, like a deputy sheriff, is not a "county employee" within the meaning of § 153A-99 of the General Statutes. As a result, Sims-Campbell's claims under that statutory provision must fail.

II. Plaintiff's Claim for Intentional Infliction of Emotional Distress

Sims-Campbell next argues that the trial court erred in dismissing her claim for intentional infliction of emotional distress. She contends that Welch's conduct "was intolerable and outrageous to society's expectations" because he "terminated [Sims-Campbell] after more than two decades of service at the Register of Deeds Office because she chose to be open and honest in discussing her intention to run in the upcoming election." We reject this argument and hold that Sims-Campbell's complaint does not state a claim for intentional infliction of emotional distress.

In order to survive a motion to dismiss, a claim for intentional infliction of emotional distress must charge that the defendant engaged in "extreme and outrageous conduct" which was intended to cause and did in fact cause the plaintiff to suffer severe emotional distress. *Simmons v. Chemol Corp.*, 137 N.C. App. 319, 325, 528 S.E.2d 368, 371 (2000). This Court consistently has held that the mere firing of an employee can never be "extreme and outrageous" conduct sufficient to state a claim for intentional infliction of emotional distress. *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872-73 (2005); *Lorbacher v. Hous. Auth. of City of Raleig*h, 127 N.C. App. 663, 675-77, 493 S.E.2d 74, 81-82 (1997); *see also Laing v. Fed. Exp. Corp.*, 2011 WL 6072028 at *9 (W.D.N.C. 2011); *Smith v. Computer Task Grp., Inc.*, 568 F. Supp. 2d 603, 621 (M.D.N.C. 2008). Here, Welch's only allegedly wrongful conduct was his decision to summarily fire Sims-Campbell when she decided to run against him in the upcoming election. That alleged conduct does not satisfy the "extreme and outrageous" standard as a matter of law. Accordingly, we affirm the trial court's order dismissing Sims-Campbell's claim for intentional infliction of emotional distress.

Conclusion

For the reasons stated above, we hold that the trial court properly dismissed Plaintiff's complaint for failure to state a claim on which relief can be granted. Because we affirm the trial court's order on this basis, we need not address Plaintiff's appeal from the denial of her motion for a preliminary injunction or Defendant's alternative arguments concerning sovereign and governmental immunity, which Plaintiff maintains were not properly preserved for appeal.

AFFIRMED.

Judges STEELMAN and INMAN concur.

STATE OF NORTH CAROLINA
v.
ZEBEDEE BROWN

No. COA14-67

Filed 3 March 2015

1. Constitutional Law—right to counsel—forfeiture of right

The trial court did not err by failing to appoint counsel for pro se defendant. Defendant forfeited his right to the assistance of counsel because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel.

2. Aiding and Abetting—acting in concert—robbery with dangerous weapon—no plain error review

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charges. Although defendant argued that the acting in concert instruction was "defective," defendant acknowledged that he did not object to the instruction, and he denied that he was seeking plain error review of the instruction. Thus, the Court of Appeals did not address whether the trial court committed plain error with respect to the instruction on acting in concert.

Appeal by defendant from judgments entered 28 June 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Iain M. Stauffer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant Zebedee Brown was convicted of multiple counts of robbery with a dangerous weapon ("RWDW") arising out of a string of robberies that took place in 2011. On appeal, defendant primarily argues that the trial court erred in allowing defendant to proceed pro se. However, because defendant engaged in repeated conduct designed

to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, we hold – cons1istent with the opinions in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282 (2011), and *State v. Mee*, ___ N.C. App. ___, 756 S.E.2d 103 (2014) — that defendant forfeited his right to the assistance of counsel. Consequently, the trial court did not err in failing to appoint counsel for defendant.

Facts

The State's evidence tended to show the following facts. On 12 September 2011, three individuals, including defendant and Tamarquis Merritt, entered an internet sweepstakes business at J&W Business Center in Greensboro, North Carolina and robbed it. The individuals' faces were covered, and one of them pointed a gun at the employee and demanded money. The individuals took about $900.00 in cash and ran out of the store.

On 17 September 2011, another internet sweepstakes business on Cone Boulevard in Greensboro was robbed by two individuals wearing masks. One of the robbers had dreadlocks and pointed a gun at an employee of the business and demanded money. The robbers took between $4,000.00 and $5,000.00.

On 27 September 2011, Mr. Merritt, defendant, and another individual robbed Lucky Nine Sweepstakes in Greensboro. Two of the robbers were wearing hoodies and masks, and one of the masked robbers had dreadlocks. That robber pointed a gun at a Lucky Nine employee and demanded money. The robbers took about $1,000.00 from Lucky Nine.

On 3 October 2011, Mr. Merritt, defendant, and two other men went to the Click It Internet Sweepstakes in Greensboro at night. Mr. Merritt knocked on the front door and, after an employee, Paul Beal, unlocked it, defendant and two other men rushed in from behind Mr. Merritt into the business. Defendant and the other men wore masks and hoodies, and each one carried a gun. While inside Click It, one armed robber directed Mr. Beal to go behind the counter, and the robbers took between $7,000.00 and $9,000.00 in cash. Another one of the armed men pointed the gun at another employee, Larry Beal, forcing him to hand over the money in his pockets, as well as his cell phone. Two of the men also took money and cell phones from two customers, Mitchell Baker and Barry Gregory, before the robbers left.

On 15 October 2011, Mr. Merritt, defendant, and two other men went to Wendover Internet Services around 2:00 a.m. Mr. Merritt knocked on the door, and, after an employee, Lori Tuttle, unlocked and opened the

door, defendant and the other two men rushed in behind Mr. Merritt. Defendant and the other two men were wearing masks and each carried a gun. Everyone in the store was forced to lie down on the floor. Before leaving, one of the armed robbers took $1,200.00 from the business and a handgun belonging to Ms. Tuttle, while another took a purse belonging to a customer, Jolenda Morgan. At the time of the robberies, Mr. Merritt did not have dreadlocks.

Defendant was arrested and charged with nine counts of RWDW, among other charges. Prior to trial, on 5 March 2013, defendant had a hearing before Judge Richard W. Stone in the Guilford County Superior Court concerning his right to counsel for the charges of RWDW. Judge Stone concluded that defendant waived his right to court-appointed counsel in connection with the RWDW charges. On 11 March 2013, defendant and Anne Littlejohn, defendant's counsel for other charges, appeared before Judge Ronald E. Spivey in Guilford County Superior Court concerning Ms. Littlejohn's motion to withdraw as defendant's counsel. Judge Spivey ordered a forensic evaluation of defendant before he would rule on Ms. Littlejohn's motion. Following the evaluation, defendant was found competent to proceed pro se. After a hearing on 8 April 2013, Ms. Littlejohn's motion to withdraw was allowed, and defendant declined all counsel.

On 25 June 2013, defendant appeared without counsel before Judge David L. Hall in Guilford County Superior Court for jury selection. At that hearing, defendant requested standby counsel, but Judge Hall denied that request and ruled that defendant had forfeited his right to proceed with any counsel.

Defendant was tried for nine counts of RWDW. At the close of the State's evidence, defendant made a motion to dismiss that the trial court denied. Defendant then put on two witnesses, and the State presented a rebuttal witness. At the close of all the evidence, defendant renewed his motion to dismiss, which the trial court again denied. The jury returned guilty verdicts for six robbery charges -- for robbing Paul and Larry Beal, Mr. Baker, Mr. Gregory, Ms. Tuttle, and Ms. Morgan -- and "not guilty" verdicts for the other three charges.

On 28 June 2013, Judge Hall sentenced defendant to four consecutive terms of 90 to 120 months imprisonment and two additional terms of 90 to 120 months imprisonment to be served concurrently with the last consecutive term of imprisonment. Defendant gave oral and written notice of appeal. On or about 28 August 2013, the trial court entered

corrected judgments setting the maximum term of imprisonment as 117 months for each sentence.

I

[1] Defendant argues that he is entitled to a new trial because the trial court erroneously allowed him to proceed pro se in violation of his Sixth Amendment rights. Defendant first contends that the trial court erred in finding that he waived his right to counsel. "The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). "Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). Consequently, mere "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.*

On 5 March 2013, defendant had the following exchange with Judge Stone regarding whether defendant wished to have court-appointed counsel:

> THE COURT: Well, . . . let me interrupt you, Mr. Brown. Can you tell me whether or not you want a lawyer appointed to represent you?
>
> THE DEFENDANT: No. I am my proper self. I do not need no representation.
>
> THE COURT: You do not want a lawyer to represent you on these other charges.
>
> THE DEFENDANT: That's correct.
>
> THE COURT: Okay. You're charged with assault on a female that's punishable by up to 150 days in prison, assault by strangulation that's punishable by up to --
>
> Is the date of the offense before December 1?
>
> THE DEFENDANT: I object --
>
> THE COURT: If so --
>
> THE DEFENDANT: -- no proceeding of any kind shall be --

THE COURT: Just a moment. Just a moment.

. . . .

THE COURT: Okay. So . . . you're facing a maximum sentence of 39 months on assault by strangulation. Robbery with a dangerous weapon is a Class D felony. You're facing a maximum sentence of 204 months on that charge. In the -- you have another charge -- you have two -- three more charges of robbery with a dangerous weapon. Each of those is punishable by up to 204 months. You are also charged with a Class H felony of larceny, which is punishable by up to 39 months; and a conspiracy to commit robbery with a dangerous weapon, a Class E felony punishable by up to 88 months. And all those charges could run consecutive to one another.

You're entitled to have a lawyer represent you. If you can't afford a lawyer, I'll appoint a lawyer. Obviously, you've got a lawyer appointed on the other charges, Mr. -- Mr. Brown. I suggest you have a lawyer. I believe you need a lawyer.

THE DEFENDANT: I object, Your Honor.

THE COURT: But if you don't want a lawyer, I can't make you take one. Are you going to waive your right to a lawyer?

THE DEFENDANT: I object, Your Honor. I am waiving no rights.

THE COURT: You are waiving no rights? Do you want a lawyer or not?

THE DEFENDANT: I -- I shall -- by -- I am sequestering (sic) Islamic council and a blue-ribbon jury.

THE COURT: Okay. Well, I understand what you're requesting, but --

THE DEFENDANT: A jury of my own peers.

THE COURT: -- do you want a lawyer appointed or not?

THE DEFENDANT: I do not. I am in proper persona sui juris in my own proper person competent enough to handle my own affairs, Your Honor.

THE COURT: Well, do you want a lawyer appointed to help you with that or not?

THE DEFENDANT: I object, Your Honor. I am a proper persona sui juris in my own proper person --

THE COURT: Just answer yes or no; do you want a lawyer appointed? You -- you can say no. It doesn't -- it's not going to hurt my feelings. Sir, do you want a lawyer appointed or not?

THE DEFENDANT: I'm in proper persona sui juris competent enough to handle my own affairs, Your Honor.

THE COURT: Does that mean you want a lawyer or does that mean you don't want a lawyer?

THE DEFENDANT: It means I'm in proper persona sui juris competent enough -- over the age of 21 years old competent enough to handle my own affairs. For the record, let the record show —-

THE COURT: Mr. Brown, I'm not -- I understand all that, but you're facing what in effect is the remainder of your natural life in prison, so . . .

THE DEFENDANT: Okay. Your Honor, no proceeding of -- for the record, let the record show that --

THE COURT: No. Well, I'm -- I'm not asking you that.

THE DEFENDANT: -- no proceeding of any kinds (sic) shall be implemented without first presenting documentary proof of nationality and delegation of order of authority --

THE COURT: Okay.

THE DEFENDANT: -- for any establishment of jurisdiction --

THE COURT: It sounds to me like your client doesn't want --

THE DEFENDANT: -- for a natural-born title not to -- National based on the artifacts.

. . . .

THE COURT: Okay. It sounds like Mr. Brown does not want a lawyer appointed and wants to -- to represent himself on those matters.

THE DEFENDANT: I -- I object. I am not representing myself. I am myself, Your Honor. I am in proper persona sui juris in special appearance in my own proper person competent enough to handle my own affairs.

THE COURT: Well, I have no idea what that -- most of what that means, Mr. Brown. I'm just --

THE DEFENDANT: That means that I'm not a Negro --

THE COURT: I'm not asking you what it means. I'm just telling you I don't understand what you're saying, so you've got to -- you've got your own vocabulary going on in your brain; nothing I can do about that.

THE DEFENDANT: I object, Your Honor. This is --

THE COURT: I'm not a -- I'm not a scientist, so I'm going to find that you do not want a lawyer to represent you and that you've waived counsel.

Anything else at this time?

. . . .

THE DEFENDANT: I object. I have no counsel. I have not seen the Islamic council. I have not seen a blue-ribbon jury of my own peers.

THE COURT: Okay.

THE DEFENDANT: And no -- no proceeding -- no proceeding of any kind should be implemented without first presenting documentary proof of nationality and delegation of order of authority before any establishment of jurisdiction for a natural-born title National based on the artifacts. I am a Moorish American.

At a hearing on 12 March 2013 in Guilford County Superior Court, Judge Spivey heard a motion to withdraw from Ms. Littlejohn who was representing defendant on charges other than the RWDW charges. At that hearing, Ms. Littlejohn stated that defendant wished her to withdraw and, although no forensic psychological evaluation had been done on defendant, Ms. Littlejohn believed defendant could proceed

on his own. Shortly thereafter, when the district attorney and Judge Spivey were discussing the court calendar, defendant interjected: "Um, anybody who feels that they still represent me, I hereby announce them fired."

After Judge Spivey responded that he would file documents with the Clerk of Court that defendant had brought with him to the hearing and that defendant had attempted to file previously, defendant stated, "I do by here refute the fraud. I am not a commercial entity or artificial person. I am a live, living soul over -- natural born sovereign by descended nature, my ancestors being Moroccans, the true birds of this land (unintelligible word) title, and I do hereby announce that I am a mortal (phonetic) American natural born sovereign." The court then responded that after a forensic psychiatric evaluation, the court would take up Ms. Littlejohn's motion to withdraw.

At a hearing on 8 April 2013, following an evaluation that indicated that defendant was competent to proceed to trial, Judge Spivey heard Ms. Littlejohn on her motion to withdraw. Ms. Littlejohn informed the trial court that defendant "cannot acknowledge authority of the courts . . . [which] extend[s] to appointed counsel as well[,]" as part of his beliefs. Judge Spivey stated: "The representation is he wishes to proceed representing himself and decline all counsel from the court; is that correct?" Defendant then responded, "I would tell Your Honor, I am myself . . . in persona, so therefore I do not represent myself. I am myself." Judge Spivey ultimately granted Ms. Littlejohn's motion to withdraw, finding that defendant had previously been allowed to waive counsel in other proceedings and finding that he was competent to waive counsel in this case.

During jury selection on 25 June 2013 before Judge Hall, defendant declared: "I do not recognize anything that this court is doing. No . . . proceedings of any kind may be implemented without first presenting delegation of authority," and "I do not recognize anything that this court is doing. The DA has not presented delegation of authority order." Defendant stated that he did not have "Islamic counsel" and that he did not "have the capacity [to represent myself] because I do not understand, I do not recognize anything that's going on." Defendant objected or interjected on similar grounds, refusing to acknowledge the trial court's authority to proceed, at least 17 other times throughout the 25 June 2013 hearing.

During the hearing, Judge Hall ruled that defendant had forfeited his right to counsel. At the end of the hearing, defendant made a request

for standby counsel that Judge Hall took under advisement but ultimately denied.

In *Leyshon*, 211 N.C. App. at 514, 710 S.E.2d at 286, this Court addressed a defendant's claims that he was appointed counsel against his wishes and that he did not waive his right to have assistance of counsel. At trial in that case,

> [t]he transcript shows that Defendant refused to answer whether he waived or asserted his right to counsel, and he made contradictory statements about his right to counsel. During the hearing, Defendant clearly stated, "I'm not waiving my right to assistance of counsel," "I want to retain my right to assistance of counsel[,]" and "I'm reserving my rights." Yet, in the same hearing, Defendant also said "I don't need an attorney[,]" "I refuse his counsel[,]" and "I'll have no counsel" at trial. Furthermore, although Defendant argues in his brief that "[t]he Court determined at the initial proceeding of July 19, 2007 that Defendant could proceed without a lawyer," Defendant refused to sign the waiver of counsel form filed on 19 July 2007, and the trial court noted on the waiver form that Defendant "refused in open court to sign."

Id. at 517, 710 S.E.2d at 287. Based on those statements, this Court held that defendant did not unequivocally waive his right to counsel, and the trial court did not err in appointing counsel for the defendant. *Id.*

Here, when asked whether he wanted a lawyer to represent him, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements refusing to answer whether he waived his right to counsel were similarly equivocal to the defendant's statements in *Leyshon*, and we, therefore, hold that defendant did not waive his right to counsel.

The State, nonetheless, argues that defendant forfeited his right to counsel as did the defendant in *Leyshon*. Despite the lack of a waiver of counsel in *Leyshon*, this Court held:

> Defendant . . . obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court twice advised Defendant of his right to assistance

> of counsel and repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." Even after the court explained the basis of its jurisdiction, Defendant would not state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. Defendant adamantly asserted, "I'm not waiving my right to assistance of counsel," but he also verbally refused the assistance of the attorney appointed by the trial court. At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. Instead, Defendant maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." Based on the evidence in the record, we conclude Defendant willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings.

Id. at 518-19, 710 S.E.2d at 288-89 (footnote omitted).

Here, in addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements to the effect that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about three and a half months he never did obtain counsel. We conclude that defendant's behavior, similar to the defendant's behavior in *Leyshon*, amounted to willful obstruction and delay of trial proceedings and, therefore, defendant forfeited his right to counsel. *See also Mee*, ___ N.C. App. at ___, 756 S.E.2d at 113-14 (upholding forfeiture where "defendant appeared before at least four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was briefly represented by an assistant public defender, refused to indicate his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and

claimed not to understand anything that was said on a subject other than jurisdiction. When the case was called for trial, defendant refused to participate in the trial.").[1]

II

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the RWDW charges because the evidence did not show that defendant personally took the personal property of another. Defendant acknowledges that "a defendant can be convicted of armed robbery under acting in concert," but contends that "the court must properly instruct the jury on acting in concert in order for the conviction to be upheld based on that theory." Defendant then asserts: "When the trial [court] fails to properly instruct the jury on acting in concert, the defendant's convictions can only be upheld if the evidence shows that the defendant 'personally committed each element' of the offense[,]" quoting *State v. Roberts*, 176 N.C. App. 159, 163-64, 625 S.E.2d 846, 850 (2006). This is a misleading citation of *Roberts*.

In *Roberts*, this Court held simply:

> The jury was instructed it could find defendant guilty of first degree sexual offense only if he employed or displayed a dangerous or deadly weapon. *Without an instruction on acting in concert* or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense.

Id. at 164, 625 S.E.2d at 850 (emphasis added). *Roberts* is limited solely to the situation in which the trial court has given no instruction whatsoever on acting in concert or aiding and abetting. *See also State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (noting that "in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense").

---

1. While defendant relies upon *State v. Wray*, 206 N.C. App. 354, 698 S.E.2d 137 (2010), that appeal presented an issue not raised in this case: whether the defendant was competent to represent himself under *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008). *See Wray*, 206 N.C. App. at 371, 698 S.E.2d at 148 (after concluding that the record raised questions about defendant's competence to represent himself, holding: "We are well aware that the trial court may not have had the benefit of the U.S. Supreme Court's decision of *Indiana v. Edwards*. On the facts of this record, we conclude that the trial court erred by granting defense counsel's motion to withdraw and in ruling that Defendant had forfeited his right to counsel.").

Defendant cites no authority -- and we know of none -- supporting his position: that even when a jury is instructed on acting in concert, that theory cannot be considered with respect to the sufficiency of the evidence to defeat a motion to dismiss if the trial court made any error in the acting-in-concert instruction. *See State v. Taft*, ___ N.C. App. ___, 738 S.E.2d 454, 2013 WL 602999, at *5, 2013 N.C. App. LEXIS 160, at *13, (unpublished) ("After reviewing the arguments and applicable case law, we find a distinction between the cases cited by defendants in which the trial court failed or refused to give an acting in concert instruction and there was otherwise insufficient evidence to support the convictions, and the case presently before this Court, where the trial court mistakenly issued the wrong instruction but there is otherwise sufficient evidence to support the convictions . . . ."), *appeal dismissed and disc. review denie*d, ___ N.C. ___, 743 S.E.2d 200 (2013).

Here, after instructing the jury on the elements of RWDW and indicating that the elements would be the same for each of the nine counts, the trial court then instructed the jury:

> Ladies and gentlemen, for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose *to commit robbery with a dangerous weapon*, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon, or as a natural or probable consequence thereof.

(Emphasis added.) The trial court, therefore, specifically instructed the jury regarding the doctrine of acting in concert in connection with the charges of RWDW. Therefore, *Roberts* is inapplicable.

While defendant spends a significant portion of his brief setting out his contentions as to why this acting-in-concert instruction was "defective," defendant acknowledges that he did not object to the instruction, and he denies that he is seeking plain error review of the instruction. Instead, he asserts in his reply brief: "The issue in this case is not that the trial court failed to give a proper acting in concert instruction to the jury." Consequently, we do not address whether the trial court committed plain error with respect to the instruction on acting in concert. *See*, *e.g.*, *State v. Hill*, ___ N.C. App. ___, ___, 741 S.E.2d 911, 916 ("Since defendant does not argue that the trial court's purported error should

be reviewed for plain error, we conclude he has waived appellate review of this issue on appeal."), *disc. review denied*, ___ N.C. ___, 747 S.E.2d 577 (2013).

No error.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
RANDY CARTER DAVIS

No. COA14-547

Filed 3 March 2015

1. Evidence—expert witnesses—child sexual abuse—foundation of opinion

In a prosecution arising from the sexual abuse of a child where neither of defendant's experts offered an expert opinion that there exists a "profile" of the victims of child sexual abuse, or whether the victim in this case had characteristics that were consistent with such a profile, the Court of Appeals did not reach defendant's arguments regarding the proper foundation for such evidence, the degree to which experts disagree about the existence of "symptoms" of sexual abuse, or the foundation required for consideration of "unnamed studies of sexual abuse" upon which defendant contends the witnesses relied.

2. Evidence—child sexual abuse—expert witnesses—credibility of victim

The expert witnesses in a prosecution arising from the sexual abuse of a child did not vouch for the victim's credibility. In context, the expert was testifying to a distinction between hallucinations and paranoid delusions, not testifying about the victim's credibility regarding her claim to have been sexually abused. Similarly, another expert testified about the victim's account of sexual abuse by defendant but was not asked for an opinion on the credibility of sexual abuse victims in general or on this victim's credibility. Defendant did not cite any authority for the proposition that a witness who testifies to what another witness reports is "vouching" for that person's

credibility unless each disclosure by the witness includes a qualifier such as "alleged."

3. Criminal Law—sexual offenses against child—instructions—expert witness testimony

An instruction in a child sexual abuse prosecution that the jury could consider the testimony of expert witnesses who had treated the victim to the extent that it corroborated or supported her testimony was not improper.

4. Evidence—sexual abuse—testimony of other victims—prejudice not shown

There was no prejudicial error in a prosecution for the sexual abuse of a child where the trial court admitted the testimony of two witnesses who also claimed abuse, as well as that of the minister of the church attended by defendant and two of the girls. Although defendant argued that the testimony described conduct that was not similar to the charged offenses and that the time interval between the interactions was too great, he failed to show the requisite prejudice and did not preserve his arguments for appeal. It was not necessary to reach a definitive conclusion on his arguments.

5. Sexual Offenses—sexual abuse of children—instructions—use of "victims"

In a prosecution arising from the sexual abuse of a child, the trial court did not err by referring to the complaining witness and a step-sister by the word "victim" during the instructions to the jury. The Court of Appeals case relied upon by defendant was reversed by the North Carolina Supreme Court. It was noted that the best practice would be for the trial judge to modify the Pattern Jury Instruction to read "alleged victim" upon defendant's request.

Appeal by defendant from judgments entered 30 September 2013 by Judge Jeffery Hunt in Cleveland County Superior Court. Heard in the Court of Appeals 20 November 2014.

Attorney General Roy Cooper by Special Deputy Attorney General Robert M. Curran for the State.

Mark Montgomery for defendant-appellant.

STEELMAN, Judge.

Where the testimony of expert witnesses was restricted to their own observations and experiences, their testimony did not constitute expert opinions that the State was required to disclose prior to trial. The trial court did not err or abuse its discretion by allowing the witnesses to testify. Even assuming, *arguendo*, that the trial court erred by allowing witnesses to testify pursuant to Rule 404(b), defendant has failed to show prejudice. The trial court did not err by using the word "victim" to refer to the prosecuting witness during its instructions to the jury.

I. Factual and Procedural Background

On 12 March 2012 Randy Carter Davis (defendant) was indicted for one count of first degree statutory rape of a child under 13, one count of sexual offense of a minor by a person in a parental role, and one count of first degree statutory sexual offense against a child under 13, with respect to G.S.; and for one count of indecent liberties and one count of sexual offense of a minor by a person in a parental role with respect to L.W. The charges against defendant came on for trial at the 23 September 2013 session of criminal superior court for Cleveland County.

A. State's Evidence

G.S. was born in 1976 and was thirty-seven years old at the time of trial. Her mother and defendant began living together when she was three or four years old, and married in 1981. She lived with defendant, her mother and her younger siblings until she was nine years old, cj528when her mother and defendant separated. After defendant and her mother separated, G.S. had occasional weekend visits at defendant's residence until she was 13 years old.

From the time G.S. was three and a half to four years old until she was thirteen, defendant engaged G.S. in sexual activity "every chance he got." Defendant committed more than 100 sexual offenses against her, including masturbation, oral sex and vaginal intercourse. Defendant's conduct ended when G.S. was thirteen and she stopped visiting defendant's residence. G.S. knew L.W., defendant's other step-daughter, but had no contact with L.W. after she was thirteen.

Defendant told G.S. not to reveal these sexual activities, but when G.S. was 16, she told her boyfriend, T.S., that defendant had sexually abused and raped her. She married T.S. when she was 17 and at the time of trial they were still married and had two children. T.S.'s testimony corroborated that of G.S. After 2006, G.S. and her husband attended the same church as defendant and, on one occasion in church, defendant gave G.S. a card stating that he was sorry. In 2011, G.S. told her

pastor "a little bit of what happened" between her and defendant. She later reported defendant's sexual assaults to the Cleveland County Sheriff's Department.

In her teens and twenties, G.S. experienced nightmares and trouble sleeping, and in 2006 she was briefly hospitalized with suicidal thoughts. In the hospital she was treated by Dr. Vikram Shukla, who testified as an expert in child and adolescent psychology. Dr. Shukla treated G.S. with anti-depressant and anti-psychotic medication for alcohol abuse, depression, and psychotic depression. She responded well to treatment, and was no longer psychotic when she was discharged. While G.S. was in the hospital, she told Dr. Shukla that she was sexually abused by her stepfather from age three and a half or four to age thirteen.

Sandra Chrysler testified as an expert in mental health counseling. She began counseling therapy with G.S. in March 2013. During counseling, G.S. described to her the sexual abuse by defendant.

L.W. was born in 1976 and was 6 months older than G.S. When she was eleven years old, her mother married defendant, and she lived with her mother and defendant until she was sixteen or seventeen. For several years, starting when L.W. was thirteen or fourteen years old and after G.S. had stopped visiting defendant's residence, defendant frequently talked to L.W. about sexual matters and attempted to engage her in sexual activity. Defendant told L.W. that he wanted to be her first sexual partner and asked her to perform oral sex on him. On a number of occasions defendant entered L.W.'s room at night and either masturbated by her bed or tried to physically force her to have sex. L.W. successfully rebuffed these attempts by kicking defendant. L.W. never reported these incidents until she was contacted by a detective in 2011. Once, when L.W. and G.S. were young, G.S. asked her "if anything had ever happened," but L.W. did not want to talk about it, and she was not aware of the sexual contact between defendant and G.S.

A.J., who was twenty-two years old at the time of trial, testified pursuant to Rule 404(b) of the North Carolina Rules of Evidence. When she was 12 or 13 she became acquainted with defendant. Their relationship was that of a "grandparent and grandchild." She knew L.W. from occasional family get-togethers, but did not know G.S. For several years, beginning when A.J. was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. Defendant also told A.J. that when L.W. was younger he discussed sex with her and took sexual pictures of L.W., and offered to do the same for A.J.

S.W., who was eighteen years old at the time of trial, also testified pursuant to Rule 404(b). When she was fourteen, defendant assisted with youth activities at her church. He frequently discussed sexual matters with S.W., asked to be her first sexual partner, and sent an explicit photo to her cell phone. Tracy Marlowe was married to S.W.'s aunt, and knew defendant through church. When S.W. was a teenager she confided to him that she had received suggestive phone messages from defendant.

Greg Neely was the pastor of the church attended by defendant, who was involved in youth activities in the church. In 2011 Pastor Neely met with defendant to discuss his concerns about defendant's conduct with teenage female members of the church, and asked defendant to "back away" from involvement with the young people of the church. Pastor Neely testified that due to "an accumulated amount" of incidents involving defendant and "a gathering of things that brought us to the point to take action," the church later sent defendant a letter informing him that he was banned from the church premises. Defendant did not respond to the letter. S.W. told Pastor Neely about unwanted conversations and text messages from defendant. Pastor Neely also met with G.S., who told him about defendant's abuse, and he encouraged her to go to law enforcement.

Deputy Tracy Curry of the Cleveland County Sheriff's Department interviewed G.S. and L.W. in October 2011, and interviewed A.J. and S.W. in 2012. His account of these interviews corroborated the testimony of the witnesses.

B. Defendant's Evidence

Delores Davis had been married to defendant for over 25 years at the time of trial. Her daughter, L. W., was eleven years old when she and defendant were married. Ms. Davis never saw anything inappropriate about L.W.'s relationship with defendant. G.S. had visited their home and Ms. Davis recalled her as happy and normal. She never saw or heard anything suspicious regarding A.J and defendant. Ms. Davis testified that her husband was never alone with the female witnesses, other than to drive L.W. to school.

Following the presentation of the State's evidence, the charge of sexual offense against L.W. by a person in a parental role was reduced to a charge of attempted sexual offense against L.W. On 30 September 2013 the jury returned verdicts finding defendant guilty of all charges. Pursuant to the Fair Sentencing Act, which governed sentencing for felonies committed between 1 July 1981 and 1 October 1994, the trial court imposed active prison sentences of life in prison for first degree

statutory sexual offense against G.S., life in prison for first degree statutory rape of G.S., and three years for attempted sexual offense against L.W., with these sentences to be served consecutively; and three years for indecent liberties against L.W., and four and a half years for sexual offense against G.S. by a person in a parental role, with the last two sentences to be served concurrently with the first set of offenses.

Defendant appeals.

II. Admission of Expert Testimony

[1] In his first argument, defendant contends that the trial court erred in admitting portions of the expert testimony of Dr. Shukla and Ms. Chrysler. Defendant asserts that these witnesses offered "opinion testimony" that was erroneously admitted without a proper foundation and in violation of discovery statutes, and that the testimony "amounted to expert vouching" for the veracity of the prosecuting witness. We disagree.

A. Standard of Review

Rule 702(a) of the North Carolina Rules of Evidence provides that: "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2013).[1] In addition, N.C. Gen. Stat. § 15A-903(a)[2] provides that, upon motion from the defendant, the trial court must order

> (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted

1. The current version of Rule 702 became effective 1 October 2011, and applies "to actions commenced on or after that date." The date of indictment marks the commencement of a criminal proceeding. *State v. Gamez*, __ N.C. App. __, __, 745 S.E.2d 876, 878-79, *disc. rev. denied*, 367 N.C. 256, 749 S.E.2d 848 (2013) ("[W]e hold that a criminal action arises on the date that the bill of indictment was filed."). Although defendant was tried for offenses committed prior to 1992, he was indicted in March of 2012; thus, the current version of Rule 702 is applicable to his trial.

2. The current version of N.C. Gen. Stat. § 15A-903 became effective 1 December 2011 and applies "to cases pending on that date and to cases filed on or after that date." It is applicable to defendant's trial, as defendant was indicted after 1 December 2011.

> by the expert. The State shall also furnish to the defendant the expert's *curriculum vitae*, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court. . . .

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citing *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986)). Thus, " '[o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence.' " *State v. Ryan*, __ N.C. App. __, __, 734 S.E.2d 598, 604 (2012) (quoting *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) (internal quotation omitted), *disc. rev. denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

"When reviewing the ruling of a trial court concerning the admissibility of expert opinion testimony, the standard of review for an appellate court is whether the trial court committed an abuse of discretion. An '[a]buse 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. Ward*, 364 N.C. 133, 139-40, 694 S.E.2d 738, 742 (2010) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal citations omitted), and quoting *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006) (internal citation omitted).

B. Analysis

At trial, Dr. Shukla testified as an expert in child and adolescent psychology, and Ms. Chrysler testified as an expert in mental health counseling. On appeal, defendant does not challenge the expert credentials of either witness or the admissibility of their testimony regarding their treatment of G.S., including the personal and medical history that she provided. Rather, defendant argues that both witnesses offered their expert opinions on the "symptoms" of sexual abuse, that their expert opinions lacked an adequate evidentiary foundation, and that their opinions were not disclosed to defendant prior to trial as required by N.C. Gen. Stat. § 15A-903(a)(2). Our review of the record and trial transcript does not support defendant's characterization of the testimony of these witnesses.

At trial, defendant argued that the State had not provided the defendant with Dr. Shukla's expert opinion prior to trial, and that Dr. Shukla

should not be permitted to offer an expert opinion on the characteristics of sexual abuse or the reasons for delayed reporting of abuse. The trial court ruled that Dr. Shukla could testify to his own observations in these areas, but could not offer an expert opinion on these issues. The trial court thus sustained defendant's objections to questions concerning Dr. Shukla's opinion on matters such as the characteristics of child sexual abuse victims. Defendant concedes on appeal that at trial the prosecutor couched her questions to Dr. Shukla in terms of his own observations.

Dr. Shukla testified that in treating more than 1000 patients who reported sexual abuse, he had observed a wide range of responses to sexual abuse. He testified that the responses of individuals to traumatic experiences such as sexual abuse or wartime atrocities varied greatly depending on the individual's genetic makeup and his or her personal experiences. He did not testify that there was any single set of "symptoms" of past sexual abuse, or a common "profile" of victims of sexual abuse. Dr. Shukla was not asked whether G.S. displayed "symptoms" or characteristics that, in his opinion, were consistent with a history of sexual abuse, and he did not volunteer testimony to this effect. We conclude that Dr. Shukla did not testify that there is a specific constellation of characteristics of sexual abuse victims, did not opine on whether G.S. met such a profile, and did not offer an expert opinion of the type that was required to be disclosed under N.C. Gen. Stat. § 15A-903. As a result, the trial court did not err or abuse its discretion by admitting Dr. Shukla's testimony.

At trial, defendant objected to Ms. Chrysler's testimony upon the same grounds as Dr. Shukla's. The trial court limited Ms. Chrysler's testimony, ruling that she could only testify about the characteristics of sexual abuse victims and delayed reporting of sexual abuse based on her own experience as a mental health counselor, but could not offer expert testimony "as to profiles" of sexual abuse victims. Ms. Chrysler testified in general terms that, in her observation and experience, victims of childhood sexual abuse might have difficulty trusting others, might experience anxiety, depression, or feelings of guilt or shame about the abuse, and that sexual abuse could be a "trigger" for various mental illnesses, including bipolar disorder, agoraphobia, and depression. In her observation and experience, victims of sexual abuse often delayed reporting the abuse. In addition to testifying about her general observations regarding victims of sexual abuse, Ms. Chrysler testified extensively about her treatment of G.S. However, she was not asked, and did not volunteer, testimony that G.S. exhibited characteristics that fit a "profile" of sexual abuse victims, or that her "symptoms" were consistent with a history

of sexual abuse. We conclude that, because Ms. Chrysler's general testimony about sexual abuse victims was limited to her own observation and experience, it did not constitute an expert opinion that had to be disclosed in advance of trial, and that the trial court did not err or abuse its discretion by admitting Ms. Chrysler's testimony.

Because we hold that neither Dr. Shukla nor Ms. Chrysler offered an expert opinion that there exists a "profile" of the victims of child sexual abuse, or whether G.S. had characteristics that were consistent with such a profile, we do not reach defendant's arguments regarding the proper foundation for such evidence, the degree to which experts disagree about the existence of "symptoms" of sexual abuse, or the foundation required for consideration of "unnamed studies of sexual abuse" upon which defendant contends that the witnesses relied in reaching their expert opinions.

[2] We also reject defendant's argument that Dr. Shukla and Ms. Chrysler "vouched" for G.S.'s credibility. Regarding the specific testimony of Dr. Shukla, defendant contends that Dr. Shukla testified that he was "able to distinguish a true from a false belief," thus suggesting that Dr. Shukla testified to the veracity of G.S.'s reports of abuse. However, the testimony to which defendant refers occurred during his cross-examination of Dr. Shukla regarding G.S.'s sense that she had a shadow over one shoulder:

> Q. I believe you testified that she had a persistent fear, an imaginary perception that something was on her, physically on her, right? Isn't that what you said?
>
> A. . . . My understanding, objectively, professionally, is she had a paranoid sense of presence on her.
>
> Q. Something behind her left shoulder?
>
> A. That is correct.
>
> . . .
>
> Q. But that couldn't be true, right?
>
> A. By definition, I have already testified that paranoid delusion is a fixed false belief, and she had a paranoid form of psychotic sign during her depressed state over a long period of time. But paranoid delusion is not the same as hallucination.

> Q. So she had a paranoid delusion, which is what you described to the jury as a fixed yet false belief.
>
> A. Yes, that is correct.
>
> Q. And you can't, as a psychiatrist, distinguish between hallucinations and paranoid delusions, true beliefs, false beliefs. You can't make that distinction, can you?
>
> A. In fact, yes, I can.

As the context makes clear, Dr. Shukla was testifying to a distinction between hallucinations and paranoid delusions, and not testifying about G.S.'s credibility regarding her claim to have been sexually abused.

Defendant also argues that in their testimony about the treatment of G.S., both Dr. Shukla and Ms. Chrysler vouched for G.S.'s credibility. We disagree. Dr. Shukla testified that G.S. told the health care providers in the hospital that she had been sexually abused, and that the treatment provided in the hospital improved G.S.'s ability to discuss her past. Dr. Shukla was not asked for an opinion regarding G.S.'s credibility. Similarly, Ms. Chrysler testified about G.S.'s account of sexual abuse by defendant. However, she was not asked for an opinion regarding either the credibility of sexual abuse victims in general or on G.S.'s credibility.

Defendant acknowledges that neither witness ever testified that he or she believed G.S. or that her behavior was consistent with credibility. Defendant's argument that Dr. Shukla and Ms. Chrysler vouched for G.S.'s credibility appears to be based primarily on the fact that they testified about the problems G.S. reported without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." For example, Dr. Shukla testified without objection that G.S. reported the following mental health issues:

> The problems she reported were inability to cope with her past, inability to cope with dysfunctional childhood, and inability to cope with approximately ten years of sexual molestation she went through with one person, and she was having difficulty coping with the nightmares that she was experiencing, and flashbacks she was experiencing as a product of the sexual molestation.

Similarly, Ms. Chrysler testified to G.S.'s account of sexual abuse by defendant over a period of many years. Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be "vouching" for that person's

credibility unless each disclosure by the witness includes a qualifier such as "alleged." We decline to impose such a requirement.

Defendant also contends that both Dr. Shukla and Ms. Chrysler testified that "patients they had treated over the years were in fact sexual abuse victims," and that G.S. "displayed [the] characteristics" of a typical victim of child sexual abuse. Defendant does not cite to a specific transcript reference for this assertion, and our review of the transcript indicates that neither expert testified that his or her patients "were in fact sexual abuse victims" or that G.S. matched a profile that was characteristic of sexual abuse victims.

[3] Defendant also challenges the trial court's instruction to the jury that it could consider the testimony of Dr. Shukla and Ms. Chrysler to the extent that it corroborated or supported G.S.'s testimony. We conclude that the instruction was not improper.

For the reasons discussed above, we hold that the trial court did not err by admitting the testimony of the expert witnesses. This argument is without merit.

III. Admission of 404(b) Evidence

In defendant's second argument, he argues that the trial court erred by admitting the testimony of S.W. and A.J. pursuant to North Carolina Rule of Evidence 404(b). Defendant asserts that this testimony was evidence only of his propensity to commit the acts for which he was on trial, and thus was inadmissible. We conclude that even assuming, *arguendo*, that this testimony was erroneously admitted, defendant has failed to show prejudice.

A. Standard of Review

N.C. Gen. Stat. § 8C-1, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." "Rule 404(b) is 'a clear general rule of inclusion.' . . . [Rule 404(b) evidence] 'is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime.' " *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (quoting *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990), and *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995)). In addition, "if the trial court concludes the evidence is relevant to something other than the defendant's propensity to commit the

crime, as well as sufficiently similar and temporally related to the crime charged, the evidence may be excluded under Rule 403 if the trial court determines that admission of the evidence would result in unfair prejudice, confusion of the issues, or would mislead the jury. N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Noble*, __ N.C. App. __, __, 741 S.E.2d 473, 480, *disc. review denied*, 367 N.C. 251, 749 S.E.2d 853 (2013).

"[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. "In addition, 'this Court has been markedly liberal in admitting evidence of similar sex offenses by a defendant.' " *Id.* at 131, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987) (internal citation omitted).

B. Analysis

[4] As discussed above, the trial court admitted the testimony of two witnesses pursuant to Rule 404(b). A.J. testified that for several years, beginning when she was about twelve, defendant frequently discussed sexual matters with her, made comments about her breasts, and offered advice on sexual subjects. S.W. testified that when she was fourteen, defendant frequently discussed sexual matters with her, asked to be her first sexual partner, and sent an explicit photo to her phone. In its ruling allowing the testimony of S.W. and A.J., the trial court found that:

> [1.] The Court finds the testimony of the witnesses [G.S. and L.W.] the alleged victims, covers a time period throughout the 1980's beginning in 1981. Further, that testimony of witness [A.J.] occurred in the year 2000[.] . . . Testimony of [S.W.] occurred over a period from 2009 through 2011, into 2011[.]
>
> [2.] [S]triking similarities exist in testimony of [the four witnesses], . . . [and] threads of commonality run through each of these witnesses' testimony;
>
> [3.] . . . [I]n each instance the alleged victims were young females from age eleven through sixteen[.] . . . [G.S.'s] victimization may have occurred, may have started at

> an earlier age. Nevertheless, successful intercourse, in her case, was alleged to have started at approximately age twelve.
>
> [4.] In each instance the victims were alone with the Defendant, either in a room or a vehicle. In each instance the Defendant used his position of authority, or perceived authority, to commit his acts upon the victims, witnesses, in [G.S. and L.W.] the position of stepfather, in [A.J.] the perceived position of grandfather, and in [S.W.] the position of youth director.
>
> [4.] In each instance the Defendant's acts and his discussions involved his sexual arousal or gratification, or his fascination with sex and his victims' sexuality.
>
> [5.] In each instance, the Defendant seemed obsessed with being the first to engage in vaginal intercourse with his victims, and in [G.S.] the victim at age twelve, and [L.W.] the attempts with the victim at age thirteen, and [A.J.] offers to engage in sex and teach about sex at ages thirteen and fourteen for the victim, that period, and in [S.W.] at age fourteen the Defendant allegedly told her he wanted to be the — he wanted to take her virginity.
>
> [6.] Next, as to the testimony of [all four witnesses], in each instance the Defendant exploited his position of authority and trust to conduct a quote, "how-to," unquote, instruction involving sex to these young girls, either through actual physical violations or through discourse, or by both.
>
> [7.] Next, the Defendant used the subterfuge of the quote, "trusted instructor," unquote, role to engage in preparation of his victims in each instance, for his subsequent criminal sexual behavior with each victim and witness.

Defendant does not challenge the evidentiary support for the trial court's findings of fact. As a general rule, "[f]indings of fact which are not challenged 'are presumed to be correct and are binding on appeal. We [therefore] limit our review to whether [the unchallenged] facts support the trial court's conclusions.' " *State v. Labinski*, 188 N.C. App. 120, 124, 654 S.E.2d 740, 743 (2008) (quoting *State v. Eliason*, 100 N.C. App. 313, 315, 395 S.E.2d 702, 703 (1990) (internal citations omitted). Moreover, our

review shows that the trial court's findings were supported by competent evidence. Based on its findings, the trial court concluded:

> 1) That the evidence of [G.S., L.W., S.W., and A.J.] is strikingly similar;
>
> 2) That the – rather than being too remote in time from one another as to run afoul of Rule 403 analysis, in this case the temporal proximity analysis actually reveals a commonality connecting the Defendant's criminal sexual conduct stretching over a period of approximately thirty years, involving at least four young girls from the ages of eleven through sixteen;
>
> 3) That the Court in its discretion concludes that the probative value outweighs the possibility of prejudice to the Defendant, pursuant to Rule 403 and 404(b);
>
> 4) Finally, that this Court concludes that the evidence questioned is admissible under 404(b) and 403 to show the Defendant's possible state of mind as to identity, plan, design, preparation, intent, opportunity and motive if the jury so finds.

On appeal, defendant argues that the testimony of A.J. and S.W. described conduct that was not similar to the charged offenses, and that the number of years between the offenses with which he was charged and his interactions with A.J. and S.W. rendered their testimony inadmissible. We conclude that it is unnecessary for us to reach a definitive conclusion on defendant's arguments, given that defendant has failed to show the requisite prejudice.

N.C. Gen. Stat. § 15A-1443 provides that:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. . . .
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a

> reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Defendant argues on appeal that "admission of this testimony denied not only [defendant's] statutory rights, but his constitutional rights to a fair trial." This conclusory statement is unsupported by argument or citation to authority, or even any discussion of the specific nature of the "constitutional rights" at issue. N.C. Rule of Appellate Procedure 28(b)(6) states that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." *See Hackos v. Goodman*, __ N.C. App. __, __, 745 S.E.2d 336, 341 (2013) ("Plaintiff cites no authority in support of this conclusory statement, and fails to make any actual argument in her brief as required by N.C.R. App. P. 28(b)(6), resulting in abandonment of Plaintiff's argument.") (citing *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008)).

Because defendant does not articulate an argument in support of his contention that his "constitutional rights" were violated by admission of the challenged testimony, he has failed to preserve for review the issue of whether admission of the challenged testimony violated his constitutional rights. As a result, we do not reach the questions either of the existence of a constitutional violation or whether the alleged constitutional violation was harmless beyond a reasonable doubt. Instead, we apply the standard set forth in N.C. Gen. Stat. § 15A-1443(a), which requires defendant to demonstrate "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."

Defendant argues that under "the ordinary standard for prejudice, a new trial [is] required." This argument is supported by a single citation, with no discussion or analysis of the application of the standard, or of the language of the quote, to the specific facts of this case. Assuming, *arguendo*, that this issue is preserved for review, we conclude that defendant has failed to show that, in the absence of the testimony of A.J. and S.W., his trial would have had a different result.

In his appellate brief, defendant emphasizes the difference in degree between the charged offenses and the 404(b) testimony:

> "Mr. Davis was charged with repeatedly and forcibly rap[ing] G.S. and attempting to forcibly rape L.W. A.J. testified only that Mr. Davis would make sexual references to her; he never tried to have sex with her. S.W. testified only

> that Mr. Davis complimented her on her breasts, texted her about sex and asked to take her virginity. He never touched her except to hug her."

We agree that the behavior described by A.J. and S.W. was far less egregious than the offenses with which defendant was charged. For that reason, it seems unlikely that admission of this evidence changed the outcome of the trial.

Moreover, defendant fails to offer any appellate argument challenging the admission of testimony by Greg Neely, the pastor at the church attended by defendant, G.S., S.W., and A.J. As discussed above, Pastor Neely testified that (1) both G.S. and S.W. confided in him that they had experienced unwanted sexual interactions with defendant; (2) Pastor Neely discussed with defendant his concerns about defendant's behavior with the young women of the church, and; (3) ultimately Pastor Neely found it necessary to ban defendant from the church premises. In addition, Pastor Neely read to the jury the letter sent by the church to defendant, informing him that he was barred from the church. " '[W]hen, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *State v. Davis*, 353 N.C. 1, 22, 539 S.E.2d 243, 258 (2000) (quoting *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989)). In addition, Pastor Neely's testimony was at least as prejudicial as that of the 404(b) witnesses. Defendant does not argue on appeal that this evidence should have been excluded.[3] We also observe that the testimony of G.S. and L.W. was largely unimpeached and was corroborated by that of other witnesses. We conclude, given the strength of the State's evidence and the unchallenged admission of Pastor Neely's testimony, that defendant has failed to establish that he was prejudiced by the testimony of A.J. and S.W.

IV. Court's Use of the Word "Victim" in Jury Instructions

[5] In his third argument, defendant contends that the trial court committed reversible error by referring to G.S. and L.W. by the word "victim" during its instructions to the jury. Defendant argues that "[t]his case is controlled by S*tate v. Walston*[, __ N.C. App. __, 747 S.E.2d 720 (2013)], in which this Court held that it was prejudicial error for the trial court

3. Defendant notes that the "prosecution presented two additional witness[es] to corroborate S.W.," presumably referring to Lindsay Landers and Tracy Marlowe, who testified that S.W. had told them about receiving suggestive phone messages from defendant. Although Pastor Neely's testimony also included corroboration of S.W., it was not received subject to a limitation restricting its consideration to corroboration.

to refer to the complaining witness as the "victim" in its jury instructions. We agree that *Walston* is controlling, but observe that *Walston* was recently reversed by our Supreme Court. In *State v. Walston*, __ N.C. __, __ S.E.2d __ (2015) (2014 N.C. LEXIS 953), our Supreme Court held that:

> [W]e hold in this case that the trial court did not err in using the word "victim" in the pattern jury instructions to describe the complaining witnesses. We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

Walston, __ N.C. at __, __ S.E.2d at __. Based on *Walston*, we hold that the trial court did not commit reversible error by using the term "victim" to describe the complaining witnesses.

V. Conclusion

For the reasons discussed above, we conclude that the defendant had a fair trial, free of reversible error.

NO ERROR.

Judges GEER and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
GRANT RUFFIN HAYES

No. COA14-766

Filed 3 March 2015

1. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—Confrontation Clause—state of mind—not hearsay

In defendant's trial for first-degree murder, the trial court did not violate the Confrontation Clause by admitting a forensic psychologist's report and testimony concerning her evaluation of defendant during a custody dispute with the victim. The evidence was admitted for the purpose of showing defendant's state of mind, not for the truth of the matter asserted.

2. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—relevancy—state of mind

In defendant's trial for first-degree murder, the trial court did not err by admitting a forensic psychologist's report and testimony concerning her evaluation of defendant during a custody dispute with the victim. Because the report arguably was unfavorable to defendant and was found in his car with handwritten markings throughout, the report was relevant for showing his state of mind toward the victim. In addition, the trial court gave the jury a limiting instruction on this evidence.

3. Homicide—evidence—psychologist's evaluation of defendant and victim—performed before commission of crime—error assumed arguendo—no prejudice

In defendant's trial for first-degree murder, even assuming that the trial court erred by admitting a forensic psychologist's report and testimony, defendant failed to show that in the absence of the alleged error there was a reasonable possibility that the jury would have reached a different verdict. There was abundant other evidence of defendant's guilt.

4. Homicide—evidence—testimony that cause of death was homicide—not commentary on a legal conclusion

In defendant's trial for first-degree murder, the trial court did not err or commit plain error by allowing the State's expert witness

pathologists to testify that the cause of the victim's death was homicide. The pathologists were testifying within their functions as medical examiners and not commenting on a legal conclusion. Even assuming admission of the testimony was error, it was not probable that the jury would have reached a different verdict absent the alleged error. Defendant's own position at trial was that the victim was killed at the hands of another person; the trial court gave a limiting instruction regarding expert testimony; and there was abundant evidence pointing to defendant's guilt.

5. Homicide—evidence—hearsay

In defendant's trial for first-degree murder, a witness did not give inadmissible hearsay testimony by indicating that he had knowledge of certain facts about a witness.

6. Homicide—evidence—hearsay—no plain error

In an appeal from defendant's trial for first-degree murder, even assuming that testimony by a detective about a witness's statements amounted to inadmissible hearsay, a violation of the Confrontation Clause, and an improper bolstering opinion, defendant failed to show plain error. The jury considered other evidence that was essentially the same as the allegedly erroneously admitted evidence and was given a limiting instruction.

7. Appeal and Error—preservation of issues—no request for plain error review

In an appeal from defendant's trial for first-degree murder, the Court of Appeals declined to consider whether evidence was properly authenticated because authentication was not the basis of defendant's objection at trial, and defendant failed to request plain error review.

8. Homicide—evidence—song lyrics—similarity to facts surrounding murder—identity, motive, and intent

In defendant's trial for first-degree murder, the trial court did not err by admitting into evidence song lyrics allegedly authored by defendant. The lyrics shared similarities with the facts surrounding the murder and therefore were relevant to establishing identity, motive, and intent. The probative value of the lyrics substantially outweighed their prejudicial effect to defendant.

9. Homicide—jury request—exercise of discretion by trial court

In defendant's trial for first-degree murder, the trial court's erroneous preemptive instruction regarding review of exhibits and

testimony did not amount to a violation of N.C.G.S. § 15A-1233. When the jury asked whether the transcripts of the trial were available for review, the trial court exercised its discretion in making its ruling.

Appeal by defendant from judgment entered 16 September 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

On 16 September 2013, a jury found defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a fair trial, free from prejudicial error.

I. Facts

Laura Jean Ackerson (the victim) and Grant Ruffin Hayes (defendant) met in March 2007. Thereafter, the two engaged in a domestic relationship, but never married. Two children were born of the relationship, and once defendant and the victim separated, a custody dispute over the children ensued. In late 2009, defendant met Amanda Hayes (Amanda) and they began dating. Defendant and Amanda married in April 2010 and moved into an apartment in Raleigh. The victim lived in Kinston.

On 29 June 2010, the Lenoir County District Court entered a consent order giving temporary physical custody of the children to defendant during the week and to the victim on weekends. As part of their temporary arrangement, the parties agreed to a psychological evaluation by Dr. Ginger Calloway, a forensic psychologist. After evaluating the parties over a period of time, Dr. Calloway issued a report recommending that defendant and the victim share legal and physical custody of the children. Over defendant's objection, Dr. Calloway testified about the contents of her report at trial.

On 12 July 2011, defendant e-mailed the victim to suggest that she see the children for a mid-week visit. The victim drove to Raleigh on 13 July, texting defendant at 4:12 p.m., "I'm leaving the Wilson area now.

I'll call when I get past the traffic. Where will you be in [an] hour or so?" The victim also called defendant, with the last outgoing call occurring at 4:59 p.m. near Crabtree Valley mall "going outbound toward [defendant's] apartment[.]" Chevon Mathes, the victim's friend and business partner, knew that the victim was going to Raleigh and expected a business related call from her at approximately 9:00 p.m., which she never received.

In the early hours of 14 July, defendant bought goggles, trash bags, a reciprocating saw, blades, plastic sheeting, tarp, gloves, bleach, tape, and a lint roller at Wal-Mart and Target in Raleigh. Amanda called her daughter, Sha, later that morning, and Sha took the children to Monkey Joe's, a play center, in Raleigh for most of the day. On 16 July, defendant bought coolers and ice. He also rented a U-Haul trailer and indicated that his destination was Texas. Amanda called Sha and told her that she was going to Texas to see her sister, Karen Berry. Defendant, Amanda, and the children drove to Texas in the U-Haul and arrived at Ms. Berry's house in the late hours of 17 July or early in the morning of 18 July.

On 19 July, defendant bought gloves and bottles of acid from Home Depot. Surveillance cameras captured Amanda dumping some of the bottles in an area near Ms. Berry's residence. Ms. Berry's residence was also located near a creek that was often used for fishing. Ms. Berry testified that defendant and Amanda took her boat into the creek on the night of 19 July. When investigators later searched the creek, they found the victim's decomposed and dismembered body parts. The State's expert witness pathologists testified at trial that the victim's cause of death was "homicide by und[et]ermined means" or "undetermined homicidal violence."

Defendant returned the U-Haul trailer on 20 July and drove with Amanda and the children back to Raleigh. Mathes became concerned about the victim's disappearance and notified law enforcement. After launching an investigation, law enforcement officers searched defendant's apartment on 20 July. In addition to a bleach stain, missing furniture, and cleaning products, they also found lyrics to a song entitled, "Man Killer." The lyrics concerned the first-person killing of a woman by making her bleed and by strangulation. Over defendant's objection at trial, the trial court admitted the song lyrics into evidence.

The State also offered the witness testimony of Pablo Trinidad at trial. Trinidad testified that in July 2011, he was being held in the Wake County Detention Center on federal charges while defendant was being held in the same location for the murder charge. Trinidad stated that

he met defendant because they were housed in the same area. One day, inmates saw defendant's case being discussed on television and wanted to harm him, but Trinidad diffused the situation. Trinidad testified that at some point after this incident, defendant told him that he called the victim and "lured" her to his apartment under the "false pretenses" of settling the custody dispute, "subdued" her with Amanda's help, strangled her, and drove out of state to dispose of the body.

II. Analysis

a.) Dr. Calloway's Report and Testimony

Defendant first argues that the trial court erred by admitting Dr. Calloway's report into evidence and by allowing her to testify about the report. Defendant specifically avers that information about defendant and the victim that was presented in Dr. Calloway's testimony and report was inadmissible under both the North Carolina Rules of Evidence 402, 404, and 802 and the Confrontation Clause of the United States Constitution because it allegedly discussed: 1.) defendant's history of illicit drug use, 2.) defendant having suffered from possible mental illness, 3.) defendant's character for untruthfulness, 4.) Dr. Calloway's opinion that defendant wanted to "obliterate" the victim, 5.) defendant's prior conviction for DWI, and 6.) sympathy for the victim and her good character.

i. Confrontation Clause

[1] We first address defendant's argument that Dr. Calloway's report and testimony violated the Confrontation Clause of the United States Constitution because they contained third party statements from non-testifying witnesses who were not subject to cross-examination. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766, 767 (2010). "The Confrontation Clause bars testimonial statements of witnesses if they are not subject to cross-examination at trial unless (1) the witness is unavailable and (2) there has been a prior opportunity for cross-examination." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005). However, "where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue." *Id.*

After reviewing the record, it is clear that the trial court admitted Dr. Calloway's report and testimony to the extent that it was relevant upon the issue of defendant's state of mind, not for the truth of the matter asserted (see the trial court's limiting instruction below). Accordingly, the third party statements found in Dr. Calloway's report and testimony were not inadmissible on Confrontation Clause grounds. *See id.*

ii. Relevancy and Prejudicial Effect

[2] Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Moreover, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, "where evidence is relevant for some purpose other than proving character, it is not inadmissible because it incidentally reflects upon character." *State v. Anderson*, __ N.C. App. __, __, 730 S.E.2d 262, 267 (2012) (citations and quotation marks omitted). This Court reviews *de novo* the legal conclusion that the evidence is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident within the permissible coverage of Rule 404(b). *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 461 (2013) (citation and quotation marks omitted).

Upon our review of issues arising from Rules 401 and 403, this Court has noted:

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

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

Before Dr. Calloway testified, the trial court provided the jury with a limiting instruction regarding her testimony as to the report:

> Let me -- I need to give the jury some limiting instructions with regard to this testimony. Okay?
>
> Ladies and gentlemen, Ginger Calloway is not here as an expert witness. She is here as a fact witness. And as such, she is permitted to testify about her report, which I believe is State's Exhibit 406. The report itself is in evidence. The report and her testimony about it may be relevant in this trial but only to the extent it may have been read by the victim or read by the defendant or read by both and that it may have had some bearing on either of them or both of them that caused them to form impressions about the upcoming August 15 custody dispute. Therefore, this information should be considered only to the extent that you find it is relevant and it bears upon the state of mind of Grant Hayes or Laura Ackerson or of both of them on or about July 13 of 2011. Otherwise, you may not consider this information for any other purpose. It is not received into evidence to prove the truth or the accuracy of the matters contained in the report but only to the extent that that report, in reviewing it, affected the mind of the victim, the alleged victim, or the defendant. And therefore I caution you and ask you to limit your evaluation of this evidence solely for that purpose.

During jury instructions, the trial court re-emphasized that the jury could only consider Dr. Calloway's report and testimony related to that report for a limited purpose:

> Ladies and gentlemen, State's Exhibit 406, a child custody evaluation report, and testimony from the author of that report was received into evidence for a limited purpose. You may consider that evidence only to the extent that you find it relevant on the issue of Laura Ackerson's state of mind and intentions regarding custody of her children on July 13, 2011, and the state of mind of the defendant on July 13, 2011, as it relates to child custody and to any motive or intent involving the crime charged in this case. You may consider this evidence only for that limited purpose and for no other purpose.

The report and testimony primarily focused on "what [were] [in] the best interests of the children with regard to parental access or custody." In answering this question, Dr. Calloway obtained background information about the relationship between defendant and the victim, met with both of them to "ask them for their concerns generally, and tr[ied] to get some sense of their interaction with each other[,]" and conducted psychological assessments in the form of home visits, behavioral observations, and interaction with the children. The report, which spans over fifty pages, also contains Dr. Calloway's written observations of: defendant's drug use, his possible mental illness, his untruthfulness toward her during the evaluation process, her opinion that defendant desired to "obliterate" the victim's relationship with the children, his prior conviction for DWI, and according to defendant, her sympathy for the victim.

Based on her findings, Dr. Calloway recommended, in relevant part, that both parents share legal and physical custody, both children enter preschool programs that will "compensate for any parental deficiencies exhibited by both parents[,]" defendant obtain a parent coach to help him "provide a greater sense of reassurance and comfort to his children[,]" defendant "be referred to a psychiatrist for evaluation regarding the question of a mood disorder or other possible explanations for the illogical, disturbed thinking he exhibits", random drug screens for both parents, and the court retain oversight over the family.

Thus, the "bad character" evidence purportedly discussed in the report and testimony, whether in fact true or not, was considered by Dr. Calloway in reaching her child custody recommendation. Because Dr. Calloway's report was arguably unfavorable to defendant and the report was found in defendant's car with handwritten markings throughout the document, Dr. Calloway's report and ensuing testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that the report as a whole created some basis for defendant's ill-will, intent, or motive towards the victim.

Although the report incidentally reflected on defendant's character, the probative value of Dr. Calloway's report and testimony substantially outweighed the potential prejudicial effect to defendant. The reflections of defendant's character, which comprised a small portion of the report, were not admitted for the truth of the matters asserted. Rather, they were offered to demonstrate how the resulting recommendations were relevant to defendant's state of mind. Thus, the admission of Dr. Calloway's report and testimony was not error.

iii. Prejudicial Error

[3] Even if we agreed with defendant that the trial court erred by admitting Dr. Calloway's report and testimony, defendant must also show that he was prejudiced by these errors. *See State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) ("To establish reversible error, a defendant must show a reasonable possibility that had the error not been committed a different result would have been reached at the trial."). If "abundant evidence" exists "to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Young*, 302 N.C. 385, 389, 275 S.E.2d 429, 432 (1981) (citation and quotation marks omitted).

Defendant has failed to carry his burden of showing that had Dr. Calloway's report and corresponding testimony not been admitted at trial, a reasonable possibility exists that the jury would have reached a different result. The State presented other abundant evidence of defendant's guilt.

Many witnesses testified to the tumultuous relationship between defendant and the victim, especially with regard to their child custody dispute. While the victim and defendant were in a relationship, defendant mentally and physically abused the victim, and defendant openly expressed his frustration with the high expenses associated with the custody issue and his belief that the victim was "gold digging" and "putting [him] through hell."

On Tuesday, 12 July, defendant e-mailed the victim and offered to let her see the children the next day. On occasion, the victim met defendant at Monkey Joe's, and less frequently, she went to defendant's apartment. Defendant's friend, Lauren Harris, was a manager at Monkey Joe's and allowed the children to play there free of charge. Harris testified that on 13 July, defendant did not bring the children to Monkey Joe's.

Based on phone records and cellular data, defendant and the victim communicated throughout the day on 13 July. The final outgoing call made by the victim on her cell phone was to defendant while she was driving in a direction towards his apartment. Investigators ultimately discovered the victim's car in a nearby apartment complex, which was the location of defendant's prior residence.

At approximately 2:30 a.m. on 14 July, defendant bought an abundance of cleaning materials and tools. Between 10:00-10:30 a.m. that morning, Sha, defendant's step-daughter, took the children to Monkey Joe's after receiving a call from Amanda. Sha remained with the children at Monkey Joe's until nearly 4:00 p.m. At 5:31 p.m., another surveillance video showed defendant at Target purchasing several containers of bleach, paper towels, two sets of gloves, electrical tape, and a lint roller. Amanda then asked Sha to bring her vacuum to their apartment, which she did by 6:00 p.m. Defendant also posted an ad on Craigslist to sell various items in his apartment.

When law enforcement officers later searched defendant's apartment, they noticed a bleach stain on the carpet near the entrance and missing furniture. A load of trash collected from defendant's apartment dumpster also yielded a vacuum cleaner, toilet scrub brushes, bleach containers, respirator mask packaging, gloves, and a bleach-stained towel. DNA on a latex glove contained the victim's DNA profile.

On 18 July 2011, Detective James Gwartney, who was investigating the victim's disappearance, contacted defendant for possible leads. Despite being at Ms. Berry's house in Texas, defendant told Detective Gwartney that he was in Raleigh and provided inconsistent information about his interaction with the victim on 13 July.

Ms. Berry testified that defendant and Amanda took her boat out into the nearby creek on the night of 19 July and were gone for a "couple of hours." Ultimately, divers found a torso, portions of a leg, and a head in the creek, which were later determined to have been the victim's body parts. Ms. Berry also testified that Amanda told her that she was "covering for [defendant]." Just before defendant and his family left the Berry residence, Amanda's niece, who lived at Ms. Berry's house in Texas, observed defendant and overheard him stating, "I don't need an alibi, I was with my family[.]"

At trial, the State's expert witness pathologists could not determine the exact cause of death due to the decomposed remains, but concluded that the victim's death was caused by "homicide by undetermined means." They testified that strangling or stab wounds to the neck area could have caused the victim's death. The State also offered Trinidad's testimony that defendant admitted to committing the crime.

In light of the State's evidence discussed above, even if the trial court erred by admitting Dr. Calloway's report and testimony, any such error was non-prejudicial.

b.) Pathologists' Testimony

[4] Defendant also argues that the trial court erred by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" Specifically, defendant argues that the pathologists' testimony was inadmissible because there were insufficient factual bases for their opinions and the State established no foundation to show that "homicide" was a medical term-of-art. We disagree.

Defendant concedes that we should review this issue for plain error because his attorneys did not object to the admission of the pathologists' testimony at trial. We "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted).

N.C. Gen. Stat. § 8C-1, Rule 704 (2013) states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our Supreme Court has interpreted Rule 704 and drawn "a distinction between testimony about legal standards or conclusions and factual premises." *State v. Parker*, 354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001).

While an expert may provide opinion testimony "regarding underlying factual premises[,]" he or she cannot "testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *Id.* (citation and quotation marks omitted).

The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck,

stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony. *See id.* at 290, 553 S.E.2d at 900.

Assuming *arguendo* that the admission of the pathologists' testimony regarding the victim's cause of death was error, it is highly unlikely that absent the error, the jury probably would have reached a different result. At trial, defendant did not appear to challenge that the victim had been killed. In fact, defendant's theory at trial was that Amanda killed the victim. During opening statements, defendant's attorney stated: "The evidence will show that the death of [the victim] happened in a spontaneous, unpredictable way at the hands of Amanda Hayes. [Defendant] helped clean up the evidence and dispose of the body. That's a serious thing, that's a terrible thing, but it's not murder." During closing arguments, defendant's attorney told the jury:

> The reliable evidence in this case points to Amanda Hayes. . . . She said she hurt [the victim]. . . . Amanda created the body so Amanda was in charge of getting rid of it. . . . Remember she called Sha on the way there and said, 'I need my big sister.' She needed her big sister because she had killed somebody. . . . Amanda Hayes' confession is a reasonable doubt. . . . She didn't say we. She said I, 'I hurt [the victim],' and that's reasonable doubt. . . . It was Amanda's plan because Amanda was responsible for killing Laura.

Moreover, the trial court provided a limiting instruction to the jury about their consideration of expert testimony:

> In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of accuracy and weight and credibility I previously mentioned, evidence of the witness's training, qualifications and experience, or lack thereof; the reasons, if any, given for the opinion; whether the opinion is supported by the facts that you find to exist from the evidence; whether the opinion is reasonable; and whether the opinion is consistent with other believable evidence in the case. You should consider the opinion of an expert witness, but you are not bound by it. In other words, you're not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Thus, defendant's own uncontested position at trial that Amanda killed the victim, the trial court's limiting instruction, and the other aforementioned evidence pointing to defendant's guilt would preclude us from holding that the pathologists' opinion testimony was plain error.

c.) Detective Faulk's Testimony

Defendant next argues that Detective Jerry Faulk's admitted testimony that Trinidad's previous statements to federal agents were consistent with Trinidad's statements to him on 6 August 2012 constituted prejudicial error and plain error. We disagree.

i. Impermissible Hearsay

[5] Defendant's first sub-argument is that a portion of Detective Faulk's testimony constituted impermissible hearsay. We disagree. We review this issue *de novo*. *See State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*.).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2013).

The testimony at issue is the following:

> PROSECUTOR: You had been questioned about the various dates of those articles that were available, apparently, on the internet on those dates. With regard to Pablo Trinidad, you indicated that you interviewed him in June of 2012; is that right?
>
> DETECTIVE FAULK: I believe when they showed me my report, it's actually August.
>
> PROSECTUOR: August 2012?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And prior to that, you were aware that he had been interviewed by other law enforcement agents in a federal debriefing, weren't you?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And at that time that he had given information related to this homicide case and Grant Hayes and information that he had at that time?

DEFENSE COUNSEL: I'm going to object to the multiple layers of hearsay here.

THE COURT: Overruled. Go ahead.

DETECTIVE FAULK: Correct.

PROSECUTOR: And were you aware that the interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?

DETECTIVE FAULK: Correct.

Defendant's argument fails because the prosecutor merely asked Detective Faulk whether he was aware that: 1.) Trinidad had been interviewed by federal agents and 2.) Trinidad had provided information related to this case. Detective Faulk indicated that he had knowledge of such facts, but he did not testify about what Trinidad actually told federal agents. Thus, Detective Faulk's statements above were not hearsay.

ii. Other Hearsay Issues, Confrontation Clause, and Improper Bolstering

[6] Defendant also argues that Detective Faulk impermissibly testified about Trinidad's statements to federal agents because Detective Faulk learned about the contents of Trinidad's statements by way of hearsay. Defendant avers that the admission of this testimony violated the Confrontation Clause of the United States Constitution. He also argues that the characterization of Trinidad's statements to federal agents as "consistent" with his statements to Detective Faulk was an improper opinion serving to bolster Trinidad's credibility. We review these issues for plain error, as asserted by defendant in his brief, because defendant's trial counsel failed to timely object to Detective Faulk's testimony concerning Trinidad's statements to the federal agents.

The relevant portion of Detective Faulk's testimony is the following:

PROSECUTOR: And were you aware that the interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?

DETECTIVE FAULK: Correct.

PROSECUTOR: And did you -- did you have that information available to you before you went to speak with Mr. Trinidad?

DETECTIVE FAULK: Yes.

> PROSECUTOR: And what type of information were you aware that Mr. Trinidad had provided to the federal authorities related to this homicide in January of 2012?
>
> DETECTIVE FAULK: Specifics, I don't recall, but it was consistent with the information that he gave me during my interview.
>
> PROSECUTOR: And during your interview, what information did he provide to you?
>
> DETECTIVE FAULK: It was consistent with his testimony here in court. He said that he had spoken with Grant while locked up with him for a period of a week or two. He said that Grant spoke with him about this case and provided him some details regarding this case, said that Grant told him that -- that he had contacted the victim in this case, Laura Ackerson, and wanted to -- told -- asked to meet with her regarding the children, and he used the term 'lured her to his apartment,' where he and his wife, Amanda Hayes, then killed her, cut up her body, and took her to Texas to dispose of the body.
>
> PROSECUTOR: In -- so basically, that information that he gave you when you spoke with him in August of 2012 was consistent with information that he had provided to the federal authorities back in January of 2012?
>
> DETECTIVE FAULK: Correct.

Even if we presume *arguendo* that Detective Faulk's testimony about the contents of Trinidad's statements to federal agents amounted to impermissible hearsay, violated the Confrontation Clause, and constituted an improper bolstering opinion, defendant has failed to establish plain error.

After reviewing the record, we do not believe that Detective Faulk's testimony by itself tilted the scales and caused the jury to reach its verdict. Notwithstanding the contested portions of Detective Faulk's testimony, Trinidad testified at trial that he met defendant in the Wake County Detention Center in July 2011 and had the opportunity to befriend him. With regard to the homicide, Trinidad testified that defendant told him:

> [the victim] was an unfit mother, that they've been going on a – they've been having a custody battle for some years

> now, going back and forth, and that she was soliciting herself on the internet, she was doing drugs, that she continuously asked for money, and he was just tired of it going back and forth with that. So he said that he placed a call to her and lured her to his apartment, and that's when him and his wife subdued her and strangled her.
>
> Later on after that -- they had dismembered the body, and afterwards they took her on a road trip in -- out of state, out of town, and got rid of the body.

Detective Faulk testified that the information provided by Trinidad to him during their previous interview was consistent with Trinidad's trial testimony. Moreover, the information elicited at trial regarding Trinidad's alleged statements to federal agents was essentially identical to Trinidad's trial testimony and his previous statements to Detective Faulk. Thus, even if Trinidad's alleged statements to federal agents were absent from the jury's purview, the jury nonetheless considered essentially the same evidence.

The jury also heard evidence related to Trinidad's credibility. Trinidad testified with the hope of "hav[ing] some consideration given at some point down the road" for his 21-year sentence for conspiracy to traffic in cocaine and possession of a firearm. Defendant's attorney cross-examined Trinidad at length and in detail with regard to what defendant allegedly told him and focused on the potential unreliability of his testimony based on his incentive to provide evidence for the State. Defendant's attorney also had the opportunity to ask Trinidad questions about his statements to federal agents. Additionally, the trial court provided the jury with a limiting instruction relating to Trinidad's testimony as an interested witness. Based on the foregoing evidence, we reject defendant's argument that the admission of Detective Faulk's testimony regarding Trinidad's statements to federal agents constituted plain error.

d.) Admission of Song Lyrics

Next, defendant argues that the trial court erred by admitting into evidence song lyrics allegedly authored by defendant. We disagree.

i. Authentication

[7] In his first sub-argument, defendant contends that the State presented no sufficient evidence of "authorship" such that "the jury could conclude that [defendant] wrote the lyrics[.]" However, we cannot consider this argument on appeal because authentication was not the basis

of the objection to the entry of the song lyrics at trial (see colloquy below) and defendant does not request this Court to review this issue for plain error.

ii. Relevancy and Prejudicial Effect

[8] Defendant avers, in his second sub-argument, that the song lyrics were not relevant. Even if they were relevant, defendant argues that the probative value of the lyrics was substantially outweighed by its prejudicial effect.

At trial, defendant's attorney objected to the State's introduction of the song lyrics on the following grounds:

> DEFENDANT'S ATTORNEY: We would object, or we did at the bench, on the basis of relevancy, and to the extent there was any relevancy, on 403, the unfair prejudice of that song or that piece of paper that was found in his home would outweigh any probative value. And we also object under due process clause, right to a fair trial.
>
> THE COURT: The Court does find that the probative value outweighs any prejudicial effect and has overruled your objection. The words in the song and also the -- the way in which they're used the jury may find relevant, and therefore the objection is overruled.

The State offered a copy of song lyrics that were found by law enforcement officers during the course of their investigation in "the room that was used as an office studio" in defendant's apartment. Testimony at trial showed that defendant was an aspiring musician and song writer. Detective Faulk testified as to the contents of the song lyrics by reading directly from the lyrics themselves:

> The title is 'Man Killer.' The first line, M and then some information in brackets. Then it goes, 'Give in to me. I want it all. I want your scream and I want your crawl. I'll make you bleed. Fall to the floor. Don't try to plead. That turns me on. I'll take the keys to your car and some more.'
>
> The next portion, 'As the dogs come, try to walk them over. Start your line there, right around her shoulder. As her mom and dad come, walk them away. Tell 'em she died fast. They'll know she wasn't in pain.' The next portion, 'I'm not the one to make you scream. I'm just the one to make you bleed. Don't raise your arms. You can't stop me.

> I'll put my hands on your throat and squeeze.' Then the last line is chorus, 'Hallelujah.'

Pertinent evidence related to the murder charge showed that the victim's car had been potentially moved from defendant's apartment to a nearby apartment complex, the victim had been stabbed, and that defendant told Trinidad he had strangled the victim.

In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant. Accordingly, we do not find error in the admission of the lyrics.

We also note that even if the trial court erred by admitting the song lyrics into evidence, any such error was not prejudicial due to the other abundant evidence of defendant's guilt previously discussed in this opinion.

e.) Jury Instructions

[9] Finally, defendant argues the trial court erred by manifesting a belief that it lacked discretion to allow the jury to review exhibits in the deliberation room and review a portion of a witness's testimony. Defendant avers that the trial court's erroneous preemptive instruction effectively denied the jury an opportunity to make such a request. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1233 (2013):

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other

> evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

N.C. Gen. Stat. § 15A-1233. "To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law." *State v. Garcia*, 216 N.C. App. 176, 178, 715 S.E.2d 915, 917 (2011) (citation and quotation marks omitted).

Even if we assume that defendant preserved this issue for appellate review despite his counsel's failure to object to the trial court's instructions, his argument nonetheless fails.

The trial court, in relevant part, stated the following to the jury during jury instructions: "If you request to see an exhibit, for instance, under the rules of the court, exhibits cannot go back to the jury room. And therefore, I'll have to bring you back out in the courtroom, and we will let you see the exhibit in whatever manner that's appropriate."

Later on during the instructional phase, a juror then asked, "[a]re the transcripts then not available to us?" The trial court responded to the juror's inquiry prospectively:

> We've actually had three court reporters in this case. The testimony of no witness has been transcribed. It's not likely they'd be. When [court reporter #1] takes this down in shorthand, basically, there is no transcript. She or [court reporter #2] or [court reporter #3], any of the three court reporters that we had here, would have to type up the transcript, the testimony, if you ask me to allow you to review testimony. And the rules of the court require that if you make that request, you're required to review the entire testimony of the witness. You can't just say I want to hear the cross-examination of a witness or part of the testimony. It requires that you -- if you consider it, you have to consider all of the testimony of a particular witness if you're interested in that. And, normally, I simply would have the testimony read back to you, and therefore it would take -- you can't just flip through the transcript. It would take — for planning purposes, it would take as

> long as it took a witness to testify, at least, for the court reporter to read back to you the testimony. And she would read question, answer, question, answer, question, answer. So from just -- *I do have the discretion to allow testimony to be reviewed by the jury. I also have the discretion to deny that request. And I'll consider any request that you make on a -- under the circumstances as you present it to me*, but I tell you now that there is no written transcript of any testimony in the case. Hopefully, collectively, you will all remember the important aspects of any witness's testimony, but *if you reach a point where you simply decide we can't make a decision until we hear this again, then let me know, and we'll make an effort to accommodate any reasonable request that you make.*

(emphasis added). We first note that although the trial court erroneously stated that the court rules require that the jury review all, not just parts, of a witness's testimony, and that exhibits cannot go back to the jury room for review, it did not make these comments in response to specific jury requests to review evidence. Thus, the provisions of N.C. Gen. Stat. § 15A-1233 do not apply. Accordingly, defendant's argument that the trial court violated the statute by manifesting a belief that it lacked discretion to allow the jury to review a portion of a witness's testimony and take evidence back to the jury room fails.

In support of his argument that the trial court violated N.C. Gen. Stat. § 15A-1233 by providing a preemptive instruction that denied the jury an opportunity to make any evidentiary requests, defendant relies on *State v. Johnson*. 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004). In *Johnson*, we held that, even in the absence of an actual jury request, the trial court erred by making "pretrial comments [that] could have foreclosed the jury from making a request for . . . testimony or evidence." *Id.* The *Johnson* court found "a failure to exercise discretion" where the trial court instructed, "[t]here is no transcript to bring back there. . . . [W]e don't have anything that can bring it back there to you. . . . Surely one of you can remember the evidence on everything that come [sic] in." *Id.* at 19, 595 S.E.2d at 187.

Unlike in *Johnson*, the trial court's own words in the present case indicated his knowing ability to exercise discretion when ruling on the jury's request to review evidence. Moreover, the trial court here did not preemptively foreclose the jury from making a future request to review evidence. To the contrary, the trial court instructed the jury that although no transcript of the case existed at that moment, it would consider each

request on a case by case basis and attempt to "accommodate any reasonable request" if necessary. Accordingly, the trial court did not violate the provisions of N.C. Gen. Stat. § 15A-1233. Thus, defendant's argument fails.

III. Conclusion

We hold that the trial court did not err by admitting into evidence: Dr. Calloway's report and testimony, the pathologists' testimony that the victim's cause of death was "homicide[,]" and the song lyrics. Moreover, the trial court's jury instructions complied with the provisions of N.C. Gen. Stat. § 15A-1233. Finally, any purported error arising from the admission of Detective Faulk's testimony about Trinidad's statements to federal agents did not amount to plain error.

No prejudicial error.

Judges DAVIS and TYSON concur.

STATE OF NORTH CAROLINA
v.
DERRICK LEE McDONALD

No. COA14-893

\Filed 3 March 2015

Evidence—motion to suppress—drugs—police checkpoint—purpose—reasonableness

The trial court erred in a possession with intent to sell or deliver cocaine and possession of marijuana case by denying defendant's motion to suppress evidence seized from a car at a police checkpoint. Contrary to defendant's assertion, an attempt to increase police presence in an affected area while conducting a checkpoint for a recognized lawful purpose is not akin to operating a checkpoint for the general detection of crime. However, the trial court erred in failing to adequately determine the reasonableness of the checkpoint. The case was remanded so that the trial court could make appropriate findings.

Appeal by defendant by writ of certiorari from order entered 14 July 2011 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 December 2014.

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

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

DAVIS, Judge.

Derrick Lee McDonald ("Defendant") appeals by writ of certiorari from his convictions of possession with intent to sell or deliver cocaine and possession of marijuana. On appeal, he contends that the trial court erred by denying his motion to suppress. After careful review, we vacate the trial court's order and remand for further proceedings consistent with this opinion.

Factual Background

On 11 March 2010, Detective Brett Riggs ("Detective Riggs") with the Charlotte-Mecklenburg Police Department ("CMPD") prepared a written operational plan for a checkpoint ("the Checkpoint") at the intersection of Ashley Road and Joy Street in Charlotte, North Carolina. The Checkpoint was conducted that night from 12:34 a.m. to 1:52 a.m. Every vehicle driving through the Checkpoint was stopped, and the officers asked the driver of each vehicle for his or her driver's license.

During the course of the Checkpoint's implementation, a vehicle in which Defendant was riding in the front passenger seat was stopped. The only other occupant of the vehicle was the driver.[1] When several of the officers approached the vehicle, they detected a strong odor of marijuana emanating therefrom. Defendant opened the front passenger door and exited the vehicle. As he did so, a bag containing 41.4 grams of marijuana, two baggies containing 2.7 grams of powder cocaine, a digital scale, cell phones, and a set of keys all fell out of the vehicle. Defendant was placed under arrest.

On 6 July 2010, Defendant was indicted for (1) possession of a Schedule VI controlled substance; (2) possession with intent to sell or deliver a controlled substance; and (3) possession of drug paraphernalia. On 26 October 2010, Defendant filed in Mecklenburg County Superior Court a motion to suppress all evidence obtained as a result of the traffic stop based on his assertion that the Checkpoint was unconstitutional.

1. The record does not contain the driver's name.

A hearing on Defendant's motion to suppress was heard on 13 July 2011 by Judge Hugh B. Lewis. At the hearing, Detective Riggs testified, in pertinent part, as follows:

> Q. What was the purpose of the license checkpoint?
>
> A. As a driver safety checkpoint, checking for valid driver's license, registration, proper registration on the vehicles coming through the checkpoint.
>
> Q. And was there a proper plan for this checkpoint?
>
> A. Yes, sir. I typed up an operational plan essentially stating that every car that approached the checkpoint would be stopped, the driver would be asked to produce their driver's license.
>
> I had a provision in the ops plan that stated that if a hazard — or if it became a hazard to conduct the check due to weather, circumstances, that it would be cancelled. Additionally if traffic became backed up we would allow all cars to move through until the traffic lightened and then we'd begin checking every car.

During the hearing, the State introduced into evidence the written plan for the Checkpoint prepared by Detective Riggs. The written plan stated that the purpose of the Checkpoint was "[t]o increase police presence in the targeted area while checking for Operators License and Vehicle Registration violations." The plan also detailed the pattern to which the officers would adhere in conducting the Checkpoint:

> Predetermined Pattern: All vehicles coming through the check point shall be stopped unless the Officer in charge determines that a hazard has developed or that an unreasonable delay to motorist [sic] is occurring. At that point all vehicles will be allowed to pass through until the hazard or delay is cleared.

On 14 July 2011, the trial court entered a written order denying Defendant's motion to suppress. Defendant subsequently entered a plea of guilty. The trial transcript did not reflect that Defendant intended to appeal the denial of his motion prior to entering his guilty plea, and no notice of his intention to appeal the motion was contained in the transcript of plea. Defendant was sentenced to 6-8 months imprisonment. The sentence was suspended, and Defendant was placed on 24 months supervised probation.

Defendant then attempted to appeal the order denying his motion to suppress. The State filed a motion to dismiss the appeal on the ground that Defendant had failed to properly preserve his right to appeal the order. In an unpublished opinion filed on 17 July 2012, we dismissed Defendant's appeal without prejudice to his right to seek an evidentiary hearing in superior court for a determination of whether his guilty plea did, in fact, reserve his right to appeal the denial of his motion to suppress. *State v. McDonald*, 221 N.C. App. 670, 729 S.E.2d 128 (2012) (unpublished).

Defendant subsequently filed a motion for appropriate relief, which was heard by the trial court on 1 February 2013. On that same date, the trial court ordered that Defendant's plea transcript be amended to reflect Defendant's intent to appeal the denial of his motion to suppress. Defendant filed a petition for writ of certiorari on 23 December 2013, which this Court granted by order entered 7 January 2014.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, Defendant asserts that the trial court failed to determine (1) the Checkpoint's primary programmatic purpose; and (2) the reasonableness of the Checkpoint.

> When reviewing a motion to suppress evidence, this Court determines whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact support the conclusions of law. If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced. However, conclusions of law regarding admissibility are reviewed de novo.

State v. Jarrett, 203 N.C. App. 675, 677, 692 S.E.2d 420, 423 (citation and internal quotation marks omitted), *disc. review denied*, 364 N.C. 438, 702 S.E.2d 501 (2010). In the present case, the trial court made the following pertinent findings of fact:

> 1. On July 13, 2011, the defense made a motion to suppress the checkpoint and any evidence produced thereafter on the basis that the checkpoint was unconstitutional.
>
> 2. The State called Detective B. Riggs, the arresting officer, as a witness.

3. Det. Riggs testified that he was the officer in charge and that he had developed the operation plan for the checkpoint that took place near the intersection of Ashley Rd. and Joy St. on the evening of March 11, 2010.

4. Det. Riggs also testified that the purpose of the checkpoint was to check for operator's license and vehicle registration and insurance violations.

5. It was Det. Riggs's testimony that every vehicle was to be stopped and checked for proper license, registration, and insurance, unless the weather became a hazard or traffic was unreasonably delayed; in those cases Det. Riggs said that either the checkpoint would be shut down or they would allow all vehicles to pass through until the hazard or delay was no longer present, at which point they would resume checking each vehicle.

6. Det. Riggs testified that every vehicle was stopped.

7. The State entered the physical document of the operation plan into evidence as State's Pre-trial Exhibit #1, which is attached to the order.

8. The language in the operation plan (State's Pre-trial Exhibit #1) laid out the purpose and pattern of the checkpoint.

a. The purpose of the checkpoint was, "To increase police presence in the targeted area while checking for Operator's License and Vehicle Registration violations."

b. The predetermined pattern was, "All vehicles coming through the checkpoint shall be stopped unless the Officer in charge determines that a hazard has developed or that an unreasonable delay to motorists is occurring. At that point all vehicles will be allowed to pass through until the hazard or delay is cleared."

The trial court then made the following pertinent conclusions of law:

1. Under N.C.G.S. § 20-16.3A(a)(2a) [sic], a pattern is required, but does not need to be in writing; however, here we have both Det. Riggs's testimony and the written operation plan that express the pattern that was exercised at the checkpoint.

> 2. Additionally, N.C.G.S. § 20-16.3A(a)(2) requires that law-enforcement designate what they will check for and how the vehicles will be stopped; Det. Riggs's testimony and the written operation plan indicated that all vehicles would be stopped and that they would be checking for Operator's License and Vehicle Registration violations.
>
> 3. In *State v. Barnes*, the North Carolina Court of Appeals found that where the findings showed that a checking station was conducted in substantial compliance with required guidelines a motion to suppress was not proper. *State v. Barnes*, 123 N.C. App. 144, 472 S.E.2d 784 (1996).
>
> 4. Based on Det. Riggs's testimony and the written operation plan, the checkpoint conducted by Det. Riggs was in compliance with the applicable statute and did not violate the defendant's constitutional rights.

In denying Defendant's motion to suppress, the trial court relied upon our decision in *State v. Barnes*, 123 N.C. App. 144, 472 S.E.2d 784 (1996). In *Barnes*, the defendant was stopped at a checkpoint and arrested for driving while impaired. The officers conducting the checkpoint stopped all vehicles that approached the checkpoint, the stated purpose of which was "to detect driver's license and registration violations as well as other motor vehicle violations including driving while impaired." *Id.* at 146, 472 S.E.2d at 785. The defendant moved to suppress all evidence stemming from the checkpoint on the ground that it had been conducted in an unconstitutional manner, and the trial court granted the defendant's motion. On appeal, this Court reversed, holding that

> [u]pon careful review of the evidence, we find that the court's findings do not support its conclusion that the checking station was not conducted in accordance with required guidelines. Instead, the findings show that there was substantial compliance with N.C. Gen. Stat. § 20–16.3A and [State Highway Patrol] Directive 63. Accordingly, we find no fourth amendment violation and we reverse the trial court's order granting defendant's motion to suppress.

Id. at 147, 472 S.E.2d at 785.

Since *Barnes* was decided, however, this Court has modified the framework it employs in analyzing Fourth Amendment challenges to checkpoints based on intervening decisions on this subject from the United States Supreme Court. We explained this framework in *State v. Veazey*, 191 N.C. App. 181, 662 S.E.2d 683 (2008).

In *Veazey*, a state trooper set up a driver's license checkpoint. When the defendant was stopped at the checkpoint, the trooper detected a strong odor of alcohol on him and ultimately arrested him for driving while impaired. At trial, the defendant moved to suppress evidence stemming from the checkpoint on the ground that the checkpoint violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the defendant's motion to suppress. *Id.* at 182-83, 662 S.E.2d at 684-85.

On appeal, we remanded the case to the trial court for new findings and conclusions, applying the United States Supreme Court's decisions in *City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L.Ed.2d 333 (2000), and *Illinois v. Lidster*, 540 U.S. 419, 157 L.Ed.2d 843 (2004) — both of which were decided after *Barnes*. We held that in reviewing a constitutional challenge to a checkpoint, courts are required to apply a two-part test in order to determine its reasonableness. *Veazey*, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87.

We noted that, as an initial matter, *Edmond* requires the identification of the primary programmatic purpose of the checkpoint.

> First, the court must determine the primary programmatic purpose of the checkpoint. In *Edmond*, the United States Supreme Court distinguished between checkpoints with a primary purpose related to roadway safety and checkpoints with a primary purpose related to general crime control. According to the Court, checkpoints primarily aimed at addressing immediate highway safety threats can justify the intrusions on drivers' Fourth Amendment privacy interests occasioned by suspicionless stops. However, the *Edmond* Court also held that police must have individualized suspicion to detain a vehicle for general crime control purposes, and therefore a checkpoint with a primary purpose of general crime control contravenes the Fourth Amendment.
>
> The Supreme Court in *Edmond* also noted that a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers. Otherwise, according to the Court, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason,

> courts must examine the available evidence to determine the primary purpose of the checkpoint program.

Id. at 185, 662 S.E.2d at 686 (internal citations, quotation marks, and brackets omitted).

Next, we addressed the second prong of the test for determining a checkpoint's constitutionality based on *Lidster*:

> Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, "[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." *Lidster*, 540 U.S. at 426, 157 L.Ed.2d at 852. To determine whether a checkpoint was reasonable under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. *See*, *e.g.*, *Martinez–Fuerte*, 428 U.S. at 555, 49 L.Ed.2d at 1126. In *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979), the United States Supreme Court held that when conducting this balancing inquiry, a court must weigh "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." *Id.* at 51, 61 L.Ed.2d at 362. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional. *See*, *e.g.*, *Lidster*, 540 U.S. at 427–28, 157 L.Ed.2d at 852–53.

Veazey, 191 N.C. App. at 185-86, 662 S.E.2d at 686-87.

Therefore, it is clear that the analysis employed by this Court in *Barnes* has been superseded by decisions from the United States Supreme Court and that the analytical framework articulated in *Veazey* must instead be used in reviewing challenges to the constitutionality of a checkpoint. Accordingly, we must now determine whether the trial court properly utilized this framework in the present case.

I. Primary Programmatic Purpose

Defendant first argues that the trial court failed to determine the Checkpoint's primary programmatic purpose. Specifically, he argues that the trial court found two purposes — one that was lawful and another

that was unlawful — without determining which of these two purposes was the primary one. We disagree.

In determining a checkpoint's legality, "the trial court must initially examine the available evidence to determine the purpose of the checkpoint program." *State v. Gabriel*, 192 N.C. App. 517, 521, 665 S.E.2d 581, 585 (2008) (citation and internal quotation marks omitted). The rationale behind inquiring into a checkpoint's primary programmatic purpose is that "[t]his type of searching inquiry is required to ensure an illegal multipurpose checkpoint is not made legal by the simple device of assigning the primary purpose to one objective instead of the other." *Id.* at 522, 665 S.E.2d at 585 (citation and internal quotation marks omitted).

> [W]here there is no evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose. In such cases, the trial court may not simply accept the State's invocation of a proper purpose, but instead must carry out a close review of the scheme at issue.

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687-88 (internal citations, quotation marks, and brackets omitted); *see also Gabriel*, 192 N.C. App. at 521, 665 S.E.2d at 585 ("[W]hen a trooper's testimony varies concerning the primary purpose of the checkpoint, the trial court is required to make findings regarding the actual primary purpose of the checkpoint and to reach a conclusion regarding whether this purpose was lawful." (citation, internal quotation marks, and ellipses omitted)).

In the present case, the trial court found that "[t]he purpose of the checkpoint was, 'To increase police presence in the targeted area while checking for Operator's License and Vehicle Registration violations.' " It is well established that checkpoints may lawfully be conducted for the purpose of "verify[ing] drivers' licenses and vehicle registrations[.]" *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339, *appeal dismissed and disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005).

The trial court's finding that the Checkpoint's purpose was to check for driver's license and vehicle registration violations was supported by the testimony of Detective Riggs and the written plan for the Checkpoint. Defendant contends, however, that the trial court found the Checkpoint

also served the dual purpose of increasing police presence in the area. He attempts to equate this latter purpose with a general crime control purpose, which our courts have held cannot serve as the basis for a checkpoint. *See Veazey*, 191 N.C. App. at 185, 662 S.E.2d at 686 ("[P]olice must have individualized suspicion to detain a vehicle for general crime control purposes, and therefore a checkpoint with a primary purpose of general crime control contravenes the Fourth Amendment.").

We reject Defendant's argument on this issue as we do not believe an attempt to increase police presence in an affected area *while conducting a checkpoint for a recognized lawful purpose* is akin to operating a checkpoint for the general detection of crime. The trial court's reference to increasing police presence was linked to the permissible purpose of checking for driver's license and vehicle registration violations. Defendant does not point to any evidence in the record suggesting that the Checkpoint was actually being operated for the purpose of general crime control or that the stated desire to check for driver's license and vehicle registration violations was a mere subterfuge. Moreover, as the State notes in its brief, *any* checkpoint inherently results in the increased presence of law enforcement officers in the subject area. Accordingly, Defendant's argument on this issue is overruled.

II. Reasonableness

Defendant's final argument is that the trial court erred in failing to adequately determine the reasonableness of the Checkpoint. We agree.

As discussed above, a trial court's inquiry does not end with the finding that a checkpoint has a lawful primary programmatic purpose.

> After finding a legitimate programmatic purpose, the trial court must determine whether the roadblock was reasonable and, thus, constitutional. To determine whether a seizure at a checkpoint is reasonable requires a balancing of the public's interest and an individual's privacy interest. In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*. Under *Brown*, the trial court must consider [1] the gravity of the public concerns served by the seizure; [2] the degree to which the seizure advances the public interest; and [3] the severity of the interference with individual liberty.

State v. Townsend, __ N.C. App. __, __, 762 S.E.2d 898, 907-08 (2014) (internal citations, quotation marks, and brackets omitted); *see also*

Jarrett, 203 N.C. App. at 679, 692 S.E.2d at 424-25 ("Although the trial court concluded that the checkpoint had a lawful primary purpose, its inquiry does not end with that finding. Instead, the trial court must still determine whether the checkpoint itself was reasonable. . . . In order to make this determination, this Court has required application of the three-prong test set out by the United States Supreme Court in *Brown v. Texas*. . . ." (internal citations and quotation marks omitted)).

We have held that "[t]he first *Brown* factor — the gravity of the public concerns served by the seizure — analyzes the importance of the purpose of the checkpoint. This factor is addressed by first identifying the primary programmatic purpose . . . and then assessing the importance of the particular stop to the public." *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342 (internal citation omitted).

With regard to "the second *Brown* prong — the degree to which the seizure advanced public interests — the trial court [is] required to determine whether the police appropriately tailored their checkpoint stops to fit their primary purpose." *State v. Nolan*, 211 N.C. App. 109, 121, 712 S.E.2d 279, 287 (citation, internal quotation marks, and brackets omitted), *cert. denied*, 365 N.C. 337, 731 S.E.2d 834 (2011).

> Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690.

Finally, in applying the third *Brown* factor, "courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Id.* at 192, 662 S.E.2d at 690-91.

> Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police

> took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not lynchpins, but instead are circumstances to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.

Id. at 193, 662 S.E.2d at 691 (internal citations, quotation marks, and brackets omitted).

In conclusion of law 4 in its order, the trial court made the following determination:

> 4. Based on Det. Riggs's testimony and the written operation plan, the checkpoint conducted by Det. Riggs was in compliance with the applicable statute and did not violate the defendant's constitutional rights.

We do not believe this bare conclusion is sufficient given the failure of the trial court to adequately assess the Checkpoint's reasonableness under the constitutional framework set out in *Veazey* and applied in other recent cases from our Court. While it appears that evidence was received at the suppression hearing as to many of the factors that are relevant under the *Brown* test, the trial court's order lacks express findings on a number of these issues.

With regard to the first prong of the *Brown* test, the trial court made no findings concerning the gravity of the public concerns served by the Checkpoint. While — as discussed above — checking for driver's license and vehicle registration violations is a permissible purpose for the operation of a checkpoint, the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged. *See Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342 ("[E]ven if a checkpoint is for one of the permissible purposes, that does not mean the stop is automatically, or even

presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances." (citation, internal quotation marks, and brackets omitted)).

As to the second *Brown* prong, there were no findings made by the trial court regarding a number of the factors relevant to the issue of whether the Checkpoint was appropriately tailored to meet its primary purpose. For example, the trial court's order failed to address (1) why the intersection of Ashley Road and Joy Street was chosen for the Checkpoint; (2) whether the Checkpoint had a predetermined starting or ending time; and (3) whether there was any reason why that particular time span was selected. *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690.

Finally, with regard to the third *Brown* prong, the trial court made no findings addressing whether the location of the Checkpoint was selected by Detective Riggs or by his supervisor or the manner in which the officers conducting the Checkpoint were subject to supervision. In addition, no findings were made as to whether (1) the officers took steps to put drivers on notice of an approaching checkpoint; (2) drivers could see visible signs of the officers' authority; and (3) the officers conducting the checkpoint were provided with any oral or written guidelines. *Id.* at 193, 662 S.E.2d at 691.

We do not mean to imply that the factors discussed above are exclusive or that trial courts must mechanically engage in a rote application of them in every order ruling upon a motion to suppress in the checkpoint context. Rather, our holding today simply reiterates our rulings in *Veazey* and its progeny that in order to pass constitutional muster, such orders must contain findings and conclusions sufficient to demonstrate that the trial court has meaningfully applied the three prongs of the test articulated in *Brown*.

As such, we must vacate the trial court's order and remand so that the trial court can make appropriate findings as to the reasonableness of the Checkpoint under the Fourth Amendment. *See Rose*, 170 N.C. App. at 298-99, 612 S.E.2d at 345 ("Based on our review of the trial court's order, it appears that the trial court concluded that the checkpoint was reasonable based solely on the purpose of the checkpoint and the fact that the officers stopped every car. In doing so, the court addressed the first prong of the . . . analysis and part of the third prong. The court made no findings regarding the tailoring of the checkpoint to the purpose (the second prong) and failed to consider all of the circumstances relating

to the discretion afforded the officers in conducting the checkpoint (the third prong). Accordingly, we remand for further findings as to each of the . . . factors and a weighing of those factors to determine whether the checkpoint was reasonable."); *Veazey*, 191 N.C. App. at 194-95, 662 S.E.2d at 692 ("[T]hese findings alone cannot support a conclusion that the checkpoint was reasonable because the trial court did not make adequate findings on the first two *Brown* prongs. . . . The trial court . . . was required to explain why it concluded that, on balance, the public interest in the checkpoint outweighed the intrusion on Defendant's protected liberty interests. The trial court's written order, however, contains no such explanation. Therefore, if the trial court determines on remand that the State's primary purpose for the checkpoint was lawful, it must also issue new findings and conclusions regarding the reasonableness of the checkpoint.").[2]

Conclusion

For the reasons stated above, we vacate the trial court's order denying Defendant's motion to suppress and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

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2. We further note that a number of the trial court's "findings" in its order are not actual findings but rather are merely recitations of testimony. *See State v. Derbyshire*, __ N.C. App. __, __, 745 S.E.2d 886, 892-93 (2013) ("[A trial court's] mere recitation of testimony . . . is not sufficient to constitute a valid finding of fact. . . . Findings of fact must be more than a mere summarization or recitation of the evidence . . . [O]ur review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts, *not* the testimony recited by the trial court in its order." (internal citations, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 753 S.E.2d 785 (2014). We therefore instruct the trial court on remand to make findings of fact based upon its evaluation of the evidence and not to merely recite the testimony of Detective Riggs and the contents of the written plan for the Checkpoint.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MARCH 2015)

ARTIS v. IMP. SERVS., LLC No. 14-1006	Pitt (14CVS84)	Dismissed
CNTY. OF HARNETT v. ROGERS No. 14-912	Harnett (12CVS890)	Dismissed
CORNING v. CORNING No. 14-764	Craven (08CVD1538)	Affirmed
HALFORD v. HALFORD No. 14-1039	Henderson (11CVD145)	Affirmed
IN RE C.L-H. No. 14-948	Henderson (13JB33)	Affirmed
MacMILLAN v. MacMILLAN No. 14-831	Forsyth (13CVD7597)	Dismissed
McKEOWN v. CASTAGNO No. 14-81	New Hanover (10CVD952)	Reversed and remanded in part; vacated in part
MILLER v. HOLLOMAN No. 14-485	Hertford (12CVS180)	Affirmed
PILOS-NARRON v. NARRON No. 14-649	Buncombe (13CVD2529)	Reversed and Remanded
STATE v. BOYD No. 14-845	Halifax (11CRS51960)	No Error
STATE v. BRASWELL No. 14-1010	Avery (07CRS50676) (09CRS50190) (12CRS639)	No Error
STATE v. BULLOCK No. 14-1035	Durham (10CRS56171) (11CRS3849)	No Error
STATE v. CURRIE No. 14-1073	Mecklenburg (12CRS1000)	No Error
STATE v. DAVIS No. 14-843	Warren (10CRS50828-30)	Affirmed

STATE v. DAVIS No. 14-1013	Craven (11CRS50791) (12CRS1014)	No Error
STATE v. DOWNEY No. 14-816	Johnston (11CRS4383) (11CRS54463)	Vacated and Remanded
STATE v. GAITHER No. 14-616	Nash (12CRS54101) (12CRS54102)	Affirmed
STATE v. GORHAM No. 14-842	Pitt (13CRS55724)	Affirmed
STATE v. LANCASTER No. 14-1018	Wilson (12CRS53945)	No Error
STATE v. MULDER No. 14-903	Lee (11CRS50050) (11CRS50051) (11CRS50055) (11CRS78)	No Error
STATE v. SETZER No. 14-722	Caldwell (12CRS219) (13CRS1329)	No Error
STATE v. SHEETS No. 14-1102	Wilkes (10CRS1089) (10CRS52859)	No Error
STATE v. STERLING No. 14-725	Mecklenburg (11CRS255751-52)	No Error
STATE v. WILLIS No. 14-674	Wake (12CRS216257) (12CRS8325)	No Error
STATE v. WILMOTH No. 14-1037	Forsyth (12CRS61644)	No Error
STOUTAMIRE v. BAILEY No. 14-322	Mecklenburg (12CVS942)	Affirmed

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