241 N.C. App.—No. 1 Pages 1-177

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 15, 2017

MAILING ADDRESS: The Judicial Department
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OF

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[1] Appointed 1 August 2016. [2] Retired 30 June 2015. [3]Retired 13 May 2016.

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[4] 1 January 2016.

COURT OF APPEALS

CASES REPORTED

FILED 5 MAY 2015 AND 19 MAY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—alleged Rule 403 error—discretionary ruling—not subject to plain error review—In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the Court of Appeals dismissed his argument that the trial court committed plain error under Rule of Evidence 403 by admitting a videotaped police interview of his co-perpetrator. Rulings subject to the trial court's discretion are not subject to plain error review. **State v. Duffie, 88.**

Appeal and Error—improper sentence—already served—dismissed as moot—The Court of Appeals dismissed as moot defendant's argument that the trial court improperly changed his sentence in response to his notice of appeal. Defendant had already served his term of imprisonment and did not argue that any collateral legal consequences may result from his sentence. **State v. Godbey, 114.**

Appeal and Error—improper sentence—already served—dismissed as moot—The Court of Appeals dismissed as moot defendant's argument that the trial court improperly changed his sentence in response to his notice of appeal. Defendant had already served his term of imprisonment and did not argue that any collateral legal consequences may result from his sentence. **State v. Godbey, 114.**

Appeal and Error—interlocutory orders and appeals—defamation action—right of free speech—substantial right—An appeal in a defamation action was properly before the Court of Appeals even though the trial court's order denying defendants' motion for summary judgment was interlocutory. Immediate appeal is available from an interlocutory order which affects a substantial right. A misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech and implicated a substantial right. **Desmond v. News & Observer Publ'g Co., 10.**

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Appeal and Error—interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late—The Court of Appeals dismissed defendants' appeal of the trial court's order that granted plaintiffs' motion

on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed. **Larsen v. Susan Rice Truffle Prods. LLC, 79.**

Appeal and Error—mootness—order to produce records—An appeal was dismissed as moot where the trial court allowed plaintiff to inspect and copy defendant's membership list and other corporate records. Defendant had already complied with the trial court's order and it was difficult to discern how any relief would remedy the alleged errors. Neither the public interest exception nor the "capable of repetition yet evading review" exception applied here. **130 of Chatham, LLC v. Rutherford Elec. Membership Corp., 1.**

Appeal and Error—preservation of issues—failure to renew objection—Although defendant appealed from the denial of a pretrial motion to suppress evidence and from judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status, he failed to preserve the error based on a failure to renew his objection. Thus, the appeal was dismissed. **State v. Hargett, 121.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—findings of fact—same wording as juvenile petition—sufficiency of evidence—The trial court did not err in a child neglect and custody case by its findings of fact that allegedly "regurgitated" the same wording used in the juvenile petition. It is not *per se* reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. The Court of Appeals concluded the record of the proceedings demonstrated that the trial court, through processes of logical reasoning based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. **In re J.W., 44.**

CHILD CUSTODY AND SUPPORT

Child Custody and Support—failure to return custody to parent after completion of case plan—conditions leading to removal still existed—The trial court did not abuse its discretion in a child neglect and custody case by failing to return the children to respondent mother's custody even though she completed her case plan and had the financial means to provide for the children. The trial court found that respondent behaved inappropriately at several visits with the children and that respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that respondent "has been unable to consistently care for herself or any of her children" and that the conditions leading to the removal of the children continued to exist. **In re J.W., 44.**

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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

November 13 and 27

December 11

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

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130 OF CHATHAM, LLC, AS A MEMBER OF RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF
v.
RUTHERFORD ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA14-1079

Filed 19 May 2015

Appeal and Error—mootness—order to produce records

An appeal was dismissed as moot where the trial court allowed plaintiff to inspect and copy defendant's membership list and other corporate records. Defendant had already complied with the trial court's order and it was difficult to discern how any relief would remedy the alleged errors. Neither the public interest exception nor the "capable of repetition yet evading review" exception applied here.

Appeal by Defendant from orders entered 28 July 2014 by Judge Alan Z. Thornburg in Rutherford County Superior Court. Heard in the Court of Appeals 4 March 2015.

Roberts & Stevens, P.A., by Ann-Patton Hornthal and William Clarke, for Plaintiff.

Parker Poe Adams & Bernstein, LLP, by Michael G. Adams, Benjamin Sullivan, and Morgan H. Rogers, for Defendant.

STEPHENS, Judge.

Defendant Rutherford Electric Membership Corporation ("Rutherford") appeals from the trial court's order allowing Plaintiff

130 of Chatham ("Chatham") to inspect and copy its membership list and other corporate records. After careful consideration, we hold that because it is moot, this appeal must be dismissed.

Facts and Procedural History

Rutherford is an electric membership corporation ("EMC") organized under Chapter 117 of our General Statutes that owns and operates an electric distribution system for members in its service area, which covers all or portions of 10 counties in western North Carolina. Chatham owns over 18,000 acres of property in Rutherford's service area, is a member of Rutherford in good standing, and receives electricity from Rutherford at two accounts in McDowell and Burke counties. These parties have been feuding for several years, with their dispute arising from Rutherford's efforts to build a power line across an undeveloped tract of Chatham's property that separates two of Rutherford's electrical substations. When Chatham refused to sell Rutherford an easement, Rutherford initiated condemnation proceedings pursuant to Chapter 40A of our General Statutes. *See Rutherford Elec. Membership Corp. v. 130 of Chatham, LLC*, __ N.C. App. __, 763 S.E.2d 296 (2014), *appeal dismissed and disc. review denied*, __ N.C. __, 769 S.E.2d 192 (2015). The present litigation arises from Chatham's request, as a member of Rutherford acting pursuant to the North Carolina Nonprofit Act and sections 55A-16-02 and -04 of our General Statutes, to inspect Rutherford's membership list and other corporate records in order to participate in the nomination and election of directors to Rutherford's board of directors.

On 12 May 2014, Chatham submitted a written request to inspect and copy Rutherford's membership list and other corporate records pursuant to N.C. Gen. Stat. § 55A-16-02. On 15 May 2014, Rutherford's counsel notified Chatham that its request would be denied unless it utilized one of Rutherford's "Member Information Request" forms, and so on 16 May 2014, Chatham resubmitted its request using the required form. On 20 June 2014, Rutherford provided a 363-page response to Chatham's request, 238 pages of which consisted of old newsletters mailed to Rutherford's members. This response did not include Rutherford's membership list, omitted several additional categories of requested corporate records, and provided incomplete or heavily redacted records pertaining to Chatham's other requests.

On 30 June 2014, Chatham submitted another written request to inspect and copy Rutherford's corporate documents, focusing largely on the membership list and other records not included to Rutherford's

initial response. This time, Chatham stated that its request was made in good faith and that the documents requested were "directly connected with the purpose of informing [Chatham] about the entity of which it is a member" and "directly connected to [Chatham's] desire to participate in the nomination of directors to [Rutherford's] board of directors, the election of directors, the service of current directors and their tenure, the annual meeting in the fall of 2014 and to evaluate nominees to the board of directors." The request also notified Rutherford that Chatham's authorized representatives and agents planned to visit Rutherford's corporate office to inspect and copy the requested documents on 9 July 2014. On 8 July 2014, Rutherford's counsel replied to Chatham with a supplemental response to Chatham's 12 and 16 May 2014 Member Information Requests but also stated that Rutherford could not respond to Chatham's 30 June 2014 member information request by 9 July 2014 and would instead respond by 25 July 2014. Rutherford's 8 July 2014 response did not include its membership list, but did contain a redacted version of Rutherford's Board Policy M-12. Policy M-12 provides in pertinent part that Rutherford's responses to Member Information Requests are determined by Rutherford's general manager and its corporate attorney "based on their belief that (1) the information requested and the purpose for which it is requested are materially germane to the requesting person's status and interests as a member of [Rutherford] and (2) furnishing the requested information will not be adverse to [Rutherford's] best interests." Policy M-12 also provides that information regarding Rutherford's membership list and the minutes from its board meetings "will not be furnished except pursuant to a court order."

On 11 July 2014, Chatham filed a verified complaint in Rutherford County Superior Court alleging that its Member Information Requests fully complied with Chapter 55A's requirements but that Rutherford had refused to allow Chatham to inspect and copy its records and that the statutorily allotted time for complying with Chatham's request had expired. As relief, Chatham sought an order to permit immediate inspection and copying of Rutherford's membership list and other previously requested corporate records on an expedited basis pursuant to N.C. Gen. Stat. § 55A-16-04.[1] Alternatively, Chatham petitioned for a writ of *mandamus* and a mandatory injunction requiring production of Rutherford's records and also requested a stay of Rutherford's board

1. In addition, Chatham's complaint alleged a similar cause of action under Chapter 55 of our General Statutes. While we express no opinion on the ultimate outcome of this case, we agree with the trial court that Chapter 55, which governs for-profit corporations, is inapplicable here to Rutherford.

election deadlines and annual meeting. That same day, Chatham filed its Notice of Hearing for 21 July 2014 in McDowell County Superior Court[2] and provided Rutherford's counsel with courtesy copies of its pleadings, although it did not formally serve Rutherford until 30 July 2014.

On 15 July 2014, Rutherford filed a Notice of Designation of this case as a mandatory complex business case under section 7A-45.4 of our General Statutes. That same day, with Chatham's consent, then-Chief Justice Sarah Parker of the North Carolina Supreme Court designated this case as a mandatory complex business case and ordered it to be assigned to the North Carolina Business Court.

On 21 July 2014, a hearing on Chatham's verified complaint was held in McDowell County Superior Court with Judge Alan Z. Thornburg presiding. Before the hearing, Rutherford filed a motion to dismiss the action for lack of subject matter jurisdiction and improper venue or, alternatively, to transfer venue to Rutherford County. In support of its motion, Rutherford argued that: (1) given its status as an EMC, the action should be governed not by Chapter 55A of our General Statutes but instead by Chapter 117, which establishes the North Carolina Rural Electrification Authority and grants broad discretionary authority to the boards of directors of rural electric membership corporations, including the power to regulate the election of board members and the power to establish procedures for handling member requests for information; (2) even if Chapter 55A did apply, McDowell County was an improper venue because claims premised on Chapter 55A must be heard in the county where the corporation's principal place of business is located, *see* N.C. Gen. Stat. § 55A-16-04 (2013), and Rutherford's principal place of business is located in Rutherford County; (3) Rutherford had already provided Chatham with all the records it was entitled to inspect under Chapter 55A; (4) regardless of Chatham's purported reasons, in light of the prior history of litigation between the parties, Chatham's inspection request amounted to an impermissible fishing expedition, and thus Rutherford had acted in accordance with Chapter 55A in denying that request because it was not made for a proper purpose; and (5) it was improper for the matter to proceed any further because Rutherford had not been formally served, had effectively received only four days'

2. Although this action was filed in Rutherford County, there were no sessions of superior court scheduled there until August 2014, so Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County.

notice of the hearing, and the matter had already been designated to the Business Court. For its part, Chatham insisted that: (1) Rutherford had not yet provided its membership list and other requested documents covered by Chapter 55A; (2) due to recent changes to Rutherford's policies for electing directors and rapidly approaching related deadlines, Chatham urgently needed the membership list in order to collect the signatures required for nominating directors and collecting proxies before the elections scheduled for Rutherford's annual meeting in October 2014; and (3) in light of Policy M-12's express requirement of a court order, Chatham had no other option apart from the present lawsuit for obtaining relief and, although Chapter 55A's plain language requires such a suit to be *filed* in the county of Rutherford's principal place of business, it is silent as to where the hearing should be held. Since there were no sessions of Superior Court scheduled in Rutherford County until August, and given the aforementioned rapidly approaching election deadlines, Chatham sought to take advantage of local rules that would allow the case to be heard in McDowell County, which is in the same judicial district as Rutherford County. At the close of the hearing, and in a subsequent written order, Judge Thornburg denied Rutherford's motion to dismiss but granted its motion to transfer venue and instructed the parties to appear in Rutherford County Superior Court on 24 July 2014.

On 23 July 2014, the Business Court assigned the case to the Honorable Louis A. Bledsoe III. That same day, Rutherford filed a motion to continue the next day's scheduled hearing in Rutherford County so that the matter could be heard and decided in accordance with the Business Court's rules and procedures. Later that same day, Judge Bledsoe's law clerk sent an email to the parties stating:

> Because the pending matters before Judge Thornburg in the above case were heard and calendared for further hearing prior to the designation of the case to the Business Court, it is the policy of the Business Court that Judge Thornburg can decide whether to go forward with the hearing and rule on the matters pending before him at the time of designation.

On 24 July 2014, Rutherford filed a demand for a jury trial. That same day, Judge Thornburg presided over a hearing held in Rutherford County Superior Court regarding Chatham's request for an order to permit inspection and copying of Rutherford's membership list and other corporate records. In support of its motion for a continuance, Rutherford argued that: (1) N.C. Gen. Stat. § 7A-45.4 required all further proceedings in the matter to be held before the Business Court; and (2) N.C.

Gen. Stat. § 55A-16-04 provides two distinct procedures for inspection requests, and although the statute allows a court to summarily order inspection of certain types of records, it expressly requires that requests involving membership lists be determined on an expedited basis governed by our Rules of Civil Procedure, but in this case Rutherford had not yet been given an opportunity to file an answer to Chatham's complaint or conduct discovery into whether Chatham's request had been made in good faith for a proper purpose. After Judge Thornburg denied Rutherford's motion, Rutherford again accused Chatham of attempting to exploit Chapter 55A to launch an impermissible fishing expedition and also argued that Chatham had not shown that the records it sought were directly connected to its request for the entire membership list, which Rutherford reasoned was overbroad because only two of its three districts were scheduled to elect directors at the annual meeting in October. Rutherford also emphasized privacy concerns for its members' personal information. For its part, Chatham countered that: (1) it only intended to use Rutherford's membership list for the proper purpose of participating in nominating and electing directors; (2) it was necessary to obtain the entire membership list because Rutherford's policies require that director nominations be supported by signatures from at least 1% of its estimated 67,500 members, but only one of those signatures can come from each household and it can only be the signature of the person first named on the member account; and (3) Rutherford's argument about maintaining its members' privacy was critically undermined by its own practice of regularly publishing their names and personal information in its newsletters. At the close of the hearing, Judge Thornburg announced that he would grant Chatham's request for an order permitting inspection and copying of Rutherford's membership list and other corporate records. When Rutherford's counsel inquired about the possibility of obtaining a stay pending appeal, the parties agreed that given the case's designation as a mandatory complex business case and assignment to Judge Bledsoe, the Business Court had jurisdiction over that request and any other motions going forward.

In a subsequent written order signed and filed on 28 July 2014, Judge Thornburg denied Chatham's motions for a writ of *mandamus*, a mandatory injunction, and a stay of Rutherford's board election deadlines, but concluded that Chatham had complied with all the statutory requirements for requesting inspection and copying of Rutherford's records on an expedited basis under Chapter 55A and therefore ordered Rutherford to provide Chatham with its membership list and a sample ballot for its director elections by 1 August 2014, and with all other requested records by 23 August 2014, but expressly limited Chatham's use of all records to

the purposes set forth in its requests. However, the order denied Chatham's request that Rutherford pay its litigation costs, concluding instead that Rutherford had refused Chatham's request in good faith "because it had [a] reasonable basis for doubt" about Chatham's right to inspect the records requested. That same day, Rutherford filed notice of appeal to this Court and also filed an emergency motion to establish bond for a Section 1-290 stay, or a stay pending appeal. On 30 July 2014, Judge Bledsoe presided over a hearing which the parties joined by teleconference, during which Rutherford's counsel complained that "[a]s a practical matter, if you don't give a stay, any victory we get on appeal is the classic Pyrrhic victory, meaning that wow, it feels good, we get an order, but it accomplishes nothing." Nevertheless, Judge Bledsoe denied Rutherford's motion in a written order and opinion entered 31 July 2014.

Rutherford ultimately complied with Judge Thornburg's order to allow Chatham to inspect its membership list and other corporate records, and now on appeal seeks to challenge: (1) the trial court's holding that Chatham's Member Information Request was governed by Chapter 55A of our General Statutes rather than Chapter 117; (2) the trial court's determination that Chatham requested the membership list for a proper purpose; (3) the trial court's jurisdiction to enter any order in this matter after it had already been designated to the Business Court and assigned to Judge Bledsoe; and (4) a litany of purported procedural errors including the denial of any opportunity to conduct discovery and the denial of Rutherford's demand for a jury trial.

Analysis

Several of Rutherford's arguments to this Court appear to raise issues of first impression, but before proceeding to their merits, we must determine whether this appeal is properly before us. Because we find that the issues argued on appeal are moot, we dismiss Rutherford's appeal.

As a general matter, a case is moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing *Black's Law Dictionary* 1008 (6th ed. 1990)). Thus, "[w]henever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (citation

omitted). "If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action." *Id.* (citation omitted).

In the present case, Rutherford has already complied with Judge Thornburg's order to allow Chatham to inspect and copy its membership list and other corporate records, and the October 2014 director elections that Chatham sought to use this information to participate in have already occurred. Under these circumstances, it is difficult to discern how any relief we could provide would remedy the alleged errors of which Rutherford now complains. Thus, even if we agreed with Rutherford's arguments that it should never have been required to allow Chatham to inspect and copy its records, because Chatham has already inspected and copied Rutherford's records, this issue is moot. *See*, *e.g.*, *Boney Publishers*, *Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 ("This appeal is technically moot because the information sought by [the] plaintiff has been fully disclosed."), *disc. review denied*, 356 N.C. 433, 571 S.E.2d 221 (2002).

Our determination that the issues brought forth in an appeal are moot does not end our inquiry, however, because "[e]ven if moot . . . [an appellate court] may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citations omitted). We may also consider a moot issue on appeal pursuant to other established exceptions to the mootness doctrine. Most relevant here, cases which are "capable of repetition, yet evading review may present an exception to the mootness doctrine." *Boney Publishers*, *Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703 (citations and internal quotation marks omitted). In order for this exception to apply, there are two required elements: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 654, 566 S.E.2d at 703-04 (citation omitted).

Here, in its appellant brief, Rutherford offered no argument regarding our mootness doctrine or the exceptions. When asked during oral arguments why this case is not moot, Rutherford focused on the "capable of repetition yet evading review" exception's first element, arguing that this case evades review because of the relatively brief amount of time that elapsed between Chatham's Member Information request and the trial court's order granting that request as compared to the average duration of an appeal to this Court. As to the exception's

second element, Rutherford also complained that without an opinion from this Court correcting the trial court's errors, Chatham will be free to engage in future fishing expeditions by exploiting the wrongly decided precedent established in Judge Thornburg's order. For its part, Chatham suggested in its appellee brief that this Court should ignore any mootness concerns based on our recent decision in *In re A.N.B.*, __ N.C. App. __, __, 754 S.E.2d 442, 445 (2014) (allowing review of an expired order continuing voluntary admission of a juvenile to a secure inpatient psychiatric treatment facility because this Court has a duty to address otherwise moot cases that raise questions involving matters of public interest and because the harm complained of was capable of repetition yet evading review). Chatham argues further that we should affirm Judge Thornburg's order because Rutherford's refusal to respect its member's inspection rights "is likely to occur again given the annual election of directors from the 10 county region and the substantial public interest in this nonprofit's activities affecting thousands of members and electricity recipients."

After careful consideration, we conclude that neither the public interest exception nor the "capable of repetition yet evading review" exception applies in this case. We are not persuaded by Chatham's assertion that the public interest exception should apply here, given that there is no evidence in the record that this litigation represents anything other than the latest episode in an ongoing private dispute between Chatham and Rutherford. We are similarly unpersuaded that this case satisfies either element of the "capable of repetition yet evading review" exception.

As to the "capable of repetition yet evading review" exception's first element, Rutherford's concerns about the short duration of this litigation evading review in future cases are unfounded because if Rutherford ever again finds itself in a similar position, it can take steps that it failed to take in the present case—such as, for example, seeking a declaratory judgment of the parties' rights from the trial court—in order to ensure that next time, there will be a live controversy remaining for our review. As to the second element, while Chatham bases its argument that this case is capable of repetition on the fact that Rutherford's directors are elected annually, its argument ignores the fact that as a result of having prevailed below, Chatham already has copies of Rutherford's membership list and corporate records, thereby substantially mitigating, if not totally obviating, any future need for it to file additional Member Information Requests in order to participate in Rutherford's director elections. By the same logic, Rutherford's argument that this

case is capable of repetition also fails, because if Chatham already has Rutherford's membership list and corporate records, it seems unlikely that a court would find Chatham had a proper purpose under Chapter 55A to request them again, and we therefore conclude that there is no "reasonable expectation that [Rutherford] would be subjected to the same action again." *Boney Publishers Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703-04 (citation omitted). Moreover, although Rutherford's appeal presents this Court with several issues of first impression, we do not believe that the procedural history of this case—marred as it is by irregularities if not outright errors—presents a fitting vehicle for such determinations, and we therefore decline to exercise our discretion in order to reach them. Accordingly, Rutherford's appeal is

DISMISSED.

Judges HUNTER, JR., and TYSON concur.

BETH DESMOND, PLAINTIFF
v.
THE NEWS AND OBSERVER PUBLISHING COMPANY, MCCLATCHY NEWSPAPERS, INC., MANDY LOCKE, JOSEPH NEFF, JOHN DRESCHER, AND STEVE RILEY, DEFENDANTS

No. COA14-625

Filed 19 May 2015

1. Appeal and Error—interlocutory orders and appeals—defamation action—right of free speech—substantial right

An appeal in a defamation action was properly before the Court of Appeals even though the trial court's order denying defendants' motion for summary judgment was interlocutory. Immediate appeal is available from an interlocutory order which affects a substantial right. A misapplication of the actual malice standard when considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech and implicated a substantial right.

2. Libel and Slander—newspaper article—expert opinions—genuine issues of fact

The trial court in a defamation action properly denied defendants' motion for summary judgment as to certain statements about expert opinions in a newspaper article about firearms analysis in

a first-degree murder trial. There were genuine issues of material fact as to whether defendants accurately reported the opinions and statements the independent experts whom they consulted and about whether the reporter acted with actual malice.

3. Libel and Slander—newspaper article--firearms analyst—testimony in underlying trial

In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, certain statements and conclusions about bullet fragments in plaintiff's testimony in the underlying criminal action was substantially accurate and thus not actionable.

4. Libel and Slander—newspaper article—firearms analyst—statements of another expert

The trial court should have granted summary judgment in favor of defendants in a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. There was no genuine issue as to the factual accuracy of statements.

5. Libel and Slander—newspaper article—firearms analyst—scribbled notes

In a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work, a statement that plaintiff "scribbled" her notes did not tend to disgrace or degrade her. The statement was neither libelous per se nor libelous per quod and the trial court should have granted summary judgment in favor of defendants as to that statement.

6. Libel and Slander—newspaper article—firearms analyst—criticism of firearm analysis generally

The trial court should have granted summary judgment in favor of defendants as to a defamation action brought by an SBI firearms analyst concerning a newspaper report about her work. Experts differ on the reliability of firearm and toolmark analysis, so a statement that experts could not provide a probability of error was not incorrect. In addition, the statement was not directly of or concerning plaintiff herself, but more of a criticism of firearm and toolmark analysis generally.

Appeal by defendants from order entered 14 March 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 18 November 2014.

DeMent Askew, LLP, by James T. Johnson, for plaintiff-appellee.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin and Hugh Stevens, for defendants-appellants.

The John Bussian Law Firm, PLLC, by John A. Bussian, for amicus curiae the North Carolina Press Association, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mark J. Prak and W. Michael Dowling, for amicus curiae the North Carolina Association of Broadcasters, Inc.

STROUD, Judge.

The News and Observer Publishing Company ("N&O"), McClatchy Newspapers, Inc. ("McClatchy"), and Mandy Locke (collectively "defendants") appeal from the trial court's order denying their motion for summary judgment as to libel claims brought by Beth Desmond ("plaintiff"). We affirm in part, reverse in part, and remand the case to the trial court.

I. Factual Background

The alleged defamation arose out of defendants' newspaper articles regarding plaintiff's testimony in two criminal trials. Both of the criminal defendants in those cases appealed their convictions to this Court, and we will first review briefly the facts of those underlying cases, as previously described by this Court.

A. Underlying Criminal Cases

> [In Pitt County, North Carolina, during] the afternoon of 19 April 2005, Loretta Strong and several of her female cousins and friends (collectively, the "Haddock girls") were socializing in a vacant lot across the street from the home of Strong's grandmother, Lossie Haddock. [Vonzeil Adams] drove by the lot with a group of her girlfriends. A verbal altercation arose between the two groups of women. [Adams] was angry with the Haddock girls because [Adams's] sister had complained to [Adams] that the Haddock girls had assaulted the sister in the presence of [Adams's] children. During the exchange, [Adams] said she would return and that she had "something" for the Haddock girls.

> Later that afternoon, some of the Haddock girls drove by [Adams's] house where another verbal altercation occurred. The Haddock girls returned to and congregated on Lossie Haddock's porch.
>
> Around 6:00 p.m. or 7:00 p.m., [Adams] traveled to Lossie Haddock's house in a reddish Chevrolet Caprice driven by her boyfriend, Jemaul Green. [Adams's] sister and several girlfriends were in the car as well. A car full of [Adams's] girlfriends followed shortly behind. [Green] parked the car across from Lossie Haddock's house. [Adams] exited the vehicle and walked toward the house, exchanging words with the women on the porch. The other women exited the vehicle, but stayed behind [Adams]. Strong stepped off the porch and began to approach [Adams], but stopped before she reached the street.
>
> [Adams] stopped in the middle of the road. She then exclaimed that someone should get a firearm and shoot the Haddock girls. . . . [Green] exited the vehicle and fired a gun into the air. [Green] then pointed the gun in the direction of Lossie Haddock's house and fired several shots. Jasmine Cox, who was on the porch, began running into the house after she saw [Green] point the gun in the air. She was the first person to get into the house, and testified that, after she got in, she heard more gunfire following the first shots.
>
> Ten-year-old Christopher Foggs, who had been playing in the area, was found face down next to the Haddock house. When he was turned over, a gunshot wound to his chest was discovered. He died from the wound at the hospital later that evening.

State v. Adams, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 2-4 (2011) (unpublished). Police never recovered a gun. *Id.*, 713 S.E.2d 251.

On 25 April 2005, a grand jury indicted Green for first-degree murder, among other charges. *State v. Green*, 187 N.C. App. 510, 653 S.E.2d 256, slip op. at 1 (2007) (unpublished), *appeal dismissed and disc. review denied*, 362 N.C. 240, 660 S.E.2d 489 (2008). During the summer 2006 trial, plaintiff, a North Carolina State Bureau of Investigation ("SBI") forensic firearms examiner, opined to a scientific certainty that eight

cartridge cases, which were found at the site of the shooting, were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. Plaintiff further opined that two bullets, which were found at the site of shooting, were fired from the same *type* of gun, a High Point 9 millimeter semiautomatic pistol, but that she could not conclusively determine whether the bullets were fired from the same gun. On voir dire, plaintiff testified she was absolutely certain as to her findings. In a lab report, plaintiff stated that the two bullets "exhibit class characteristics that are consistent with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]"

At trial, Green testified that, during the confrontation, a person shot a gun at him. He testified that he shot back at the person but that the person ran away. On 2 August 2006, a jury found Green guilty of second-degree murder, among other offenses. *Id.*, 653 S.E.2d 256, slip op. at 1.

A grand jury also indicted Adams for first-degree murder, among other charges. *Adams*, 212 N.C. App. 235, 713 S.E.2d 251, slip op. at 1-2. During the spring 2010 trial, plaintiff gave the same opinion about the cartridge cases and bullets. *Id.*, 713 S.E.2d 251, slip op. at 5. A jury found Adams guilty of voluntary manslaughter, under an aiding-and-abetting theory, among other offenses. *Id.*, 713 S.E.2d 251, slip op. at 7.

During Adams's trial, her lawyer, David Sutton, arranged for Frederick Whitehurst, who had previously worked as a forensic chemist in a Federal Bureau of Investigation ("FBI") crime laboratory, to take photographs of the two bullets butt-to-butt with his microscope.

B. Newspaper Articles

In March 2010, Locke, an investigative reporter for N&O, became interested in the *Green* and *Adams* cases. Locke interviewed plaintiff; Sutton; Whitehurst; Liam Hendrikse, a firearms forensic scientist; Stephen Bunch, a firearms forensic scientist and former FBI scientist; William Tobin, a forensic material scientist and metallurgist; Adina Schwartz, a professor at the John Jay College of Criminal Justice; Clark Everett, the Pitt County district attorney during the *Green* and *Adams* cases; and Jerry Richardson, the SBI laboratory director.

On 14 August 2010, N&O published an article written by Locke and Joseph Neff, which was entitled, "SBI relies on bullet analysis critics deride as unreliable[.]" In the 14 August article, Locke and Neff are highly critical of plaintiff's bullet analysis and testimony in the *Green* and *Adams* cases and include one of Whitehurst's photographs of the two bullets. In September or October 2010, Everett engaged Bunch to

conduct an outside examination of the eight cartridge cases and two bullets. Bunch agreed with plaintiff that the eight cartridge cases were fired from the same firearm. Bunch also concluded that it is *likely*, but not certain, that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Bunch further concluded that the two bullets *could* have been fired from the same gun. On 31 December 2010, N&O published a follow-up article, written by Locke and Neff, which was entitled "Report backs SBI ballistics[.]" In the 31 December article, Locke and Neff discussed Bunch's results but emphasized that, unlike plaintiff, Bunch refused to ascribe absolute certainty to his finding that the two bullets were likely fired from the same type of gun.

II. Procedural Background

On 1 September 2011, plaintiff brought libel claims against N&O, McClatchy, N&O's parent company, Locke, Neff, John Drescher, N&O's executive editor, and Steve Riley, N&O's senior editor of investigations, among other defendants who were later dismissed from this action. On 27 June 2013, plaintiff filed her first amended complaint. On or about 22 January 2014, plaintiff moved to amend her first amended complaint. On 27 January 2014, N&O, McClatchy, Locke, Neff, Drescher, and Riley moved for summary judgment. On or about 5 March 2014, the trial court allowed plaintiff's motion, and plaintiff filed her second amended complaint. On 14 March 2014, the trial court granted Neff, Drescher, and Riley's motion for summary judgment but denied N&O, McClatchy, and Locke's motion for summary judgment. On 4 April 2014, defendants gave timely notice of appeal.

III. Interlocutory Appeal

[1] As an initial matter, we note that the trial court's order denying defendants' motion for summary judgment was interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). But "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). Defendants contend that the trial court's order misapplied the actual malice standard, which adversely affected their rights to free speech and freedom of the press as guaranteed by the First Amendment to the U.S. Constitution and article I, section 14 of the North Carolina Constitution. *See* U.S. Const. amend. I; N.C. Const. art. 1, § 14. "Our Courts have recognized that because a misapplication of the actual malice standard when

considering a motion for summary judgment would have a chilling effect on a defendant's right to free speech, a substantial right is implicated." *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (quotation marks omitted) ("Boyce II"), *disc. review denied*, 365 N.C. 365, 718 S.E.2d 403 (2011), *cert. denied*, ___ U.S. ___, 182 L. Ed. 2d 1018 (2012). Accordingly, we hold that this appeal is properly before us.

IV. Standard of Review

We review a trial court's summary judgment order *de novo* and view the evidence in the light most favorable to the non-movant. *Erthal v. May*, ___ N.C. App. ___, ___, 736 S.E.2d 514, 517 (2012), *appeal dismissed and disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013). We engage in a two-part analysis of whether:

> (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.
>
> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Id. at ___, 736 S.E.2d at 517 (citations and quotation marks omitted).

V. Libel

Defendants argue that the trial court erred by denying their motion for summary judgment as to plaintiff's libel claims. "In North Carolina, the term defamation applies to the two distinct torts of libel and slander." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 898 (2002) ("Boyce I"), *appeal dismissed and disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. *See id.*, 568 S.E.2d at 897. This statement must be a statement of fact, not opinion, but "an individual cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability." *Lewis v. Rapp*, 220 N.C. App. 299, 306, 725 S.E.2d 597, 603 (2012) (quotation marks and brackets omitted).

> Whether a statement constitutes fact or opinion is a question of law for the trial court to decide. Like all questions of law, it is subject to *de novo* review on appeal. . . . In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made. Specifically, we consider whether the language used is loose, figurative, or hyperbolic language, as well as the general tenor of the article.

Id. at 304-05, 725 S.E.2d at 602 (citation and quotation marks omitted). "[T]he court must view the words within their full context[.]" *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899.

Moreover,

> [w]here the plaintiff is a public official and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The rule requiring public officials to prove actual malice is based on First Amendment principles and reflects the Court's consideration of our national commitment to robust and wide-open debate of public issues.
>
> When a defamation action brought by a public official is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence presented is sufficient to allow a jury to find that actual malice had been shown with convincing clarity.
>
> It is important to acknowledge that evidence of personal hostility does not constitute evidence of actual malice. Additionally, reckless disregard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Lewis, 220 N.C. App. at 302-03, 725 S.E.2d at 601 (citations, quotation marks, and brackets omitted). Plaintiff stipulates that she is a public official.

Plaintiff contends that the following 12 statements in the 14 August 2010 article are false, defamatory statements of or concerning her, which defendants published with actual malice. We number the statements for clarity:

> 1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.
>
> 2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.
>
> 3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.
>
> 4. She scribbled down the measurements of the lands and grooves[.]
>
> 5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt to butt, amplified several times, the bullets look starkly different.
>
> 6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.
>
> 7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."
>
> 8. Experts, therefore, can't provide probability of error.
>
> 9. [A]ssuring a jury of a match is risky.
>
> 10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

> 11. "You don't even need to measure to see this doesn't add up," said Hendrikse, the firearms analyst from Toronto. "It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."
>
> 12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

Plaintiff further contends that the following 4 statements in the 31 December 2010 article are also false, defamatory statements of or concerning her, which defendants published with actual malice:

> 13. However, agent's courtroom certainty that bullets came from one gun in question.
>
> 14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report's findings undermined the certainty of her testimony.
>
> 15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar markings.
>
> 16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We will address these 16 statements in four groups: (1) statements about expert opinions; (2) statements about plaintiff's testimony in the *Green* and *Adams* cases; (3) statements about Whitehurst's photographs; and (4) any remaining statements. For each, before we consider the question of actual malice, we will address whether the statements as alleged are actually false, defamatory statements of or concerning plaintiff.

A. Statements About Expert Opinions

[2] Statements 6, 7, 10, 11, 12, and 16 discuss the opinions of various experts that Locke consulted about plaintiff's analysis of the bullets:

> 6. Independent firearms experts who have studied the photographs question whether Desmond knows anything

about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.

7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."

10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.

11. "You don't even need to measure to see this doesn't add up," said Hendrikse, the firearms analyst from Toronto. "It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."

12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.

16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

We first note that defendants argue that "[m]any of the statements identified in [plaintiff's] Complaint are simply expressions of opinion" by various experts whom Locke interviewed, not assertions of fact, and thus not actionable. Defendants contend that "[t]he Supreme Court consistently has held that such statements cannot form the basis for a defamation claim." *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990). But in *Milkovich*, the U.S. Supreme Court did not create "an artificial dichotomy between 'opinion' and fact" and noted that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 18-19, 111 L. Ed. 2d at 17-18. The Supreme Court gave this example:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in

> terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words 'I think.' "

Id., 111 L. Ed. 2d at 17-18 (brackets omitted). Thus, the Supreme Court held that "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." *Id.* at 20, 111 L. Ed. 2d at 19.

In this case, which involves mostly Locke's reports of opinions of experts regarding Desmond's work, fact and opinion are difficult to separate. Some of the allegedly defamatory statements, though stated as expressions of opinion from experts, may be factually false because Locke reported that the experts expressed opinions regarding Desmond's work that they actually did not express. In some instances, the evidence indicates that Locke asked the experts a hypothetical question, and they answered on the assumption that the facts of the hypothetical question were true, while the facts were actually false and Locke either knew the facts were false or she asked the question with reckless disregard for the actual facts. The experts' opinions were then stated in the article as opinions which the experts gave about Desmond's actual work, instead of in response to a hypothetical question. Thus, the statements, even as opinions, "imply a false assertion of fact" and may be actionable under *Milkovich*. *See id.* at 19, 111 L. Ed. 2d at 18.

With regard to Statement 6, Locke stated in her deposition that her sources who questioned whether plaintiff "knows anything" about firearms analysis and who suspected that plaintiff "falsified the evidence" were Tobin, Hendrickse, and Bunch. Each of these experts denied making these comments to Locke. In their brief, defendants attribute the source of this statement to Locke's interview with Schwartz. But even assuming *arguendo* that Schwartz was Locke's source for this statement, defendants ignore the fact that the article clearly attributes this statement to multiple experts. Therefore, Schwartz's interview with Locke could not fully support this statement. In the light most favorable to plaintiff, this evidence creates a genuine issue of material fact as to whether Locke wrote Statement 6 "with knowledge that it was false or with reckless disregard of whether it was false or not." *See Lewis*, 220

N.C. App. at 302, 725 S.E.2d at 601; *Cochran v. Piedmont Publishing Co.*, 62 N.C. App. 548, 550, 302 S.E.2d 903, 904-05 (holding that the publication of a statement attributed to a source, which that source denied making, created a genuine issue of material fact as to whether the statement was published with actual malice), *appeal dismissed and disc. review denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816, 83 L. Ed. 2d 30 (1984).

With regard to Statement 7, in his deposition, Tobin disputed that he made those comments. He specifically denied that he questioned whether plaintiff had done an analysis at all. Additionally, he stated that that his comments regarding "a big red flag" and the analysis being "as bad as it can be" were only made in response to a hypothetical question posed by Locke that assumed an error had been made and that those comments were never intended to apply to plaintiff's actual work in the *Green* and *Adams* cases. Tobin further stated that, after the 14 August article was published, he contacted the SBI and told Richardson that he had never intended any of the comments he provided to Locke to apply specifically to plaintiff's work. In the light most favorable to plaintiff, Tobin's deposition testimony created a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 7, because Tobin either denied making these comments or he explained that the material meaning of his comments had been deliberately altered. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 115 L. Ed. 2d 447, 473 (1991) ("[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.").

Defendants respond that Tobin testified several times that he did not recall everything he told Locke, and that, based on Locke's notes, the statement attributed to Tobin was accurate. But Tobin's deposition testimony and Locke's notes, at best, create a contradiction in the evidence, which must be resolved by the jury, not the trial judge. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 395, 651 S.E.2d 261, 265 (2007) ("Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.").

With regard to Statements 10 and 12, defendants assert that these statements are factually accurate and thus cannot be defamatory. *See Letter Carriers v. Austin*, 418 U.S. 264, 284, 41 L. Ed. 2d 745, 761 (1974)

("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.").

There was much deposition testimony about the differences between an analysis based upon a physical examination of the actual bullets and an analysis of Whitehurst's photographs, particularly considering how the bullets were oriented in the photographs. Defendants correctly assert that even plaintiff acknowledges that, in Whitehurst's photographs, the bullets look different. In her deposition, plaintiff admitted this:

> [Defendants' lawyer:] . . . [I]s it accurate to say that butt to butt and amplified seven times, the bullets look starkly different? . . .
>
> [Desmond:] I agree.
>
> . . . .
>
> [Desmond:] All right. The statement itself, if you take the statement by itself, essentially it's based on truth, because Sutton did ask Whitehurst to photograph the bullets and he—and Whitehurst did photograph them butt to butt. And the photograph itself does look—and the bullets in the photograph do look different.

But the potentially defamatory, and allegedly false, portion of Statements 10 and 12 is the report of the opinions of various experts about the photographs of the bullets. Viewed in context, Statements 10 and 12 indicate that, after examining the photographs, independent analysts concluded that plaintiff's analysis was incorrect. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602 ("[C]ourts look to the circumstances in which the statement is made."); *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899 ("[T]he court must view the words within their full context[.]"). But in their depositions, Tobin, Hendrikse, and Bunch stated that they told Locke that they could not give an opinion based on the photographs alone. Additionally, Bunch, the only one of the three to physically examine the actual bullets, concluded that it was likely that the two bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol.

Defendants also claim that these statements are either not defamatory of Desmond or not "of and concerning" Desmond, but this argument requires that we take the statements entirely out of context, which we cannot do. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602;

Boyce I, 153 N.C. App. at 31, 568 S.E.2d at 899. In context, all the statements are criticizing Desmond's analysis of the bullets, and therefore are "of and concerning her" and potentially defamatory of her. In the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statements 10 and 12. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 11, Hendrikse averred that his comments were "taken out of context." He admitted that he said, "You don't even need to measure to see this doesn't add up." But he averred that his full comment "was something to the effect that you don't even need to measure to see that a second opinion was warranted, again, making it clear to Ms. Locke that only by physically examining the evidence can you determine whether [plaintiff] was right or wrong." He also averred that he commented that plaintiff may have accidentally measured the same bullet twice only in response to a hypothetical question that assumed plaintiff had made an error. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 11. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

With regard to Statement 16, Bunch, the "second FBI scientist who wrote the report released Thursday," did not conclude that the two bullets could not have been fired from the same gun; on the contrary, he concluded that the two bullets *could* have been fired from the same gun. Additionally, he, Tobin, and Hendrikse stated that they could not give an opinion based on the photographs alone. We also note that plaintiff never testified that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Thus, in the light most favorable to plaintiff, we hold that there is a genuine issue of material fact as to whether Locke acted with actual malice when she published Statement 16. *See Cochran*, 62 N.C. App. at 550, 302 S.E.2d at 904-05; *Masson*, 501 U.S. at 517, 115 L. Ed. 2d at 473.

In summary, we hold that the trial court properly denied defendants' motion for summary judgment as to the statements about expert opinions, specifically Statements 6, 7, 10, 11, 12, and 16.

B. Statements About Plaintiff's Testimony

[3] Statements 1, 2, 3, 9, 13, and 14 discuss plaintiff's testimony in the *Green* and *Adams* cases:

> 1. They asked Desmond, an SBI firearms analyst, to determine whether the two bullet fragments had passed through the same gun, a Hi-Point 9 mm she had already linked to a cluster of casings at the crime scene.
>
> 2. Desmond would turn to firearms and toolmark identification . . . to harness these clues into proof that Green was the only gunman.
>
> 3. The day after getting the request from prosecutors, [Desmond] testified that she was absolutely certain both bullets were fired from a Hi-Point 9 mm Model C handgun, the same type she had matched to casings scattered about the ground where Green stood that day. Her report eliminated doubt about another shooter.
>
> 9. [A]ssuring a jury of a match is risky.
>
> 13. However, agent's courtroom certainty that bullets came from one gun in question.
>
> 14. But SBI ballistics analyst Beth Desmond went beyond the finding of her lab report when she testified under oath that she was certain the bullets were fired from the same make of gun. The report's findings undermined the certainty of her testimony.

Defendants contend that the fair report privilege protects them from a defamation claim as to these statements, because the articles report on North Carolina's judicial system generally and the criminal trials of Green and Adams in particular. Defendants note that this Court has held that the press has a privilege to report on such judicial proceedings, provided the reporting offers a substantially accurate account. *See LaComb v. Jacksonville Daily News Co.*, 142 N.C. App. 511, 512-13, 543 S.E.2d 219, 220-21, *disc. review denied*, 353 N.C. 727, 550 S.E.2d 778 (2001). Plaintiff's brief fails to address this privilege.

> The fair report privilege flows from the absolute privilege which attaches to statements made in the due course of a judicial proceeding. Official statements made in a judicial proceeding will not support a civil action for defamation. This privilege includes statements made in arrest warrants. Statements in pleadings and other papers filed in a judicial proceeding which are relevant or pertinent to the subject matter in controversy are cloaked with this absolute privilege.

Id. at 513, 543 S.E.2d at 221 (citations, quotation marks, and brackets omitted). Under the fair report privilege, "[t]he law does not require absolute accuracy in reporting. It does impose the word 'substantial' on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings." *Id.* at 512, 543 S.E.2d at 220.

With respect to Statement 1, plaintiff contends that she did not testify that a High Point 9 millimeter gun was linked to the cartridge cases. But plaintiff testified that the cartridge cases were all fired from the same gun, a High Point 9 millimeter semiautomatic pistol. We thus hold that Statement 1 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 2, plaintiff contends that she never testified that Green was the only shooter. But neither party disputes that the State in the *Green* and *Adams* cases proffered plaintiff's testimony as evidence supporting the State's theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. We thus hold that Statement 2 is substantially accurate. *See id.*, 543 S.E.2d at 220.

With respect to Statement 3, plaintiff asserts that (1) she did not testify that the bullets were fired from the same gun; (2) her report did not eliminate doubt about another shooter; and (3) she did not testify with absolute certainty before a jury. First, we acknowledge that plaintiff did not testify that the bullets were fired from the same gun; rather, she testified that the bullets were fired from the same *type* of gun. Although Statement 3 is ambiguous about whether plaintiff testified that the bullets were fired from the same gun or same type of gun, we hold that this statement is substantially accurate given that plaintiff testified that both bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. Second, as noted above, neither party disputes that the State proffered plaintiff's testimony as evidence supporting the State's theory that Green was the only shooter, and that when considered along with the rest of the evidence, a jury might reasonably infer that Green was the only shooter. Finally, plaintiff admits that, on voir dire, outside the presence of the jury, she testified that she was absolutely certain as to her findings:

> [Green's counsel:] Can you tell with absolute certainty that these came from a 9 mm weapon?
>
> [Plaintiff:] Yes.

> [Green's counsel:] As opposed to being consistent with a 9 mm weapon?
>
> [Plaintiff:] I am with absolute certainty saying that it's a 9 mm High Point firearm.

Sworn testimony presented in court, whether before the judge on voir dire or to the jury, is undoubtedly made "in the due course of a judicial proceeding." *See id.* at 513, 543 S.E.2d at 221. Plaintiff has not presented any authority for her seeming assertion that there is a difference between testimony presented on voir dire or testimony presented to a jury. As demonstrated by the quoted testimony above, plaintiff did testify with absolute certainty that the bullets came from the same type of gun. We thus hold that Statement 3 is substantially accurate. *See id.* at 512, 543 S.E.2d at 220.

With regard to Statement 9, plaintiff asserts that she did not assure a jury of a match. But Locke did not make this claim. We must examine Statement 9 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

> Experts say they can use smaller markings on a bullet to pinpoint a particular gun.
>
> The use of those finer markings can be inexact, too. One study suggests that up to 20 percent of guns of the same model produce identical markings on fired bullets. In other words, assuring a jury of a match is risky.

The article does not state that plaintiff "assur[ed]" a jury, as plaintiff suggests in her complaint. Accordingly, we hold that Statement 9 is not actionable.

With regard to Statement 13, plaintiff contends that she never testified that the bullets were fired from the same gun. Again, plaintiff is correct but plaintiff did testify that both bullets were fired from the same *type* of gun, a High Point 9 millimeter semiautomatic pistol. While Statement 13 is not absolutely accurate, we hold that, under the fair report privilege, this statement is *substantially* accurate and thus not actionable. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 41 L. Ed. 2d 789, 805-06 (1974) ("Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

With regard to Statement 14, plaintiff contends that she did not testify with absolute certainty before a jury and that her lab report did not undermine the certainty of her testimony. As noted above, the articles correctly state that plaintiff testified with absolute certainty that the bullets were fired from the same type of gun, a High Point 9 millimeter semiautomatic pistol. In contrast, in her lab report, plaintiff did not ascribe absolute certainty to her findings; rather, she stated that the two bullets "exhibit class characteristics that are *consistent* with ammunition components that are fired by firearms that are manufactured by or known as: Hi-point (Model C)[.]" (Emphasis added.) She also noted: "Do not use this list to eliminate any suspect firearm of similar caliber and class characteristics." Accordingly, we hold that Statement 14 is substantially accurate. *See LaComb*, 142 N.C. App. at 512, 543 S.E.2d at 220.

With respect to Statements 1, 2, 3, 9, 13, and 14, defendants are protected by the fair report privilege. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

C. Statements About Whitehurst's Photographs

[4] Statements 5 and 15 discuss Whitehurst's photographs:

> 5. This spring, Sutton asked a former FBI crime lab analyst to photograph the bullets under a microscope. Butt to butt, amplified several times, the bullets look starkly different.
>
> 15. The photo, taken under a microscope by a former FBI scientist, showed bullet fragments with dissimilar markings.

Defendants contend that these statements are factually accurate and thus not actionable. *See Austin*, 418 U.S. at 284, 41 L. Ed. 2d at 761 ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact."). We agree.

Plaintiff contends that Whitehurst is not a qualified expert and that his photographs are misleading. But there is no genuine dispute as to the truth of Statements 5 and 15. First, Whitehurst was in fact a "former FBI crime lab analyst[,]" regardless of his qualifications to review plaintiff's analysis. Second, Sutton asked Whitehurst to photograph the bullets under a microscope, and he did. As noted above, even plaintiff admitted that the bullets look different in the photographs. Thus, there is no genuine issue as to the factual accuracy of Statements 5 and 15.

Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to these statements.

D. Remaining Statements

[5] We finally address the remaining statements, Statements 4 and 8:

> 4. She scribbled down the measurements of the lands and grooves[.]
>
> 8. Experts, therefore, can't provide probability of error.

With regard to Statement 4, plaintiff contends that this statement is either libel *per se* or libel *per quod*. To be libelous *per se*, a statement "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that [it] tend[s] to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided." *Skinner v. Reynolds*, ___ N.C. App. ___, ___, 764 S.E.2d 652, 655 (2014). To be libelous *per quod*, a statement must be defamatory "when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]" *Id.* at ___, 764 S.E.2d at 657. Plaintiff essentially contends that she does not "scribble" her notes and the assertion that she did is defamatory. But even if the statement that plaintiff "scribbled" is false, we hold that it does not "tend to disgrace and degrade [plaintiff] or hold [her] up to public hatred, contempt, or ridicule, or cause [her] to be shunned and avoided." *See id.* at ___, 764 S.E.2d at 655. We further hold that Statement 4 does not become defamatory "when considered in conjunction with innuendo, colloquium, and explanatory circumstances[.]" *See id.* at ___, 764 S.E.2d at 657. Because Statement 4 is neither libelous *per se* nor libelous *per quod*, we hold that the trial court should have granted summary judgment in favor of defendants as to that statement.

[6] With regard to Statement 8, plaintiff contends that this statement is false, because "[f]orensic firearms examiners have established and recognized error rates that stem from proficiency tests and validation studies." But defendants proffer academic literature from the National Academy of Sciences, which states: "[T]he decision of the toolmark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates." We must examine Statement 8 in context. *See Lewis*, 220 N.C. App. at 305, 725 S.E.2d at 602; *Boyce I*, 153 N.C. App. at 31, 568 S.E.2d at 899. The 14 August article states:

> As forensic science goes, firearm and toolmark analysis stands on shaky legs. It's built on the idea that every tool leaves a unique mark.

> Unlike with DNA, there is no statistical foundation. Experts, therefore, can't provide probability of error. Every bullet identification boils down to a subjective evaluation by an analyst.

Viewed in context, Statement 8 represents an opinion that firearm and toolmark analysis lacks a statistical foundation for error rates similar to those used for DNA analysis. Unlike the opinions of experts whom Locke interviewed, discussed in section A above, Statement 8 refers to the reliability of firearm and toolmark analysis in general. Experts differ on the reliability of firearm and toolmark analysis, so Statement 8 is not incorrect. Plaintiff has failed to show how this statement makes a false assertion of objective fact. *See Milkovich*, 497 U.S. at 19, 111 L. Ed. 2d at 18. In addition, the statement is not directly of or concerning plaintiff herself, but is more of a criticism of firearm and toolmark analysis generally. Accordingly, we hold that the trial court should have granted summary judgment in favor of defendants as to Statement 8.

In summary, we hold that there is a genuine issue of material fact as to whether Statements 6, 7, 10, 11, 12, and 16 are false and defamatory and whether Locke acted with actual malice when she attributed those statements to firearms experts, as they either denied making those statements or claim that those statements were made in a different context that materially changed their meaning. In the light most favorable to plaintiff, the evidence is "sufficient to allow a jury to find that actual malice [has] been shown with convincing clarity." *See Lewis*, 220 N.C. App. at 303, 725 S.E.2d at 601. But we hold that defendants were entitled to summary judgment as to Statements 1, 2, 3, 9, 13, and 14, which discussed plaintiff's testimony in the *Green* and *Adams* cases; Statements 5 and 15, which discussed Whitehurst's photographs; and Statements 4 and 8, the remaining statements.

Moreover, [i]t is well settled that all who take part in the publication of a libel or who procure or command libelous matter to be published may be sued by the person defamed either jointly or severally." *Taylor v. Press Co.*, 237 N.C. 551, 552, 75 S.E.2d 528, 529 (1953). Defendants do not argue otherwise, so plaintiff's surviving claims should proceed against all three defendants.

VI. Conclusion

Taking the evidence presented in the light most favorable to plaintiff, there were genuine issues of material fact as to whether defendants published defamatory statements of or concerning plaintiff with actual

malice. The trial court properly denied defendants' motion for summary judgment as to the statements identified above as

> 6. Independent firearms experts who have studied the photographs question whether Desmond knows anything about the discipline. Worse, some suspect she falsified the evidence to offer prosecutors the answers they wanted.
>
> 7. "This is a big red flag for the whole unit," said William Tobin, former chief metallurgist for the FBI, who has testified about potential problems in firearms analysis. "This is as bad as it can be. It raises the question of whether she did an analysis at all."
>
> 10. The independent analysts say the widths of the lands and grooves on the two bullets are starkly different, which would make it impossible to have the same number.
>
> 11. "You don't even need to measure to see this doesn't add up," said Hendrikse, the firearms analyst from Toronto. "It's so basic to our work. The only benefit I can extend is that she accidentally measured the same bullet twice."
>
> 12. Other firearms analysts say that even with the poor photo lighting and deformed bullets, it's obvious that the width of the lands and grooves are different.
>
> 16. Ballistics experts who viewed the photographs, including a second FBI scientist who wrote the report released Thursday, said the bullets could not have been fired from the same firearm.

As to the remaining statements which were addressed above as "statements about plaintiff's testimony" or "statements about Whitehurst's photographs" or "the remaining statements," the trial court erred in failing to grant defendants' motion for summary judgment. Accordingly, we affirm the trial court's order in part, reverse it in part, and remand the case to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CALABRIA and McCULLOUGH concur.

IN RE D.L.W.

[241 N.C. App. 32 (2015)]

IN THE MATTER OF D.L.W., D.L.N.W., V.A.W.

No. COA14-1341

Filed 19 May 2015

1. Termination of Parental Rights—neglect of children—findings not sufficient

None of the findings in a termination of parental rights case supported a conclusion that respondent-mother "neglected" her children under N.C.G.S. § 7B-1111(a)(1). The findings addressed respondent-mother's interactions and relationship with DSS and respondent-father rather than respondent-mother's relationship or care, visitation, or support or lack thereof of her children.

2. Termination of Parental Rights—mother's social phobia—not statutorily authorized—not cause of deficiencies with child

A trial court may not order a parent to undergo any course of conduct not provided for in N.C.G.S. § 7B-904. The district court in a termination of parental rights hearing had no authority under N.C.G.S § 7B-904 to order respondent-mother to make reasonable progress to comply with requirements that she obtain treatment for "social phobia" as recommended by her mental health assessment. The juveniles were removed from respondents' care due to domestic violence between respondents, respondents' lack of housing, and respondents' failure to provide the juveniles with sufficient food, nutrition, and hygiene. No evidence in the record or finding suggests that respondent-mother's "social phobia" led or contributed to these deficiencies.

3. Termination of Parental Rights—lack of progress toward correcting conditions—employment and transportation—evidence not sufficient

The trial court erred in a termination of parental rights case by concluding that respondent-mother's lack of stable employment and transportation showed a lack of reasonable progress towards "correcting those conditions which led to the removal of the juveniles without making a finding of willfulness. Moreover, the court's findings must acknowledge the statutory mandate that no parental rights shall be terminated for the sole reason of the parent's poverty. No evidence showed the respondent-mother's failure to prepare a budget caused or perpetuated the neglect of the children or the conditions that led to the children being removed from her custody, and this was not a statutorily enumerated course of conduct.

4. Termination of Parental Rights—mother ordered to submit a budget—no statutory authority

The district court exceeded its authority in a termination of parental rights proceeding under N.C.G.S. § 7B-904(d1)(3) by ordering respondent-mother, after a review hearing, to submit to DSS a budgeting plan.

5. Termination of Parental Rights—father's termination—finding on every option—not required

The district court's decision to terminate respondent-father's parental rights was supported by the findings of fact on each of the dispositional factors set forth in N.C.G.S. § 7B-1111(a)(1)-(5). The trial court is not required to make findings of fact on all the evidence presented or to state every option it considered in arriving at its disposition under N.C.G.S. § 7B-1110.

Appeal by respondent-parents from order entered 29 September 2014 by Judge Kathryn Overby in Alamance County District Court. Heard in the Court of Appeals 20 April 2015.

Jamie L. Hamlett for petitioner-appellee Alamance County Department of Social Services.

Derrick J. Hensley for guardian ad litem.

Jeffrey William Gillette for respondent-appellant mother.

Richard Croutharmel for respondent-appellant father.

TYSON, Judge.

Marisha Nicole Wade ("respondent-mother") and Dammien Lamar Worth ("respondent-father") (collectively "respondents") appeal from an order terminating their parental rights as to their minor children D.L.W., D.L.N.W., and V.A.W (collectively "the juveniles"). We reverse those portions of the order concerning respondent-mother and affirm those portions of the order concerning respondent-father.

I. Background

On 1 March 2013, the Alamance County Department of Social Services ("DSS") filed juvenile petitions seeking an adjudication of neglect and dependency concerning two-year-old D.L.W., three-year-old

D.L.N.W., and five-year-old V.A.W. The petitions alleged DSS had received reports respondents were "residing with their three children in a van located in the woods that is heated by a kerosene heater," and respondents refused to disclose their location to DSS or otherwise cooperate with an investigation. The petitions also alleged "significant domestic violence between the parents that places the juveniles at risk" and that the juveniles were denied adequate nutrition and hygiene and subjected to inappropriate physical discipline by respondent-father.

DSS obtained nonsecure custody of the juveniles on 28 February 2013 and placed them in foster care. On 27 March 2013, V.A.W. was placed with her maternal grandmother ("Ms. W."), who already had custody of one of respondent-mother's two older daughters. The other older daughter, A.I.C., was in the custody of her great-grandmother (respondent-mother's grandmother). Once Ms. W. obtained housing sufficient to accommodate D.L.W. and D.L.N.W., the two boys joined V.A.W. and the older sibling in Ms. W.'s home on 23 May 2013.

At the adjudication hearing on 1 May 2013, based on stipulations entered into by the parties, the court made the following findings relevant to the court's determination that the juveniles were neglected:

> e. At the time of the filing of the petition the Respondent Mother and Father were residing at times with their three children in a van located in the woods.
>
> f. The Respondent Mother denies the van is heated with a kerosene heater but states the van is run during the night to keep warm, but also states the van is cool enough to store milk.
>
> g. The Respondent Parents refused to disclose the location of the van so that the Alamance County Department of Social Services can assess safety and risk issues.
>
> h. It is reported there was domestic violence between the parents that places the juveniles at risk. For example, [V.A.W.] has intervened when the parents are arguing.
>
> . . . .
>
> j. At times, the family has difficulty providing for basic necessities such as housing, baths and so forth. Their skin is very pale and dry, needing lotion.
>
> . . . .

l. The Respondent Father is not employed.

m. The Respondent Mother is employed at AW-NC as a factory worker. She works from 6:00 a.m. until 2:30 p.m.-6:00 p.m. She has been employed for approximately ten months.

n. The Respondent Mother reports she made the van payment for the first time in several months a few weeks ago. She reports the van is not drivable because the finance company turned the car off [sic].

o. The Respondent Mother reports she did not have enough money to maintain a household since becoming a permanent employee on February 18, 2013.

Based on its findings of fact, the court adjudicated the juveniles as "neglected" as defined by N.C. Gen. §7B-101(15) (2013).

The district court held a permanency planning hearing on 23 October 2013 and established a primary permanent plan of reunification with a secondary plan of custody with a court-approved caretaker by order entered 18 November 2013. The court found that respondents made no progress on their "Out of Home Services" case plans and were homeless, "living in motels." The court also found respondent-mother inconsistently contacted and called her social worker outside of business hours, maintained her full-time job, and completed her mental health assessment.

The court found neither parent had signed a voluntary support agreement with the Child Support Agency, but found respondent-mother was paying child support through income withholding. Although respondent-mother had full-time employment, she had not provided DSS with a "budgeting plan that can account for where the funds coming into the household go," as was ordered by the court.

Respondent-father remained unemployed, provided no child support for his children, and had not attended any visitation or participated in a domestic violence course. He had arranged "access to reliable transportation" but respondents had not negotiated a plan for shared use of the transportation with respondent-mother.

Following a review hearing on 18 December 2013, the district court found respondent-mother had not completed all of the objectives presented in her case plan. She failed to follow the recommendation of treatment for her "social phobia," as diagnosed in the mental health

assessment, to obtain appropriate housing, and to provide a plan for shared transportation with respondent-father.

Respondent-father likewise was found to have failed to find appropriate housing, and verifiable employment. He had not participated in domestic violence courses and had attended only a few visits with the children. The court found the parents had made "no progress on any aspect of the case plan has been completed [sic]." The court changed the permanent plan for the juveniles from a primary plan of reunification and secondary plan of custody to a court-approved caretaker to a primary plan of adoption with a secondary plan of guardianship. DSS filed a motion to terminate respondents' parental rights on 11 March 2014.

After hearing evidence on 6-8 August 2014 and 3 September 2014, the district court found grounds to terminate respondents' parental rights for neglect and for failure to make reasonable progress since 28 February 2013 in correcting the conditions that led to the juveniles' placement outside the home. N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2013).

The court found a third ground for termination of respondent-father's parental rights due to his failure to pay a reasonable portion of the juveniles' cost of care. N.C. Gen. Stat. § 7B-1111(a)(3) (2013). The court determined that terminating respondents' parental rights was in the best interests of the juveniles. Respondents gave timely notice of appeal from the termination order. We address each party's arguments in turn.

II. Respondent-Mother's Appeal

Respondent-mother challenges the district court's determination that grounds exist to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2). She claims she had resolved, made progress toward, and intended to resolve the issues which led to the juveniles' removal from her home and their adjudication as neglected in 2013. To the extent she failed to satisfy elements of her DSS case plan or requirements imposed by the court, respondent-mother argues "this was the result of [her] poverty and was not willful." She further contends that the court exceeded its statutory authority in imposing certain requirements for reunification, and finding lack of progress to terminate her parental rights because they were "unrelated to the conditions that led to the children's removal or adjudication" as neglected. *See* N.C. Gen. Stat. § 7B-904 (2013).

A. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact

> are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law
>
> The trial court's 'conclusions of law are reviewable *de novo* on appeal.'

In re J.S.L., 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

B. Analysis

[1] The district court determined respondent-mother had neglected the juveniles under N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is one who "does not receive proper care [or] supervision" from the juvenile's parent or who "lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2013). To support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1), "[n]eglect must exist at the time of the termination hearing." *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). Where "the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future." *Id.* (citation omitted). The determination of whether a child is neglected is a conclusion of law and is reviewed *de novo* on appeal. *In re J.N.S.*, 180 N.C. App. 573, 575, 637 S.E.2d 914, 915 (2006).

The district court made the following findings of fact in support of its determination that respondent-mother had neglected the juveniles under N.C. Gen. Stat. § 7B-1111(a)(1):

> 26[-27]. . . . At the time of the filing of the motion to terminate parental rights, [both parents were] residing at 740 Ivey Road Graham, NC 27253. [They are] currently residing at the Allied Homeless Shelter in Burlington, North Carolina.
>
> . . . .
>
> 30. The juveniles have consistently been in out-of-home placement since being removed from the care of the parents.
>
> . . . .
>
> 45. The Respondent Mother entered into and was court ordered to comply with [an] out-of-home family services agreement. She was to obtain a mental health assessment. She did an initial assessment which indicated diagnoses

of social phobia and cannabis dependency full remission. She did not seek out services to address social phobia.

. . . .

48. The Respondent Mother was to obtain and maintain appropriate housing. She did obtain three different homes and, at times, resided with friends in Durham. She was not stable, would pay rent for one month but not subsequently without good reason and she does not currently have appropriate housing . . . .

49. The Respondent Mother was to obtain and maintain employment. She was employed at AW working 65 hours a week earning between $11.00 and $13.00 per hour. The money was direct deposited in[to her] account. She could not figure out why she could not pay bills or where the money went. In March of 2014, she lost her employment due to incarceration. Initially she lied about the loss of employment, saying she resigned, then that she lost employment due to snow days and then due to incarceration.

50. The Respondent Mother was to develop a reliable means of transportation. She does not have a valid North Carolina driver's license. She continued to drive without a valid driver's license. In December of 2013, she was charged with careless and reckless and fleeing to elude still [sic]. She drove a vehicle registered in the Respondent Father's name with his knowledge that she did not have a license.

. . . .

52. The Respondent Mother was to attend counseling for victims of domestic violence and be able to articulate what she has learned. She attended seven sessions of the support group at Family Abuse Services in 2013. She attended several meetings since losing her job in March of 2014 but has not consistently attended and has not articulated an[] understanding of what she has learned. She continued in a relationship with the Respondent Father and there were significant issues regarding ongoing domestic violence.

. . . .

> 62. The Respondent Parents were required to do a budgeting plan but failed to do so despite being employed for periods of more than one month. Their failure to appropriately budget their funds has continued to result in instability.
>
> . . . .
>
> 65. On two differen[t] occasions in 2014, law enforcement has been called to the home of the parents due to domestic violence between the parents.

Based on these findings, the court concluded that "[t]here is a likelihood of repetition of neglect of the minor child[ren] in that neither the mother nor the father ha[s] made reasonable progress given their individual circumstance[s] in the twelve months preceding the filing of the motion for the termination of parental rights."

In her challenge to the evidence supporting the enumerated findings, respondent-mother excepts to the district court's statement in finding 52 that she "has not articulated and [sic] understanding of what she has learned" from domestic violence counseling. While noting she was never ordered to "articulate" anything related to her domestic violence counseling, respondent-mother argues that the court's finding "fails to take into account [her] testimony" at the termination hearing, in which she acknowledged domestic violence and other controlling behaviors by respondent-father and declared her intention to end the relationship.

She submitted and the court found she had attended seven domestic violence group sessions in 2013. She testified she had attended two sessions since losing her employment in March 2014, and failed to attend others because she lacked transportation.

Respondent-mother denied engaging in domestic violence with respondent-father on 16 and 19 March 2014. She attributed difficulties in her relationship with respondent-father to "the loss of our kids and . . . us discussing this case plan." She acknowledged having told police on 16 March 2014 that respondent-father "beat [her] up all the time," but claimed she had lied to the police in an attempt to get them to leave her residence. Respondent-mother also acknowledged lying at a Child and Family Team meeting on 4 April 2014, when she claimed her relationship with respondent-father had ended.

After respondent-father testified, the tenor of respondent-mother's testimony changed the following day. She disavowed her previous

testimony as untrue and proceeded to describe a longstanding pattern of abusive, controlling behavior by respondent-father toward her.

None of these findings support a conclusion that respondent-mother "neglected" her children under N.C. Gen. Stat. § 7B-1111(a)(1). These findings do not address respondent-mother's relationship or care, visitation or support or lack thereof of her children. Rather, they address respondent-mother's interactions and relationship with DSS and respondent-father.

[2] Respondent-mother also challenges the district court's findings regarding her failure to obtain treatment for "social phobia," as recommended by her mental health assessment; to secure stable employment and reliable transportation; and to submit a budgeting plan to DSS. She argues that the district court had no authority under N.C. Gen. Stat. § 7B-904 to order her to make reasonable progress to comply with these requirements. We agree.

"A trial court may not order a parent to undergo any course of conduct not provided for in N.C. Gen. Stat § 7B-904." *In re W.V.*, 204 N.C. App. 290, 297, 693 S.E.2d 383, 388 (2010) (citation and internal quotation marks omitted). In *W.V.*, the trial court ordered the father to obtain and maintain stable employment. There was no evidence that the father's unemployment "led to or contributed to the juvenile's adjudication." *Id.*

Here, respondent-mother's initial mental health assessment indicated a diagnosis of "social phobia." A treatment option of group therapy was suggested to "assist her in developing [her] sense of self."

Based on the petitions filed by DSS on 1 March 2013, the juveniles were removed from respondents' care due to domestic violence between respondents, respondents' lack of housing, and respondents' failure to provide the juveniles with sufficient food, nutrition, and hygiene. No evidence in the record or finding suggests respondent-mother's "social phobia" led or contributed to these deficiencies. The trial court's finding that respondent-mother failed to make reasonable progress to reunite with her children because she failed to seek services to address her "social phobia" is without statutory authority. The court's reliance on this finding to support lack of reasonable progress is error.

[3] Respondent-mother argues the trial court erred by finding she had not made reasonable progress in obtaining stable employment and reliable transportation. A stable job and reliable transportation may be steps which could "remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove

custody of the juvenile[s]" from respondents' care, as authorized by N.C. Gen. Stat. § 7B-904(d1)(3). However, after the juveniles were removed from her care, respondent-mother obtained employment, which she subsequently lost due to her arrest involving domestic violence with respondent-father and being stranded in Durham due to the weather. Nonetheless, the trial court found respondent-mother regularly and consistently paid child support, attended parenting classes when she was able, and had a nurturing bond with her children.

The trial court's findings concerning respondent-mother's reasonable progress towards correcting the conditions which led to the removal of her children must acknowledge N.C. Gen. Stat. § 7B-1111(a)(2)'s final sentence: "no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." "A finding that a parent has ability to pay support is essential to termination for nonsupport" pursuant to N.C. Gen. Stat. § 7B–1111(a)(3). *In re Ballard*, 311 N.C. 708, 716–17, 319 S.E.2d 227, 233 (1984); *In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004) *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005).

Here, the trial court found that respondent-mother had been employed, but had lost employment due to weather and incarceration. "Where a respondent has been and continues to be incarcerated, our courts have prohibited termination of parental rights solely on that factor." *In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 81 (2007).

The court found respondent-mother had obtained housing, but had been unable to pay rent. The court made no finding that respondent-mother "willfully" failed to seek employment or "willfully" failed to pay support of her children based on clear, cogent and convincing evidence.

In the absence of finding willful failure as supported by clear, cogent and convincing evidence, the trial court erred in concluding respondent-mother's lack of stable employment and transportation showed a "lack of reasonable progress" towards "correcting those conditions which led to the removal of the juvenile[s]." N.C. Gen. Stat. § 7B-1111(a)(2).

[4] Respondent-mother also argues the district court exceeded its authority under N.C. Gen. Stat. § 7B-904(d1)(3) by ordering respondent-mother, after a review hearing on 31 July 2013, to submit to DSS "a budgeting plan that can account for where the funds coming into the household goes [sic] and [respondents'] plan for maintaining appropriate funds for the care of their children." Finding of Fact 49 of the termination order shows respondent-mother earned substantial income

through her employment at AW from February 2013 until March 2014, yet was unable to pay all her bills or to account for her expenditures, even though she paid child support for her children from her employment.

Respondent-mother initially estimated she was "bringing home about $2,400 a month" when she and respondent-father were evicted from Deer Trails Apartments for non-payment of rent in the Fall of 2013. When asked how she had spent her income, respondent-mother stated "child support, food, trying to pay off some debts. I have to pay on my electric bill . . . to have electric[ity] cut on. That's it. I was buying toys for my kids which I might not should have been doing but I was buying toys." Respondent-mother also later testified that respondent-father took all of her money for his own use, which was not disclosed prior to the termination hearing.

Pursuant to N.C. Gen. Stat. § 7B-904(d1)(3), the trial court may order a parent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(d1)(3). The "trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen Stat. § 7B–904]." *In re Cogdill*, 137 N.C. App. 504, 508, 528 S.E.2d 600, 603 (2000); *see also*, *In re W.V.*, 204 N.C. at 297, 693 S.E.2d at 388-89.

No evidence shows the respondent-mother's failure to prepare a budget caused or perpetuated the neglect of the children or the conditions that led to the children being removed from her custody. As this is not an enumerated course of conduct, the trial court exceeded its authority under N.C. Gen. § 7B-904 in finding her failure to prepare a budget plan showed lack of reasonable progress to reunify with her children.

The trial court failed to make findings of fact to establish either willfulness or lack of reasonable progress to correct the conditions which led to the removal of the juveniles by clear, cogent and convincing evidence and to support the termination for neglect under N.C. Gen. Stat. §§ 7B-904 or 7B-1111(a)(1). *In re J.S.L.*, 177 N.C. App. at 160-164, 628 S.E.2d at 392-394. DSS "must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future." *In re C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 729; *In re Ballard*, 311 N.C. at 714-15, 319 S.E.2d at 231-32. The trial court's order does not include these findings to support its conclusions and is reversed as to respondent-mother.

III. Respondent-Father's Appeal

[5] Respondent-father does not challenge the grounds for termination of his parental rights found by the district court under N.C. Gen. Stat. § 7B-1111(a)(1)-(3), but argues that the court improperly chose termination as the disposition serving the best interests of the juveniles. In his brief, respondent-father cites the bond he shares with his children and proposes guardianship as providing the juveniles with "both a permanent plan and a continuing relationship with their parents." He further notes that "the prospective adoptive parent in this case was the children's unmarried paternal [sic] grandmother."

The district court's decision to terminate respondent-father's parental rights is supported by the findings of fact. The court made findings of fact on each of the dispositional factors set forth in N.C. Gen. Stat. § 7B-1111(a)(1)-(5). Respondent-father asserts the court was obliged to make a specific finding regarding the juveniles' "need for ongoing contact with their parents" under the catchall provision of N.C. Gen. Stat. § 7B-1111(a)(6). "[T]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered" in arriving at its disposition under N.C. Gen. Stat. § 7B-1110. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

Insofar as respondent-father suggests that preserving his parental rights would "keep [him] on the hook for child support," the record shows he paid nothing toward the support of the juveniles during the course of these proceedings and evidence shows he took respondent-mother's wages for himself. Respondent-father's objections and arguments are overruled.

IV. Conclusion

The portions of the trial court's order to terminate respondent-mother's parental rights are reversed and the portions of the order to terminate respondent-father's parental rights are affirmed.

REVERSED IN PART AS TO RESPONDENT-MOTHER AND AFFIRMED AS TO RESPONDENT-FATHER.

Judges ELMORE and INMAN concur.

IN RE J.W.

[241 N.C. App. 44 (2015)]

IN THE MATTER OF J.W. AND K.M.

No. COA14-927

Filed 5 May 2015

1. Child Abuse, Dependency, and Neglect—findings of fact—same wording as juvenile petition—sufficiency of evidence

The trial court did not err in a child neglect and custody case by its findings of fact that allegedly "regurgitated" the same wording used in the juvenile petition. It is not *per se* reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. The Court of Appeals concluded the record of the proceedings demonstrated that the trial court, through processes of logical reasoning based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.

2. Child Visitation—visitation plan—frequency and length of visits

The trial court did not err in a child neglect and custody case in its child visitation order even though respondent mother contended that the visitation plan allegedly did not include the frequency and length of visits as required by N.C.G.S. § 7B-905.1. However, the two orders complied with the statutory mandate in setting respondent's visitation.

3. Child Custody and Support—non-secure custody—Department of Social Services

The trial court did not err in a child neglect case by awarding the Department of Social Services (DSS) non-secure custody of the juveniles at the dispositional hearing even though respondent mother contended that the statute did not provide for non-secure custody. Respondent did not provide any reason why the children should have been placed in secure custody, and there was none.

4. Child Custody and Support—failure to return custody to parent after completion of case plan—conditions leading to removal still existed

The trial court did not abuse its discretion in a child neglect and custody case by failing to return the children to respondent mother's custody even though she completed her case plan and had the financial means to provide for the children. The trial court found that respondent behaved inappropriately at several visits with the

children and that respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that respondent "has been unable to consistently care for herself or any of her children" and that the conditions leading to the removal of the children continued to exist.

Appeal by respondent from orders entered 8 and 22 May 2014 by Judge Susan Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 17 February 2015.

Hanna Honeycutt for petitioner-appellee Buncombe County Department of Social Services.

Sydney Batch for respondent-appellant mother.

Amanda Armstrong for guardian ad litem.

DIETZ, Judge.

Respondent, the mother of J.W. and K.M., appeals from orders adjudicating her children neglected and placing them in the custody of the Department of Social Services.

Respondent's lead argument is one we see with increasing frequency in this Court: that the trial court's fact findings are infirm because they are "cut-and-pasted" directly from the juvenile petition. This argument stems from language in a series of this Court's decisions holding that fact findings "must be more than a recitation of allegations."

As explained below, we clarify today that it is not *per se* reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. It is a long-standing tradition in this State for trial judges to "rely upon counsel to assist in order preparation." *In re A.B.*, ___ N.C. App. ___, ___, 768 S.E.2d 573, 579 (2015). It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose.

Instead, as we previously have held on many occasions, when examining whether a trial court's fact findings are sufficient, we will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we

are confident the trial court did so, it is irrelevant whether those findings appear cut-and-pasted from a party's earlier pleading or submission. We thus reject Respondent's argument that the trial court's order is infirm because it "regurgitated" the same wording used in the juvenile petition.

We also reject Respondent's remaining arguments concerning custody, visitation, and the denial of reunification, all of which are controlled by well-settled law from this Court. Accordingly, we affirm the trial court's orders adjudicating the juveniles neglected and the dispositional orders placing the juveniles in the custody of the Buncombe County Department of Social Services.

Facts and Procedural History

On 10 September 2013, Buncombe County Department of Social Services (DSS) filed petitions alleging that J.W. and K.M. were neglected juveniles. DSS recounted Respondent's history with Child Protective Services which dated back to 2004, and which included issues with drug abuse and domestic violence. DSS's latest involvement with Respondent stemmed from a report by Child Protective Services in February 2013. The report stated that Respondent had been raped and assaulted by K.M.'s father. Respondent took out a Domestic Violence Protective Order against the father, but failed to prosecute the case and allowed the father contact with the minor children. The report further alleged that Respondent was suicidal and was abusing a prescription painkiller.

Child Protective Services also found that the father had physically assaulted Respondent during her pregnancy with K.M., and that Respondent was afraid of the father. The agency created a safety plan which provided that Respondent would abide by the Domestic Violence Protective Order and that the father's contact with the juveniles would occur only at a visitation center.

On 7 March 2013, Respondent placed the juveniles in kinship arrangements after she admitted to violating the provisions of the Domestic Violence Protective Order and stated that she was unable to care for the juveniles. Respondent received mental health counseling and help for her domestic violence issues. On 11 July 2013, Respondent was granted sole physical and legal custody of J.W. Respondent also was granted unsupervised visitation with K.M. However, on 8 August 2013, Respondent sent a letter to her social worker stating she no longer wished to participate in voluntary services and requested that DSS take custody of her children. According to DSS, Respondent indicated the she did not want her children at that time, that she believed K.M. should be adopted by his kinship care providers, and that J.W. should

stay in kinship care until he was five so that Respondent could get her "life in order." The father was released from jail at the end of August 2013. Following his release, Respondent reported that he was leaving her threatening messages on Facebook, and that somebody had tampered with the brakes on her car.

DSS filed another juvenile petition regarding K.M. on 3 January 2014, this time adding an allegation that K.M. was dependent. DSS alleged that there had been ongoing difficulties between Respondent and the juveniles' kinship providers since the filing of the August 2013 petitions. Specifically, on 2 January 2014, K.M. was taken to a hospital due to breathing issues. While at the hospital, Respondent threatened K.M.'s kinship provider, stating "I will kick your ass." K.M. was discharged from the hospital on 3 January 2014. Following his release, Respondent was unwilling to allow K.M. to be discharged to his kinship providers and stated that she wanted him moved to another kinship placement. DSS concluded that it was in K.M.'s interests to remain in his placement, noting that his kinship providers had provided a safe and appropriate placement, and further that it was unsafe for K.M. to return to Respondent's care.

The trial court held adjudicatory hearings on 25 through 28 February 2014. The trial court adjudicated the juveniles as neglected and entered an interim dispositional order granting custody to DSS and providing for their continued placement with their kinship providers. Respondent was granted supervised visitation.

The trial court held a full dispositional hearing on 10 April 2014. The court awarded non-secure custody to DSS, with placement to be continued with the children's kinship care providers. Respondent again was granted supervised visitation. Respondent timely appealed from these orders.

Analysis

I. Adjudication of Neglect

[1] Respondent first challenges the trial court's adjudication of neglect with respect to her two children. Specifically, Respondent contends that the trial court failed to make proper findings of fact and that the findings, even if proper, are not supported by clear and convincing evidence.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C.

App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (internal quotation marks omitted).

At an adjudicatory hearing, "the trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal quotation marks omitted). These findings "must be more than a recitation of allegations. They must be the specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (internal quotation marks omitted).

A. Wording of the Trial Court's Findings

Respondent first argues that the trial court's fact findings are improper because the court simply "regurgitated" the allegations in the juvenile petitions. Respondent accurately notes that nearly every fact finding in the trial court's orders is copied verbatim from a corresponding allegation in the juvenile petitions. Respondent asserts that "[i]t is blatantly obvious that the trial court failed to craft ultimate findings of facts as evidenced by its 'cut-and-paste' process of drafting its order."

We do not agree that findings by the trial court are insufficient simply because they are similar, or even identical, to the wording of the juvenile petition. The cases on which Respondent relies for this proposition do not prohibit "cut-and-pasted" findings, but instead prohibit findings that do not actually *find* any facts. For example, *In re Anderson* concerned an order stating only that "the grounds *alleged* for terminating the parental rights are as follows . . . ." 151 N.C. App. at 97, 564 S.E.2d at 602. This Court held that "[a]s indicated by the word 'alleged,' the findings are not the 'ultimate facts' required by Rule 52(a) to support the trial court's conclusions of law." *Id.* Similarly, *In re O.W.* involved a series of findings that simply stated what witnesses had said. As this Court observed, this type of finding "is not even really a finding of fact as it merely recites the testimony that was given." 164 N.C. App. at 703, 596 S.E.2d at 854.

To the extent our previous decisions created any confusion, we clarify today that it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court

did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

This holding is compelled not only by our existing precedent, but also by the reality of how trial court orders are prepared in our State. As this Court recently observed, "initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. . . . District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation." *In re A.B.*, ___ N.C. App. at ___, 768 S.E.2d at 579. In light of this reality, it would impose an impossible burden on trial court judges if we were to hold that any findings "cut-and-pasted" from a party's pleading automatically warranted reversal of the order. If a trial court, after carefully considering the evidence, finds that the facts are exactly as alleged in a party's pleading, there is nothing wrong with repeating those same words in an order. The purpose of trial court orders is to do justice, not foster creative writing.

In this case, we readily conclude that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to support its conclusions of law. The trial court heard four days of witness testimony before reaching its decision to adjudicate the juveniles as neglected. The court found that Respondent took out a Domestic Violence Protective Order against the father after he physically assaulted her while she was pregnant; that Respondent failed to enforce that protective order and that she allowed the father contact with the juveniles; that Respondent had a history of substance abuse and domestic violence; that Respondent indicated that she no longer wished to participate in her case plan; and that there were ongoing difficulties between Respondent and the children's kinship providers. The court also made the ultimate fact finding that the juveniles were neglected because they did not receive proper care, supervision, or discipline; they were not provided with necessary medical care; and they lived in an environment injurious to their welfare.

Although many of these findings in the court's orders appear to be "cut-and-pasted" from wording in the juvenile petitions, the findings are based on evidence presented to the court. In light of the entire record and the transcript of the proceedings, we are confident that the trial court's findings are the result of its own independent, reasoned decision. Accordingly, we reject Respondent's argument that the trial court's orders are erroneous because they contain language cut-and-pasted from the juvenile petitions.

B. Evidence Supporting Finding of Neglect

Respondent next argues that, even if the trial court's findings of neglect are sufficient on their face, those findings are not supported by the record. We disagree.

A neglected juvenile is a "juvenile who does not receive proper care, supervision, or discipline . . . or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2013). In addition, there must be "some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment*." *In re A.B.*, 179 N.C. App. 605, 613, 635 S.E.2d 11, 17 (2006) (internal quotation marks omitted). In determining whether a child is neglected, domestic violence in the home contributes to an injurious environment. *See In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006).

During the adjudicatory hearing in this case, social worker Karina Pizarro testified that Respondent took out a Domestic Violence Protective Order against the father after he strangled and attempted to rape her and that Respondent admitted to having contact with the father despite the protective order. She also stated that Respondent was afraid to enforce the protective order, that Respondent went back and forth about where she wanted her children placed multiple times, that Respondent stated that she could not care for the children because she was having a rough time and did not have any money, and that Respondent has a history of problems with her children requiring intervention by DSS.

Social worker Rachel Crandall testified that Respondent sent her a letter indicating that she no longer wanted to participate in her case plan services and that she wished for the children to be placed in foster care. She also testified about ongoing difficulties between Respondent and her children's kinship providers and that Respondent often expressed her desire to remove the children from their kinship placements only to quickly change her mind again. Crandall also stated that Respondent behaved inappropriately during some of her visits with her children.

Respondent testified to her prior involvement with DSS due to domestic violence and her past substance abuse treatment and mental health treatment. She also admitted that the father physically assaulted her while she was pregnant and, importantly, that she had contact with the father and allowed him contact with the children despite the protective order being in place to prevent any contact for her own safety and the safety of her children. This testimony, taken together, is sufficient to support the trial court's findings of neglect.

II. Visitation Order

[2] Respondent next argues that the trial court erred in its visitation order because the visitation plan did not include the frequency and length of visits as required by N.C. Gen. Stat. § 7B-905.1. We disagree.

Section 7B-905.1 provides that, "[i]f the juvenile is placed or continued in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved or ordered by the court. The plan shall indicate the minimum frequency and length of visits and whether the visits shall be supervised." N.C. Gen. Stat. § 7B-905.1(b) (2013).

The court's dispositional order for J.W. grants Respondent "weekly, supervised visits with the minor child, supervised by a social worker at the Buncombe County Department of Social Services or the Haywood County Department of Social Services." The order also states that "all prior orders of the Court should remain in full force and effect, unless specifically modified by this order." In an interim order entered 8 May 2014, the court ordered that Respondent "shall have two hours of supervised visitation with [J.W.] per week" at a specified McDonald's restaurant supervised by DSS. Reading the two orders together, the visitation order for J.W. provides for weekly two hour visits supervised by DSS. Thus, the visitation order properly complies with N.C. Gen. Stat. § 7B-905.1.

The dispositional order for K.M. also states that "all prior orders of the Court should remain in full force and effect, unless specifically modified by this order" and orders that "the Child and Family Team shall have discretion to allow the respondent mother to have unsupervised visits at the Department." The interim order entered 8 May 2014 granted Respondent "a maximum of one hour of supervised visitation with [K.M.] per week" to be "supervised by the Department or another appropriate adult approved by the Department and shall occur at a time mutually agreeable to the parties." Viewing the two orders together, the court granted Respondent one hour of supervised visitation per week with the possibility of unsupervised visits to be decided by the Child and Family Team, of which Respondent is a member. Thus, the order complies with the statutory mandate in setting Respondent's visitation.

III. Award of Non-Secure Custody

[3] Respondent next argues that the trial court erred in awarding DSS non-secure custody of the juveniles at the dispositional hearing. Respondent contends that, although the statute allows for the court to

grant "custody" to DSS, the statute does not provide for "non-secure custody." We disagree.

N.C. Gen. Stat. § 7B-903 provides the various dispositional alternatives available to the trial court. Under the statute, if the court determines the juvenile needs more adequate care or supervision, "the court may . . . [p]lace the juvenile in the custody of the department of social services." N.C. Gen. Stat. § 7B-903(a)(2)(c) (2013). The use of the term "non-secure custody" merely distinguishes the custody from "secure custody," in which the juvenile is placed in a detention facility or other government-supervised confinement. Respondent does not provide any reason why the children should have been placed in secure custody, and there is none. Accordingly, we reject this argument.

IV. Denial of Reunification

[4] Finally, Respondent argues that the trial court erred by failing to return the children to her custody because she completed her case plan and has the financial means to provide for the children. We disagree.

"The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child. . . . We review a dispositional order only for abuse of discretion." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008).

The trial court found that Respondent behaved inappropriately at several visits with the children and that Respondent appeared to be under the influence of drugs or alcohol during one of the visits. The court also found that Respondent "has been unable to consistently care for herself or any of her children" and that the conditions leading to the removal of the children continue to exist. These findings are supported by evidence presented during the hearing and support the trial court's conclusion that the children should remain in the custody of DSS. Therefore, the court did not abuse its discretion in declining to return the children to Respondent's custody at the dispositional hearing.

Conclusion

For the reasons discussed above, we affirm the trial court's orders adjudicating the juveniles neglected and the dispositional orders placing the juveniles in the custody of the Buncombe County Department of Social Services.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

IN RE P.A.

[241 N.C. App. 53 (2015)]

IN THE MATTER OF P.A

No. COA14-1086

Filed 5 May 2015

1. Juveniles—guardianship—fundamentally fair procedures—scrutiny of guardian and mother

In a guardianship proceeding for respondent-mother's child, respondent contended that the hearing lacked fundamentally fair procedures in that the trial court subjected her to closer scrutiny than it did Ms. Smith, an unrelated person who was to be the guardian. Respondent's arguments were in substance directed at the trial court's weighing of the evidence and determination of the credibility of the witnesses. While it is true that some of the evidence could be viewed as respondent suggested, the appellate court cannot reweigh the evidence or credibility as determined by the trial court.

2. Juveniles—guardianship—fundamentally fair procedures—cross-examination—prior neglect adjudication

Respondent-mother's right to fundamentally fair procedures in a guardianship proceeding for her child was not violated by a Department of Social Services (DSS) attorney's cross-examination of her concerning a prior adjudication of neglect that was overturned on appeal. Examined in context, the questions were not improper in any way. The questions related not to the legal conclusions of the prior adjudication but to facts as to prior events in the long history of DSS's involvement with respondent's children.

3. Juveniles—guardianship—guardian's understanding and resources—evidence not sufficient

The trial court's determination that legal guardianship of respondent-mother's child should be granted to Ms. Smith, a third party, was remanded for further proceedings. The trial court's finding that Ms. Smith was aware of the legal significance of her appointment as legal guardian of the juvenile was supported by the evidence, as Ms. Smith was present in court and the trial court directly addressed her at the hearing. However, there was insufficient evidence in the record to support a determination that Ms. Smith would have adequate resources to care appropriately for the juvenile. Ms. Smith's unsworn affirmative answer to the trial court's inquiry as to whether she had the financial and emotional ability to support the child and provide for its needs alone was not sufficient. The trial court has the

responsibility to make an independent determination, based upon facts in the particular case.

4. Juveniles—guardianship—further review waived by trial court—requisite findings not made

In a guardianship proceeding vacated and remanded on other grounds, the trial court erred by not making the requisite findings before waiving further review hearings.

Appeal by respondent from orders entered 6 July 2014 by Judge Susan Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 6 April 2015.

Buncombe County Department of Social Services, by Hanna Honeycutt, for petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from a permanency planning review order and guardianship order in which the trial court awarded guardianship of her minor child P.A. ("Parker") to Ms. H.-M. ("Ms. Smith"), ceased reunification efforts by the Buncombe County Department of Social Services ("DSS"), and waived further review hearings in this juvenile case.[1] Respondent contends that the trial court (1) violated her right to fundamentally fair procedures; (2) failed to verify that Ms. Smith had adequate resources to care appropriately for Parker; and (3) failed to make requisite findings of fact before waiving further review hearings. We vacate the trial court's orders and remand this matter for further proceedings.

I. Background

On 15 September 2011, DSS filed a petition alleging Parker was a neglected juvenile in that he did not receive proper care, supervision, or discipline from respondent and lived in an environment injurious to his welfare. DSS assumed non-secure custody of Parker that same day,

1. Pseudonyms are used to protect the identity of the juvenile and for ease of reading.

and on 20 September 2011, DSS placed Parker with his biological father ("Father"), who lived with his girlfriend, Ms. Smith. On 25 September 2012, the trial court entered an adjudication and dispositional order on the juvenile petition. The trial court concluded that Parker was a neglected juvenile and that the conditions that led to the removal of Parker from respondent's care had not been fully resolved, and thus DSS should remain involved in the case. In summary, the adjudication of neglect was based upon respondent's pattern of residential instability and involvement in domestic violence with Father. Nevertheless, the trial court concluded that Father was a fit and proper person to care for Parker and granted him custody of Parker.

After a review hearing, the trial court entered an order on 2 April 2013 in which it concluded that sole custody of Parker should remain with Father and waived further review hearings in the juvenile case. But six days later, respondent filed a request for emergency custody alleging that Father had been arrested for three counts of taking indecent liberties with A.H. ("Annie"), the minor child of Father's girlfriend, Ms. Smith. Ms. Smith had reported the incident to the police and had removed Annie from the home that she had shared with Father.

On 8 April 2013, DSS filed a new juvenile petition alleging that Parker was an abused and neglected juvenile based upon Father's alleged sexual abuse of Annie and his resulting incarceration. DSS again assumed non-secure custody of Parker and placed him with Ms. Smith. After conducting a hearing on the second juvenile petition, the trial court entered adjudication and dispositional orders on 3 September 2013. The trial court concluded that Parker was an abused and neglected child and that Father was a "responsible individual, as he has abused and seriously neglected the minor child."[2] The trial court continued custody of Parker

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2. It is not entirely clear whether the trial court adjudicated Parker as neglected, abused, or both. The 8 April 2013 Juvenile Petition alleged both abuse and neglect, and specifically alleged that Parker was abused based upon the claim that Father had "committed, permitted, or encouraged the commission of a sex or pornography offense with or upon the juvenile in violation of the criminal law." But the only allegations of sexual abuse were the acts upon Annie; based upon the record, it appears that Parker was not present when these acts occurred. The 3 September 2013 order addressed the allegations of sexual abuse of Annie in detail but then concluded that "the minor child [(apparently referring to Parker, not Annie)] is an abused and neglected child, pursuant to N.C.G.S. §§ 7B-101(1), and 7B-101(15), in that the juvenile's parent has committed, permitted, or encouraged the commission of a sex or pornography offense with the juvenile or upon the juvenile in violation of criminal law; and as the juvenile lives in an environment injurious to the juvenile's welfare, and does not receive proper care, supervision, or discipline from their parent." The 3 September 2013 order thus appears to confuse two children, Annie, the actual victim

with DSS, continued to sanction placement of Parker with Ms. Smith, established several requirements for respondent to meet before regaining custody of Parker, and awarded respondent visitation with Parker several days each week.

On or about 22 October 2013, the trial court sanctioned a trial home placement in respondent's home. At first, this placement went well. But on 20 December 2013, respondent married a man with a long criminal history ("Mr. King"), whom she had just met in October 2013. Mr. King's convictions include assault with a deadly weapon, assault on a female, and drug-related offenses. Respondent did not notify DSS about her marriage to Mr. King. On 4 January 2014, after a domestic disturbance, respondent asked Mr. King to leave their home. Because of this incident, a criminal warrant was issued for respondent's arrest for an alleged domestic assault on Mr. King that she had committed in Parker's presence. On or about 21 January 2014, after learning of the outstanding warrant, DSS terminated the trial placement and returned Parker to Ms. Smith's care.

On 20 and 21 March 2014, the trial court held a permanency planning and review hearing. On 6 June 2014, the trial court entered an order in which it set the permanent plan for Parker as guardianship, granted guardianship of Parker to Ms. Smith, awarded respondent visitation with Parker, relieved DSS of making further efforts toward reunification of Parker with his parents, and waived further review hearings. The trial court also entered a separate guardianship order that granted guardianship of Parker to Ms. Smith. Respondent gave timely notice of appeal from the permanency planning review order and guardianship order.

II. Fundamentally Fair Procedures

[1] Respondent contends that the hearing lacked fundamentally fair procedures, because (1) she was held to a higher standard of conduct than Ms. Smith; (2) there was no evidence that Ms. Smith had a job; (3) Ms. Smith was not forced to comply with a case plan; (4) DSS abruptly transitioned the juvenile from her home to Ms. Smith's home when it had

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of the sexual abuse, and Parker, who apparently was not abused but was properly adjudicated as neglected based upon N.C. Gen. Stat. § 7B-101(15) because he "live[d] in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *See* N.C. Gen. Stat. § 7B-101(15) (2013). This apparent confusion in the order does not change our analysis of the order on appeal by respondent-mother, as she does not challenge the trial court's adjudication of neglect by Father. In fact, she herself filed a pro se "complaint and request for emergency custody" on 8 April 2013 based upon the same allegations of sexual abuse of Annie. (Original in all caps.)

previously gradually transitioned the juvenile from Ms. Smith's home to her home; and (5) DSS's attorney extensively cross-examined her about a previous juvenile case involving one of her other children that had been dismissed. In short, respondent argues that the hearing was fundamentally unfair because the trial court subjected her, the child's biological mother, to closer scrutiny than it did Ms. Smith, an unrelated person. In addition, she notes, accurately, that Ms. Smith had made essentially the same bad choices regarding the men that she permitted to reside with her children and that Ms. Smith's child, Annie, had also been the subject of a DSS investigation, but that the trial court did not view these facts as disqualifying Ms. Smith as a guardian, while it did rely on similar facts in disqualifying respondent as a parent. In support of her argument, respondent relies on N.C. Gen. Stat. § 7B-100(1) and *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007).

N.C. Gen. Stat. § 7B-100(1) states that a purpose of abuse, neglect, and dependency proceedings is "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. § 7B-100(1) (2013). In *K.N.*, this Court held that the General Assembly achieved this aim "in part through statutory provisions that ensure a parent's right to counsel and right to adequate notice of such proceedings." 181 N.C. App. at 737, 640 S.E.2d at 814 (citing N.C. Gen. Stat. §§ 7B-1101.1, -1106 (2005)). But *K.N.* is inapplicable here, as respondent has not asserted that the trial court violated her right to counsel or her right to adequate notice. *See id.*, 640 S.E.2d at 814. Respondent's arguments are in substance directed at the trial court's weighing of the evidence and determination of the credibility of the witnesses. It is true that some of the evidence could be viewed as respondent suggests, but this court cannot reweigh the evidence or credibility as determined by the trial court. *See In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (brackets omitted)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009).

[2] With respect to DSS's attorney's cross-examination of respondent, we first note that respondent did not object to this questioning. But respondent couches this argument as based upon her right to "fundamentally fair" procedures and not any particular evidentiary rule, relying on *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935). But *Berger* is inapposite. There, the prosecutor was

> guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

Id. at 84, 79 L. Ed. at 1319. In contrast, here, DSS's attorney cross-examined respondent about a previous juvenile case in which the trial court had adjudicated one of respondent's other children neglected. Respondent emphasizes that this Court reversed that order and the trial court on remand dismissed the juvenile petition. *See In re C.Q.*, 183 N.C. App. 489, 645 S.E.2d 229 (2007) (unpublished). Respondent is correct that the adjudication order upon which she was cross-examined was reversed by this Court and therefore no longer had any legal effect. *See id.*, 645 S.E.2d 229. But after examining the entirety of the transcript and particularly respondent's testimony in context, we do not find that the questions on cross-examination were improper in any way. The questions related not to the legal conclusions of the prior adjudication but to facts as to prior events in the long history of DSS's involvement with respondent's children. We hold that the trial court did not violate respondent's right to fundamentally fair procedures. *See K.N.*, 181 N.C. App. at 737, 640 S.E.2d at 814.

III. Guardian Verification

A. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, ___ N.C. App. ___, ___, 767 S.E.2d 341, 344 (2014).

B. Analysis

[3] Respondent contends that the trial court failed to verify that Ms. Smith had adequate resources to care appropriately for Parker, in

contravention of N.C. Gen. Stat. §§ 7B-600(c), -906.1(j) (2013). N.C. Gen. Stat. § 7B-600(c) provides: "If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c). N.C. Gen. Stat. § 7B-906.1(j) similarly provides:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j). The trial court "may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." *Id.* § 7B-906.1(c). The trial court also "shall consider information from the parents, the juvenile, the guardian, any person providing care for the juvenile, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid in the court's review." *Id.*

In its order, the trial court specifically found that Ms. Smith "is aware of the legal significance of her appointment as legal guardian of the juvenile and will have adequate resources to care appropriately for the juvenile." The trial court's finding that Ms. Smith "is aware of the legal significance of her appointment as legal guardian" is supported by the evidence, as she was present in court and the trial court directly addressed Ms. Smith at the hearing:

> THE COURT: . . . Do you understand that the Court may be asking you to become a permanent guardian today?
>
> [Ms. Smith]: Yes, ma'am.
>
> THE COURT: And you understand the nature and legal significance of having that label?
>
> [Ms. Smith]: Yes, ma'am.
>
> THE COURT: And are you prepared to support this minor child, not only as an infant, but as a rebellious teenager as they grow?

> [Ms. Smith]: Yes.
>
> THE COURT: Do you have the financial and emotional ability to support this child and provide for its needs?
>
> [Ms. Smith]: I do.
>
> THE COURT: And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?
>
> [Ms. Smith]: Definitely.
>
> . . . .
>
> THE COURT: And you feel comfortable that you can provide this child with a home?
>
> [Ms. Smith]: Yes.

Respondent contends that this inquiry is insufficient to support the trial court's finding because the trial court questioned Ms. Smith without having her sworn. But respondent did not object to Ms. Smith's testimony and thus may not argue on appeal that the trial court erred in allowing Ms. Smith to testify without being sworn. *See In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222-23 (1995). This evidence supported the trial court's finding that Ms. Smith was "aware of the legal significance of her appointment as legal guardian of the juvenile[.]"

But possessing an understanding of the "legal significance" of guardianship is not necessarily the same thing as having "adequate resources" to serve as a guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). We have been unable to find sufficient evidence in the record to support a determination that Ms. Smith "will have adequate resources to care appropriately for the juvenile." DSS argues that specific findings of fact are not required by statute for the trial court to make the determinations under N.C. Gen. Stat. § 7B-906.1(j), citing to *In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B-907(f) (2005), as well as N.C. Gen. Stat. § 7B-600(c) (2005)). After reciting the statutory requirements of N.C. Gen. Stat. § 7B-600(c) and N.C. Gen. Stat. § 7B-907(f), this Court noted that "neither N.C. Gen. Stat. § 7B–600(c) nor N.C. Gen. Stat. § 7B–907(f) require that the court make any specific findings in order to make the verification." *Id.* at 616-17, 643 S.E.2d at 73. But the next paragraph goes on to note the evidence as to the resources of the guardians:

Here, the order appointing the maternal grandparents as guardians shows that the trial court received into evidence and considered a home study conducted by Grayson County (Virginia) Department of Social Services ("Grayson County"). In the home study report, Grayson County reported that:

> The maternal grandparents have both raised children in the past. They are aware of the importance of structure and consistency in a child's life.
>
> The maternal grandparents both appear to have a clear understanding of the enormity of the responsibility of caring for B.E. They are aware of the negative impact the past several years have had on his life. They are committed to raising B.E. and providing for his needs regardless of what may be required.
>
> They have adequate income and are financially capable of providing for the needs of their grandson.
>
> They are in good physical health.

Based on these findings, Grayson County recommended that the maternal grandparents be considered for placement of B.E. A home study conducted in 2001 regarding both J.E. and B.E. made similar findings and recommendations. Accordingly, based on its consideration of these reports, we conclude that the court adequately complied with N.C. Gen. Stat. § 7B–907(f) and N.C. Gen. Stat. § 7B–600(c).

Id. at 617, 643 S.E.2d at 73 (ellipses and brackets omitted). *In re J.E.* does not hold that no *evidence* is required regarding the resources of the guardian. *In re J.E.* is easily distinguishable from this case based upon the extensive evidence regarding the guardians presented in that case, which included two home study reports. *See id.*, 643 S.E.2d at 73.

It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, nor does the law require any specific form of investigation of the potential guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). But the statute does require the trial court to make a determination that the guardian has "adequate resources" and some evidence of the

guardian's "resources" is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence. *See id.*; *R.A.H.*, 182 N.C. App. at 57-58, 641 S.E.2d at 408 (holding that competent evidence must support a trial court's findings). Neither DSS nor the guardian ad litem ("GAL") has directed us to sufficient evidence in this record.

Although Parker had lived at least part of the time with Father and Ms. Smith before Father was incarcerated, at the time of the 20 March 2014 hearing, he had lived solely with Ms. Smith for the periods of April to October 2013 and then from 21 January 2014 until the hearing. Thus, the only evidence that could have been presented regarding Ms. Smith's actual history of caring for Parker on her own spanned only these two time periods, the most recent lasting less than 60 days. The GAL and DSS reports and court orders during the times when Parker was living with Father focused quite appropriately upon *Father's* situation and resources; Ms. Smith was noted only as Father's girlfriend who also resided in the home. The evidence regarding Ms. Smith's resources at the 20 March 2014 hearing consisted of the testimony of Teresa Jenkins, a DSS social worker, as follows:

> [DSS's counsel]: . . . And the Department is recommending that the Court award guardianship of the minor child to [Ms. Smith]; is that correct?
>
> [Jenkins]: Yes.
>
> [DSS's counsel]: And have you run a Child Protective Services and criminal record check on [Ms. Smith]?
>
> [Jenkins]: Yes.
>
> [DSS's counsel]: And were there any concerns noted from those record checks?
>
> [Jenkins]: No.
>
> [DSS's counsel]: Have you visited the home of [Ms. Smith]?
>
> [Jenkins]: Yes.
>
> [DSS's counsel] Have you found it to be appropriate?
>
> [Jenkins]: Yes.
>
> [DSS's counsel]: And can you describe the nature of the relationship between [Parker] and [Ms. Smith]?

[Jenkins]: They are very bonded.

[DSS's counsel]: Are there other children in the home?

[Jenkins]: Yes.

[DSS's counsel]: How many other children?

[Jenkins]: One.

[DSS's counsel]: And is that child a boy or girl?

[Jenkins]: It's a girl.

[DSS's counsel]: What is her name?

[Jenkins: Annie.]

[DSS's counsel]: And how old is [Annie]?

[Jenkins]: Eight.

[DSS's counsel]: Eight. And does [Parker] have a relationship with [Annie]?

[Jenkins]: Yes.

[DSS's counsel]: And how would you describe that relationship?

[Jenkins]: I have seen them interact in very positive manners. There are some sibling-like conflicts at times.

[DSS's counsel]: Has [Ms. Smith] been able to provide for all of [Parker]'s medical, dental, [and] financial needs?

[Jenkins]: Yes.

[DSS's counsel]: And do you have any concerns about [Parker] being in [Ms. Smith's] care?

[Jenkins]: No.

On cross examination, Jenkins further testified as follows:

[Respondent's counsel]: How many times has [Ms. Smith] moved with [Parker]?

[Jenkins]: I do not know exactly.

[Respondent's counsel]: Repeatedly; is that true?

[Jenkins]: There have been at least three addresses that I have seen him at.

> [Respondent's counsel]: Okay. And there is another child in that home?
>
> [Jenkins]: Yes.
>
> [Respondent's counsel]: And it's just the three of them; just [Ms. Smith], her daughter [Annie]—is that her daughter?
>
> [Jenkins]: Yes.
>
> [Respondent's counsel]: And then [Parker], just those three?
>
> [Jenkins]: There is a roommate.
>
> [Respondent's counsel]: And a roommate?
>
> [Jenkins]: Yes.
>
> [Respondent's counsel]: How many bedrooms is the home that she's in currently?
>
> [Jenkins]: It is a three-bedroom.
>
> [Respondent's counsel]: Okay. Do the children share a room?
>
> [Jenkins]: No.
>
> [Respondent's counsel]: Okay.
>
> [Jenkins]: The daughter shares a room with the mother.
>
> [Respondent's counsel]: So [Parker] has his own room?
>
> [Jenkins]: Yes.

The trial court also considered the GAL reports, but these added no substantial information to the testimony above regarding Ms. Smith's resources. The GAL report filed on or about 14 May 2013 noted:

> Currently, [Parker] resides in the home of [Ms. Smith], the former girlfriend of his father, who is living in an apartment in West Asheville with friends. There, [Parker] lives with [Ms. Smith]'s daughter, [Annie], and approximately two other children and one adult female.
>
> . . . .
>
> . . . [Parker] has his own bed and shares a room with [Annie.]

Ms. Smith's unsworn affirmative answer to the trial court's inquiry as to whether she had "the financial and emotional ability to support this child and provide for its needs" alone is not sufficient evidence, as this is Ms. Smith's own opinion of her abilities. No doubt, had the trial court asked respondent the same question, she also would have said "yes," but her answer alone would not have been sufficient evidence of her actual resources or abilities to care for Parker either. The trial court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact "adequate[.]" *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). In this case, there is no evidence at all of what Ms. Smith considered to be "adequate resources" or what her resources were, other than the fact that she had been providing a residence for Parker. *See id.* And the evidence indicated that, even in providing a residence, Ms. Smith had moved several times and had lived with friends or roommates. The trial court even seemed to recognize that Ms. Smith may at some point lack resources to care for Parker on her own, as indicated by the question: "And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?"

The evidence noted above is the only evidence which is cited by the GAL and DSS as supporting the trial court's finding that Ms. Smith has "adequate resources" to be Parker's guardian, and upon our own examination of the record, we cannot find any additional evidence.[3] Therefore, the trial court's finding that Ms. Smith "will have adequate resources to care appropriately for the juvenile" is not supported by the evidence. For this reason, we vacate the trial court's determination that legal guardianship should be granted to Ms. Smith and remand for further proceedings.

IV. Waiver of Further Review Hearings

[4] As we have already determined that the orders granting guardianship to Ms. Smith must be vacated for the reasons noted above and are remanding this case, further review hearings will be necessary. But because this issue is likely to arise on remand, we will address it in order to provide guidance to the trial court.

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3. We realize that DSS and the trial court may have been aware of more extensive background information about Ms. Smith and her resources than is reflected in this record, based upon the fact that DSS had presumably had some involvement with her family due to Father's sexual abuse of Annie. But we must base our analysis only on the evidence which appears in the record on appeal in this case.

Respondent next contends that the trial court failed to make requisite findings of fact before waiving further review hearings, in contravention of N.C. Gen. Stat. § 7B-906.1(n). The GAL concedes that the order does not include the required findings but contends that there is sufficient evidence in the record to support the proper findings. A trial court may waive further review hearings if the court finds by clear, cogent, and convincing evidence each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n). The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error. *See In re L.B.*, 184 N.C. App. 442, 447, 646 S.E.2d 411, 413-14 (2007) (construing predecessor statute, N.C. Gen. Stat. § 7B-906(b) (2005)).

Here, the trial court failed to make any findings of fact in support of the first, third, and fourth criteria set forth in N.C. Gen. Stat. § 7B-906.1(n). And it would have been impossible for the trial court to make a finding as to the first criterion that "[t]he juvenile has resided in the placement for a period of at least one year" since Parker had been placed with Ms. Smith for only about 60 days at the time of the March 2014 hearing. *See* N.C. Gen. Stat. § 7B-906.1(n). Accordingly, we hold that the trial court committed reversible error in waiving further review hearings. *See L.B.*, 184 N.C. App. at 447, 646 S.E.2d at 413-14.

On remand, we also note that the trial court should more clearly address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent,

should the trial court again consider granting custody or guardianship to a nonparent. As directed by this Court in *In re B.G.*:

> [T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status.
>
> Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact. Rather, our review is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Accordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

In re B.G., 197 N.C. App. 570, 574-75, 677 S.E.2d 549, 552-53 (2009) (citations and quotation marks omitted).

IV. Conclusion

For the foregoing reasons, we vacate the trial court's 6 June 2014 Subsequent Permanency Planning and Review Order and Guardianship Order and remand this matter for further proceedings.

VACATED AND REMANDED.

Judges HUNTER, JR and DILLON concur.

ERIN ISENBERG, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENT

No. COA14-808

Filed 5 May 2015

Process and Service—petition for judicial review—denial of unemployment benefits—service of notice

Actual delivery was required for service of a petition for judicial review of a decision by the Division of Employment Security that petitioner was disqualified from receiving unemployment insurance benefits. The language in N.C.G.S. § 96-15(h) closely mirrored the language in N.C.G.S. § 1A-1, Rule 4(j) and required actual delivery to achieve service on petitioner's former employer. The service requirements are jurisdictional.

Appeal by petitioner from order entered 28 April 2014 by Judge A. Robinson Hassell in Guilford County Superior Court. Heard in the Court of Appeals 18 November 2014.

Hopler & Wilms, LLP, by Adam J. Hopler, for petitioner-appellant.

N.C. Department of Commerce, Division of Employment Security, by Chief Counsel Thomas H. Hodges and Sharon A. Johnston, for respondent-appellee.

McCULLOUGH, Judge.

Erin Isenberg ("petitioner") appeals from an order dismissing her petition for judicial review of a decision of the North Carolina Department of Commerce, Division of Employment Security ("respondent" or "Division"). Upon review, we affirm.

I. Background

On 21 January 2014, petitioner filed a petition for judicial review (the "petition") in Guilford County Superior Court seeking review of a 2 January 2014 decision by respondent that petitioner was disqualified from receiving unemployment insurance benefits. Respondent responded to the petition on 12 February 2014 by filing a motion to dismiss on the ground that petitioner failed to serve the petition upon all

parties of record in the Division proceedings as required by N.C. Gen. Stat. § 96-15(h). Attached to respondent's motion was an affidavit of the Director of Business and Finance of petitioner's former employer, Growing Years Burlington, indicating that petitioner's former employer had not been served with a copy of the petition as of the date of the affidavit, 11 February 2014.

On 10 March 2014, petitioner filed an affidavit of service dated 5 March 2014. The affidavit of service, along with the attachments, show that petitioner mailed a copy of the petition to the former employer via certified mail on 31 January 2014. The U.S. Postal Service attempted delivery on 3 February 2014 and left notice because there was no authorized recipient available. Thereafter, the mailing was available for pickup from 12 February 2014 to 20 February 2014. The mailing was returned to petitioner unclaimed on 27 February 2014. During the time the mail was held by the U.S. Postal Service, petitioner communicated with respondent by email. In their communications, respondent indicated that it had been in contact with petitioner's former employer about the mailing but petitioner's former employer never received it.

In addition to the affidavit of service, petitioner submitted a brief in which he opposed respondent's motion to dismiss the petition.

Respondent's motion to dismiss came on for hearing in Guilford County Superior Court on 9 April 2014 before the Honorable A. Robinson Hassell. By order filed 28 April 2014, the superior court granted respondent's motion and dismissed the petition. In doing so, the superior court concluded it did not obtain jurisdiction to review the petition because petitioner failed to comply with the statutory requirements of N.C. Gen. Stat. § 96-15(h) in that petitioner failed to serve the petition on petitioner's former employer within the time allowed. Petitioner now appeals.

II. Discussion

On appeal, petitioner raises two issues concerning the superior court's interpretation of N.C. Gen. Stat. § 96-15(h). That statute, in full, provides the following concerning judicial review of a decision of the Division:

> Any decision of the Division, in the absence of judicial review as herein provided, or in the absence of an interested party filing a request for reconsideration, shall become final 30 days after the date of notification or mailing thereof, whichever is earlier. Judicial review shall be permitted only after a party claiming to be aggrieved

> by the decision has exhausted his remedies before the Division as provided in this Chapter and has filed a petition for review in the superior court of the county in which he resides or has his principal place of business. The petition for review shall explicitly state what exceptions are taken to the decision or procedure of the Division and what relief the petitioner seeks. *Within 10 days after the petition is filed with the court, the petitioner shall serve copies of the petition by personal service or by certified mail, return receipt requested, upon the Division and upon all parties of record to the Division proceedings.* Names and addresses of the parties shall be furnished to the petitioner by the Division upon request. The Division shall be deemed to be a party to any judicial action involving any of its decisions and may be represented in the judicial action by any qualified attorney who has been designated by it for that purpose. Any questions regarding the requirements of this subsection concerning the service or filing of a petition shall be determined by the superior court. Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after receipt of the copy of the petition. Any person aggrieved may petition to become a party by filing a motion to intervene as provided in [N.C. Gen. Stat. §] 1A-1, Rule 24.

N.C. Gen. Stat. § 96-15(h) (2013) (emphasis added).

In the review proceedings below, the superior court interpreted the service requirement in the N.C. Gen. Stat. § 96-15(h) to require that copies of the petition "must be *delivered* to the Division and all parties of record to the Division's proceedings within ten (10) days after the petition is filed." (Emphasis added). Now in petitioner's first issue on appeal, petitioner claims the superior court's interpretation is error. Specifically, petitioner contends actual delivery is not required for service, but instead service under N.C. Gen. Stat. § 96-15(h) is complete upon deposit of the petition into the mail.

The crucial inquiry in deciding this issue is whether Rule 4 or Rule 5 of the N.C. Rules of Civil Procedure applies to service of the petition under N.C. Gen. Stat. § 96-15(h).[1] "Issues of statutory construction are

1. All references to rules in this opinion are to the N.C. Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1.

questions of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Rule 4 governs the manner of service to exercise personal jurisdiction and provides that service of process may be made upon a natural person, agencies of the State, and business entities "[b]y delivering a copy of the summons and of the complaint . . ." or "[b]y mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested . . . [,]" among other methods. N.C. Gen. Stat. § 1A-1, Rule 4(j) (2013). As both parties acknowledge, service under Rule 4 is complete upon actual delivery.

As a complement to Rule 4, Rule 5 governs the service of pleadings and other papers. It provides that "[w]ith respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party's attorney of record . . . . If the party has no attorney of record, service shall be made upon the party." N.C. Gen. Stat. § 1A-1, Rule 5(b) (2013). Service upon the party's attorney of record or upon the party may be made in a manner provided in Rule 4 or by delivering or mailing a copy of the pleading or other paper to the party's attorney of record or the party. *Id.* Under Rule 5, "[s]ervice by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the [U.S.] Postal Service." *Id.* "A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4." N.C. Gen. Stat. § 1A-1, Rule 5(b1) (2013).

In this case, petitioner asserts "[s]ervice of a petition for judicial review should be looked at as service under [Rule 5] as opposed to Rule 4."

In support of this position, petitioner points to the following language in N.C. Gen. Stat. § 96-15(h): "Any party to the Division proceeding may become a party to the review proceeding by notifying the court within 10 days after *receipt* of the copy of the petition." N.C. Gen. Stat. § 96-15(h) (emphasis added). Petitioner contends that "[i]f the legislature had equated service with actual delivery then one would presume that the legislature would have used the word 'service' instead of 'receipt' to start the period of time for the [e]mployer to request participation." Petitioner further argues that if actual delivery is required for service under N.C. Gen. Stat. § 96-15(h), the statute provides an unreasonably short period of time, "[w]ithin 10 days after the petition is filed with

the court," to accomplish service when compared to the 60 day period allowed for service in Rule 4. *See* N.C. Gen. Stat. § 1A-1, Rule 4(c).

Upon review, we disagree. While we acknowledge the short time period allowed for service of the petition under N.C. Gen. Stat. § 96-15(h) provides little room for mistakes in service, we are bound by the language of the statute, which we hold supports the superior court's determination that actual delivery, as required in Rule 4, is required for service of the petition under N.C. Gen. Stat. § 96-15(h).

Similar to service by mail under various subsections of Rule 4(j), N.C. Gen. Stat. § 96-15(h) provides service may be accomplished by "certified mail, return receipt requested[.]" When a statute requires "certified mail, return receipt requested," it is clear to this Court that the emphasis is on actual delivery. *See Nissan Div. of Nissan Motor Corp. in USA v. Nissan*, 111 N.C. App. 748, 755, 434 S.E.2d 224, 228 (1993) ("When a statute requires registered mail, . . . the emphasis is on delivery of a written document."), *rev'd sub nom. on other grounds*, *Nissan Div. of Nissan Motor Corp. in U.S. v. Fred Anderson Nissan*, 337 N.C. 424, 445 S.E.2d 600 (1994). Rule 5(b), on the other hand, places no emphasis on actual delivery and merely requires pleadings and other papers to be mailed to the party's last known address. Instead of proof of actual delivery by return receipt, Rule 5(b1) requires a certificate of service to accompany all pleadings or other papers required to be served.

Where the language in N.C. Gen. Stat. § 96-15(h) closely mirrors the language in Rule 4(j), we hold actual delivery is required to accomplish service of the petition. This holding guarantees that all parties to the Division proceedings have notice that a petition for judicial review of a final decision of the Division has been filed in superior court.

Additionally, N.C. Gen. Stat. § 96-15(h) does not distinguish between the service of a petition for judicial review upon the Division and service upon all parties of record to the Division proceedings. Therefore, we assume the service requirements for the Division and all parties of record to the Division proceedings are the same. N.C. Gen. Stat. § 96-4 provides that "[s]ervice of process upon the Division in any proceeding instituted before an administrative agency or court of this State shall be pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 4(j)(4)[.]" N.C. Gen. Stat. § 96-4(y) (2013). Thus, we hold N.C. Gen. Stat. § 96-15(h) requires actual delivery to achieve service on petitioner's former employer. The superior court's interpretation was not error.

On appeal, petitioner also argues in the alternative that even if service under N.C. Gen. Stat. § 96-15(h) requires actual delivery, service of

the petition upon petitioner's former employer was not a jurisdictional defect necessitating dismissal. We disagree.

The courts have long recognized that

> [t]here is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court.
>
> *A fortiori*, no appeal lies from an order or decision of an administrative agency of the State or from the judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. If the right exists, it is brought into being, and is a right granted, by legislative enactment.
>
> There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor.
>
> Obviously then, the appeal must conform to the statute granting the right and regulating the procedure.
>
> The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.

In re State ex rel. Emp't Sec. Comm'n, 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (quotation marks and citations omitted). Nothing in the many amendments to N.C. Gen. Stat. § 96-15(h) to date have changed the mandatory nature of the service requirements. Thus, we hold the service requirements are jurisdictional and the superior court did not err in dismissing the petition where petitioner's former employer, a party of record to the Division proceedings, was not properly served.

III. Conclusion

For the reasons discussed above, we affirm the superior court's dismissal of the petition.

AFFIRMED.

Judges CALABRIA and STROUD concur.

KAREN LARSEN, BENEFICIARY, MORGAN STANLEY AS IRA CUSTODIAN F/B/O KAREN LARSEN, MARY JO STOUT, CHIARA IDHAMMAR, AND CHRISTER IDHAMMAR, PLAINTIFFS

v.

BLACK DIAMOND FRENCH TRUFFLES, INC. AND SUSAN RICE, DEFENDANTS

No. COA14-1040

Filed 5 May 2015

Appeal and Error—interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late

The Court of Appeals dismissed defendants' appeal of the trial court's order that granted plaintiffs' motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court of Appeals would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed.

Appeal by Defendants from an order entered on 16 June 2014 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 4 March 2015.

H. Gregory Johnson and Jane Soboleski, Ferikes & Bleynat, PLLC, for Defendant-Appellants.

R. Palmer Sugg and Neil T. Oakley, Robbins May & Rich, LLP, for Plaintiff-Appellees.

HUNTER, JR., Robert N., Judge.

Black Diamond French Truffles, Inc. ("BDFT") and Susan Rice (collectively, "Defendants") appeal from an order granting Plaintiffs' motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. For the following reasons, we dismiss Defendants' appeal as interlocutory.

I. Factual & Procedural History

Defendant BDFT is a North Carolina corporation. Since its incorporation in 2007, Defendant Susan Rice has been BDFT's president. On

19 March 2008, Plaintiff Karen Larsen purchased 25,000 shares of BDFT Series B Preferred Stock. On 15 May 2008, Plaintiffs Chiara and Christer Idhammar purchased 25,000 shares of BDFT Series A Preferred Stock. On 24 June 2008, Plaintiff Mary Jo Stout purchased 25,000 shares of BDFT Series A Preferred Stock.

On 25 November 2013, Plaintiffs filed a verified complaint, alleging that they are qualified shareholders of BDFT and are entitled to inspect certain corporate records under N.C. Gen. Stat. § 55-16-02. Plaintiffs' complaint contended that they met the statutory notice and demand requirements of N.C. Gen. Stat. § 55-16-02, but Defendants refused to provide the requested documents. Plaintiffs asked the trial court to order Defendants to permit them to inspect the corporate records, and to order Defendants to pay Plaintiffs' costs incurred to obtain the order, including reasonable attorney's fees.

On 30 January 2014, Defendants answered Plaintiffs' complaint. In their answer, Defendants admitted that Plaintiff Idhammar sent a written demand to Defendant Rice and admitted that Defendant Rice "agreed to provide the requested information 'as soon as [Defendants] have it in proper form[.]' " Defendants denied all other relevant allegations, including Plaintiffs' contention that they desired to inspect the records in good faith and for a proper purpose.

On 14 May 2014, Plaintiffs filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. The motion was heard on 30 May 2014. On 16 June 2014, the trial court issued an order granting the motion for judgment on the pleadings as to Plaintiffs Larsen, Christer Idhammar, and Stout, but denying the motion as to Plaintiff Chiara Idhammar. The trial court also ordered Defendant BDFT to pay Plaintiffs Larsen, Christer Idhammar, and Stout's attorney's fees in the amount of $4,520.62. Defendants filed timely written notice of appeal on 23 June 2014.

Defendants filed their principal appellant brief with this Court on 25 November 2014. Defendants argue in their brief that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings and awarding attorney's fees. Defendants contend that the trial court's grant of Plaintiffs' motion for judgment on the pleadings was erroneous because, among other things, the order "did not fully resolve all issues between all of the parties." Despite that admission, Defendants' principal brief to this Court does not address the interlocutory nature of their appeal, or allege that the trial court's order deprives them of a substantial right. Furthermore, Defendants' principal brief contains no statement of the grounds for appellate review.

On 15 January 2015, Plaintiffs filed their appellee brief with this Court. In their brief, Plaintiffs argue that Defendants' appeal should be dismissed as interlocutory. Plaintiffs contend that the appeal is interlocutory because it does not finally determine the entire controversy, and neither a substantial right is implicated nor did the trial court certify the case for appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Defendants served Plaintiffs with a reply brief on 29 January 2015. In their reply brief, Defendants admit that the appeal is interlocutory, but argue that grounds for appellate review exist because the trial court's judgment on the pleadings creates "a potential for inconsistent trial verdicts" and therefore "affects a substantial right." We need not reach the issue of whether a substantial right is implicated here because Defendants failed to properly establish grounds for appellate review. Defendants' appeal must be dismissed.

II. Analysis

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazy v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). As a general rule, there is no right of appeal from an interlocutory order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Fraser v. Di Santi*, 75 N.C. App. 654, 655, 331 S.E.2d 217, 218, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 856 (1985) (citation omitted). However, there are two circumstances under which a party is permitted to appeal an interlocutory order:

> First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253 (internal citations and quotation marks omitted). "Under either of these two circumstances, it

is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[.]" *Id.* "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]" *Id.* at 380, 337 S.E.2d at 254.

In this case, the trial court's order is interlocutory because it does not dispose of the case as to Plaintiff Chiara Idhammar. Furthermore, the trial court did not certify in the judgment that there is no just reason for delay of the appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure. Therefore, in order for this Court to accept Defendants' interlocutory appeal, Defendants must show that the trial court's order deprives Defendants of a substantial right.

Here, Defendants' only allegation of a substantial right deprivation is in their reply brief, as a reaction to Plaintiffs' argument that the appeal should be dismissed as interlocutory. Therefore, for this Court to find that proper grounds exist for appellate review, we must either: (1) find that Defendants' principal brief sufficiently states grounds for appellate review; or (2) allow Defendants to establish grounds for appellate review via reply brief. We refuse to do so for the following reasons.

Defendants' principal brief is wholly insufficient to establish grounds for appellate review. Not only did the principal brief not mention the interlocutory nature of the appeal or the issue of a substantial right deprivation, but also it did not include *any* statement of grounds for appellate review, in violation of Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. Rule 28(b) provides:

> An appellant's brief *shall* contain . . .
>
> > (4) *A statement of the grounds for appellate review.* Such statement *shall* include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement *must contain* sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4) (2014) (emphasis added). Our Supreme Court has held that noncompliance with "nonjurisdictional" rules such as Rule 28(b) "normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). However, when an appeal is interlocutory, Rule 28(b)(4) is not a "nonjurisdictional" rule. Rather, the *only way*

an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right. In this case, because Defendants failed to state *any* grounds for appellate review in their principal brief, their appeal can only survive if we allow Defendants to establish grounds for appellate review via reply brief.

We will not allow Defendants to use their reply brief to independently establish grounds for appellate review. Rule 28(h) of the North Carolina Rules of Appellate Procedure governs reply briefs. Rule 28(h) was amended in 2013 to provide greater opportunity for an appellant to submit a reply brief. The amended Rule provides:

> Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief.

N.C. R. App. P. 28(h) (2014). Although this Rule is permissive, allowing appellants to freely file reply briefs so long as they follow the Rule's requirements, this Court has noted that "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *State v. Greene*, 753 S.E.2d 397, 2013 WL 5947337, at *5 (N.C. Ct. App. 2013) (unpublished); *see also Red Arrow v. Pine Lake Preparatory, Inc. Bd. of Dirs.*, 741 S.E.2d 511, 2013 WL 1314053, at *2 (N.C. Ct. App. 2013) (unpublished).[1]

For example, we have held that where a criminal defendant did not ask this Court to review an unpreserved issue under the plain error standard in his principal brief, he may not cure this deficiency by mentioning plain error in his reply brief. *See State v. Dinan*, ___ N.C. App. ___, ___, 757 S.E.2d 481, 485 (2014) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief."); *see also Greene*, at *5.

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1. Under the old version of Rule 28(h), an appellant was not permitted to submit a reply brief except under certain circumstances, one of which was "if the appellee has presented in its brief new or additional issues[.]" N.C. R. App. P. 28(h) (2012). In *Red Arrow*, this Court held that where an appellant did not mention the interlocutory nature of the appeal in her principal brief, and the appellees subsequently raised the issue in their brief, the appellees' raising of the issue was not "new or additional[,]"rather, it was a different argument on the grounds for appeal. *Red Arrow*, 2013 WL 1314053, at *2. Therefore, we refused to consider the appellant's reply brief. *Id.* at *2. Our opinion here, under the new Rule 28(h), is consistent with our holding in *Red Arrow*.

Furthermore, we have held that under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue and cannot revive the issue via reply brief. *See Beckles-Palomares v. Logan*, 202 N.C. App. 235, 246, 688 S.E.2d 758, 765 (2010) (holding that appellant abandoned its statute of limitations argument "by its failure to advance the issue in its principal brief"); *see also* N.C. R. App. P. 28(b)(6) (2014) ("An appellant's brief shall contain . . . the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Therefore, in this case, we will not allow Defendants to correct the deficiencies of their principal brief in their reply brief. Because "it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal[,]" *Jeffreys*, 115 N.C. App. at 379, 444 S.E.2d at 253, and Defendants have not met their burden, Defendants' appeal must be dismissed.

III. Conclusion

For the foregoing reasons, Defendants' appeal is dismissed as interlocutory.

DISMISSED.

Judges STEPHENS and TYSON concur.

KAREN LARSEN, MARY JO STOUT, CHIARA IDHAMMAR, AND CHRISTER IDHAMMAR, PLAINTIFFS

v.

SUSAN RICE TRUFFLE PRODUCTS LLC AND SUSAN RICE, DEFENDANTS

No. COA14-1041

Filed 5 May 2015

Appeal and Error—interlocutory orders and appeals—failure to establish grounds for appellate review—reply brief too late

The Court of Appeals dismissed defendants' appeal of the trial court's order that granted plaintiffs' motion on the pleadings as to three of the plaintiffs but denied the motion as to the fourth plaintiff in a suit by shareholders seeking to inspect corporate records. The trial court did not certify the judgment for appellate review, and

defendants' principal appellant brief failed both to state the grounds for appellate review and to address the interlocutory nature of their appeal. The Court would not permit defendants to establish grounds for appellate review in their reply brief. Defendants' appeal was dismissed.

Appeal by Defendants from an order entered on 16 June 2014 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals on 4 March 2015.

H. Gregory Johnson and Jane Soboleski, Ferikes & Bleynat, PLLC, for Defendant-Appellants.

R. Palmer Sugg and Neil T. Oakley, Robbins May & Rich, LLP, for Plaintiff-Appellees.

HUNTER, JR., Robert N., Judge.

Susan Rice Truffle Products, LLC and Susan Rice (collectively, "Defendants") appeal from an order granting Plaintiffs' motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

Defendants' assignments of error and arguments in the present case are similar to those in companion case COA14-1040. In both cases, Defendants argue that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings. In COA14-1040, Defendants use N.C. Gen. Stat. § 55-16-01 (governing corporate records) to support their argument, whereas in this case, Defendants cite N.C. Gen. Stat. § 57C-3-04 (repealed effective 1 January 2014, formerly governing LLC members' ability to access records).

Defendants' principal brief and reply brief in this case have the same fatal jurisdictional deficiencies as the briefs in the companion case. For the reasons stated in COA14-1040, we dismiss Defendants' appeal as interlocutory.

DISMISSED.

Judges STEPHENS and TYSON concur.

MARTIN MARIETTA MATERIALS, INC., PLAINTIFF
v.
BONDHU, LLC, DEFENDANT

No. COA14-908

Filed 19 May 2015

Statutes of Limitation and Repose—equally applicable statutes of limitations—longer limitations period governs

The trial court did not err by granting summary judgment in favor of plaintiff in an action for recovery of property taxes paid by plaintiff on defendant's behalf. Pursuant to North Carolina's choice of law rules, the Court applied North Carolina's procedural rules and Virginia's substantive law. Because two statutes of limitations were equally applicable in this case, the longer limitations period of ten years governed.

Appeal by defendant from order entered 22 May 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 December 2014.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Lauren H. Bradley, for plaintiff-appellee.

Erwin, Bishop, Capitano & Moss, PA, by Fenton T. Erwin, Jr. and Matthew M. Holtgrewe, for defendant-appellant.

DAVIS, Judge.

Bondhu, LLC ("Defendant") appeals from the trial court's order granting summary judgment in favor of Martin Marietta Materials, Inc. ("Plaintiff") on its action seeking the recovery of $71,947.00 in property taxes paid by Plaintiff on Defendant's behalf and denying Defendant's motion for partial summary judgment. On appeal, Defendant contends that the trial court improperly granted summary judgment in Plaintiff's favor because its claims for reimbursement were barred, in part, by the statute of limitations. After careful review, we affirm.

Factual Background

This case arises from the parties' joint ownership of a 90-acre tract of real property ("the Property") located in Chesterfield County, Virginia. Property owners in Chesterfield County receive bills for the *ad valorem*

property taxes they owe from the Chesterfield County Treasurer's Office twice a year. When Plaintiff first acquired its one-half interest in the Property, its then co-tenant, Tamojira, Inc. ("Tamojira"), had already failed to pay its share of the property taxes for the years 2002, 2003, and the first half of 2004. After Plaintiff acquired its interest in the Property, Tamojira failed to pay the taxes for the second half of 2004 and the first half of 2005. Plaintiff brought suit and subsequently obtained a default judgment against Tamojira for the unpaid taxes. Tamojira's interest in the Property was then transferred to Defendant by deed recorded 24 May 2005. Defendant has not paid *ad valorem* property taxes on the Property since acquiring its interest in 2005.

On 31 October 2013, Plaintiff filed a verified complaint in Wake County Superior Court alleging that (1) Defendant has failed to pay any property taxes since Defendant acquired its one-half interest in the Property on 24 May 2005; and (2) "[a]s the other one-half owner of the Property, [Plaintiff] has had to satisfy the tax debts owed by Defendant in the amount of $67,831.60, plus any amounts in taxes, fees, and interest [Plaintiff] must pay for the property taxes for the second half of 2013." In its complaint, Plaintiff sought reimbursement from Defendant for the property taxes it had paid on Defendant's behalf.

On 26 February 2014, Defendant filed an answer asserting the statute of limitations as an affirmative defense and seeking the appointment of a receiver pursuant to N.C. Gen. Stat. § 1-502. Plaintiff filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 4 February 2014 and an amended motion for summary judgment on 19 February 2014. On 15 May 2014, Defendant filed a motion for partial summary judgment, alleging that the applicable statute of limitations barred Plaintiff's recovery of any property taxes that were paid before the three-year period immediately preceding its 31 October 2013 complaint.

The parties' cross-motions for summary judgment came on for hearing before the Honorable Donald W. Stephens on 20 May 2014. On 22 May 2014, the trial court entered an order granting summary judgment in Plaintiff's favor, denying Defendant's motion for partial summary judgment, and awarding Plaintiff $71,947.00[1] plus costs and interest. Defendant gave timely notice of appeal to this Court.

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1. The amount awarded to Plaintiff in the trial court's judgment included the additional $4,115.40 in property taxes Plaintiff paid on Defendant's behalf for the second half of 2013, bringing the total amount from $67,831.60 to $71,947.00.

Analysis

The entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, ___ N.C. App. ___, ___, 755 S.E.2d 56, 59 (2014) (citation and quotation marks omitted). An order granting summary judgment is reviewed *de novo* on appeal. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

In this case, no material factual dispute exists as Defendant does not contest (1) its status as a co-owner of the Property during the relevant time period; (2) its nonpayment of property taxes; or (3) the amount of the property tax debt. Rather, the sole issues presented on appeal are (1) which statute of limitations applies to Plaintiff's claims; and (2) whether the applicable statute of limitations serves to render Plaintiff's claims partially time-barred. Defendant contends that the trial court erred in granting Plaintiff's motion for summary judgment because Plaintiff's claims for reimbursement are barred, in part, by the three-year limitations period contained in N.C. Gen. Stat. § 1-52(1). Plaintiff, conversely, asserts that the "catch-all" ten-year limitations period contained in N.C. Gen. Stat. § 1-56 is applicable to its action.

Although this case was filed in Wake County, North Carolina, the claims asserted by Plaintiff involve obligations arising from the parties' relationship as co-tenants of the Property in Chesterfield County, Virginia. The Chesterfield County Treasurer's Office — the entity that assessed taxes on the Property — is located in Virginia, and the tax debt on the Property resulting from Defendant's nonpayment of its share of the taxes accrued there as well.

"Under North Carolina choice of law rules, we apply the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina." *Stokes v. Wilson and Redding Law Firm*, 72 N.C. App. 107, 112-13, 323 S.E.2d 470, 475 (1984), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985); s*ee also Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 16, 598 S.E.2d 570, 581 (2004) (explaining that "according to North Carolina's choice of law rules, as traditionally applied, the law of North Carolina . . . control[s] the procedural matters in this . . . lawsuit, such as determining the statute of limitations" and "the substantive law of the state where the injury occurred" is applied to plaintiffs' claims and utilized for purposes of determining

available remedies and damages). Thus, Virginia's substantive law governs Plaintiff's claims for relief.

Because, however, "statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover," *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988), we must apply the appropriate statute of limitations under North Carolina law to Plaintiff's substantive claims — that is, the limitations period that would apply to such causes of action in this State, *see id.* at 341, 368 S.E.2d at 857 (explaining that statutes of limitations are procedural "in the context of choice of law"). "When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). Accordingly, in order to determine the appropriate statute of limitations to apply, we must first identify the nature of the substantive claims asserted by Plaintiff as they exist under Virginia law.

In its complaint, Plaintiff asserted two claims for relief. Without specifically identifying or labeling the first cause of action, Plaintiff made the following allegations in support of this claim:

> 20. Defendant, as a co-owner of the Property, is liable for its fair share of the property taxes owed on the Property.
>
> 21. By virtue of Defendant's failure to pay the taxes owed, and failure to reimburse [Plaintiff] for such amounts, [Plaintiff] is entitled to have and recover of Defendant the principal amount of $67,831.60 plus any amount in taxes, fees, and interest [Plaintiff] must pay for the property taxes for the second half of 2013, plus interest. [Plaintiff] is also entitled to have and recover of Defendant the costs of this action.

Plaintiff's second claim for relief — pled in the alternative — sought recovery in *quantum meruit* on the theory that Defendant was unjustly enriched by Plaintiff's full payment of property taxes owed on the Property for which Defendant was jointly responsible. It is clear that the statute of limitations for unjust enrichment is three years. *See Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 85, 712 S.E.2d 221, 228 (2011) ("A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of section 1-52."). However, because the unjust enrichment claim was pled merely as an alternative means

of recovery, we must determine the appropriate limitations period that applies to Plaintiff's first cause of action.

The parties differ in their respective positions on this issue. Defendant contends that Plaintiff's right to receive reimbursement as pled in its first claim for relief stems from an implied contract between the parties. Defendant argues that this cause of action is therefore grounded in principles of contract law and more properly denominated as a claim for contribution arising out of a joint debt. Quoting *Tuttle v. Webb*, Defendant asserts that "[w]hen two or more persons are jointly liable to pay a debt, the law *implies a contract* between the co-obligors to contribute ratably toward the discharge of the obligation." 284 Va. 319, 327, 731 S.E.2d 909, 913 (2012) (citation, quotation marks, and brackets omitted and emphasis added); *see Ohio Cas. Ins. Co. v. State Farm Fire and Cas. Co.*, 262 Va. 238, 241-42, 546 S.E.2d 421, 423 (2001) (explaining that right to contribution is based on implied contract "between the parties to contribute ratably toward the discharge of a common obligation"). Consequently, Defendant argues, North Carolina's three-year statute of limitations applicable to an "obligation or liability arising out of a contract, express or implied" applies. N.C. Gen. Stat. § 1-52(1) (2013).

Plaintiff, conversely, contends that its claim against Defendant should be treated as a cause of action for an "accounting in equity" between two tenants in common under Virginia law. As such, Plaintiff argues, its first claim for relief falls under Va. Code Ann. § 8.01-31, which provides that "[a]n accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion, or against the personal representative of any such party." While North Carolina does not have a statute of limitations expressly addressing claims seeking an equitable accounting, Plaintiff contends that its claim is governed by the ten-year limitations period provided in N.C. Gen. Stat. § 1-56 for "action[s] for relief not otherwise limited by this subchapter." N.C. Gen. Stat. § 1-56 (2013).

In so arguing, Plaintiff notes that North Carolina courts have previously applied N.C. Gen. Stat. § 1-56 to claims seeking an accounting between the parties. *See Hamlet HMA, Inc. v. Richmond Cty.*, 138 N.C. App. 415, 422, 531 S.E.2d 494, 498 (explaining that "N.C. Gen. Stat. §1-56 has been applied mainly in cases related to trusts, *accountings*, tax liens and fiduciary duty" (emphasis added)), *appeal dismissed and disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000); *see also Jarrett v. Gree*n, 230 N.C. 104, 107, 52 S.E.2d 223, 225 (1949) (determining that ten-year statute of limitations was applicable to plaintiff's claims to establish resulting trust, to recover property, and for accounting).

Both parties cite *Jenkins v. Jenkins*, 211 Va. 797, 180 S.E.2d 516 (1971), in which two ex-spouses owned a parcel of real property as tenants in common following their divorce. The plaintiff paid the mortgage payments on the property after the divorce and until the property was sold on 4 October 1968. *Id.* at 798-99, 180 S.E.2d at 517. She then sought reimbursement from the defendant for his portion of the mortgage payments as well as an order requiring the defendant to pay half of the real estate taxes on the property that had accrued. *Id.* at 798, 180 S.E.2d at 517. The Virginia Supreme Court determined that the plaintiff was entitled to reimbursement because "unless something more can be shown than the mere fact that one co-tenant is in possession of the premises, each co-tenant should be ratably responsible for taxes and other liens against the property." *Id.* at 800, 180 S.E.2d at 518. The *Jenkins* Court noted that "[a]n accounting in equity may be had . . . by one . . . tenant in common . . . against the other as bailiff, for receiving more than comes to his just share or proportion." *Id.* at 800 n. 1, 180 S.E.2d at 518 n. 1.

While *Jenkins* supports the right of a co-tenant such as Plaintiff to obtain reimbursement from its co-tenant under these circumstances, it does not explain the precise nature and origin of this right under Virginia law. However, in *Grove v. Grove*, 100 Va. 556, 42 S.E. 312 (1902), the Virginia Supreme Court held that "[t]he right of a co-tenant, who discharges an incumbrance upon the common property, . . . to ratable contribution from his cotenants, is said to *arise out of the trust relationship which exists among joint owners of property*, rather than by way of subrogation." *Id.* at 561, 42 S.E. at 314 (emphasis added).

Thus, Plaintiff's first claim for relief can also be interpreted as asserting a substantive right stemming from the parties' trust relationship as co-tenants rather than one arising from principles of contract law. Under this theory, Plaintiff's first claim for relief would be governed not by the three-year statute of limitations under N.C. Gen. Stat. § 1-52(1) that is applicable to obligations arising from implied contracts but rather by the ten-year limitations period contained in N.C. Gen. Stat. § 1-56. *See Jarrett*, 230 N.C. at 107, 52 S.E.2d at 225 (stating that ten-year statute of limitations under N.C. Gen. Stat. § 1-56 was applicable to action for accounting and to establish resulting trust); *Teachey v. Gurley*, 214 N.C. 288, 293-94, 199 S.E. 83, 87-88 (1938) (explaining that ten-year limitations period applies to claims grounded in equitable principles which impose trust relationship between parties).

Consequently, we are unable to discern a clear answer to the question of which of the two respective limitations periods applies most directly to the substantive claim Plaintiff has pled in its first claim for

relief. However, our Supreme Court has held that "where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." *Fowler v. Valencourt*, 334 N.C. 345, 350, 435 S.E.2d 530, 533 (1993). Such doubt exists here because the first claim for relief in Plaintiff's complaint can be construed as setting forth either of two distinct, legally cognizable claims under Virginia law: (1) a claim for contribution; or (2) a claim for an accounting in equity. While Plaintiff would be entitled under either legal theory to reimbursement from Defendant for its share of the property taxes, a contribution claim would be governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1) because the substantive right underlying such a claim is derived from an implied contract whereas a claim for equitable accounting — grounded in equity and arising from a trust relationship — would be subject to the ten-year limitations period set out in N.C. Gen. Stat. § 1-56.

Thus, because there are two statutes of limitations that are equally applicable to Plaintiff's first claim for relief, we conclude — based on our Supreme Court's decision in *Fowler* — that application of the longer ten-year limitations period is appropriate. *See id.* at 350, 435 S.E.2d at 533. As such, because all of the payments for which Plaintiff seeks reimbursement fall within the ten-year period immediately preceding the date Plaintiff filed suit, Plaintiff's first claim for relief is not barred in any respect by the statute of limitations. Accordingly, the trial court did not err in granting Plaintiff's motion for summary judgment and denying Defendant's motion for partial summary judgment.

Conclusion

For the reasons stated above, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and DIETZ concur.

STATE OF NORTH CAROLINA
v.
LINWOOD EARL DUFFIE, DEFENDANT

No. COA14-925

Filed 5 May 2015

1. Appeal and Error—alleged Rule 403 error—discretionary ruling—not subject to plain error review

In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the Court of Appeals dismissed his argument that the trial court committed plain error under Rule of Evidence 403 by admitting a videotaped police interview of his co-perpetrator. Rulings subject to the trial court's discretion are not subject to plain error review.

2. Evidence—corroboration—additional statements—substantially consistent

In defendant's appeal from his convictions for common law robbery, conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status, the trial court did not commit plain error by admitting a videotaped police interview of his co-perpetrator for corroborative purposes. The co-perpetrator's statements in the video were consistent with his statements at trial, and the additional information contained in the video interview did not render the video inadmissible.

3. Conspiracy—to commit robbery—jury instructions—definition of "firearm"

The trial court did not commit plain error by incorrectly defining "firearm" in its jury instructions on conspiracy to commit robbery with a dangerous weapon. Even though the co-perpetrator testified that he used a BB gun to commit the robberies, proof that a dangerous weapon was actually used to commit a robbery was not required to establish conspiracy to commit robbery with a dangerous weapon.

4. Sentencing—habitual felon—misapprehension of sentencing statute—remanded

The trial court erred by sentencing defendant as a habitual felon to three consecutive sentences for his three common law robbery convictions. This sentencing was based on the trial court's

misapprehension that N.C.G.S § 14-7.6 "requires consecutive sentences on habitual felon judgments." The Court of Appeals remanded the case for resentencing to allow the trial court to exercise its discretion in determining whether defendant's sentences should run consecutively or concurrently.

Appeal by defendant from judgments entered 21 November 2013 by Judge Robert H. Hobgood in Pitt County Superior Court. Heard in the Court of Appeals 7 January 2015.

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

Paul F. Herzog for defendant-appellant.

DAVIS, Judge.

Linwood Earl Duffie ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of three counts of common law robbery, three counts of conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status. On appeal, Defendant contends that the trial court erred in (1) admitting a videotaped interview of Kumetrius Friason ("Friason"), Defendant's co-perpetrator; (2) its instruction to the jury defining the term "firearm"; and (3) sentencing him to consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. After careful review, we conclude that Defendant received a fair trial free from prejudicial error but remand for resentencing.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 22 April 2013, Defendant drove Friason, his girlfriend's 16 year-old son, to Emerald City Internet Café ("Emerald City"), which featured online sweepstakes games in which players were eligible to win cash prizes. While Defendant went inside and played games, Friason waited in Defendant's car. After some time, Friason went inside Emerald City with a bandana covering his face and demanded that the cashier, Zapora Washington ("Washington"), "give [him] the money." As Friason was emptying the cash register, Washington noticed that he was holding a gun by his side. Friason put the money in a bag and exited the café. Defendant then ran out the door of the café, telling Washington that he was going to go find the person who had robbed the store. Defendant

drove to Hopkins Apartments to pick up Friason who was waiting there with the money from the robbery. Friason kept "a little bit" of the money, and Defendant "got the rest."

Six days later on 28 April 2013, Defendant drove Friason to a Family Dollar store in Winterville, North Carolina. Defendant stayed in his car while Friason entered the store, told the two employees on duty that "this [is] a robbery," pointed a gun, and said "give me your money." Friason took money from the cash register and from one of the employees' wallets. Friason then told the employees to "lay down on the floor and don't even look up. Don't say a word. . . . if you move, I'll come back and I'll shoot both of you." Friason ran out of the store, and Defendant picked him up in the parking lot of a nearby gas station. Defendant and Friason "split" the "thousand or two" dollars from the Family Dollar store robbery.

On 30 April 2013, Defendant and Friason committed a third robbery at a Trade Mart convenience store in Greenville, North Carolina. Defendant parked his car behind a nearby Outback Steakhouse, and Friason exited the vehicle and entered the Trade Mart. He covered his face with a bandana and approached the two cashiers. Friason "really didn't say nothing, [he] just had the gun pointed towards them and they gave [him] the money." Friason obtained approximately $1,000.00 from the Trade Mart and "split it" with Defendant. Defendant then drove Friason back to Friason's house.

On 21 May 2013, law enforcement officers apprehended Defendant and Friason after receiving information from Martin Lichty ("Lichty"), a witness who observed Defendant's vehicle parked near a Dollar General store in Beaufort County. Lichty noticed that the license plate on Defendant's vehicle was obscured by a black rag, which he thought was "suspicious," and that the driver of the vehicle had "shot across the street" in the same direction as a person who was "dressed in all black" and proceeding on foot. Shortly thereafter, Lichty saw the vehicle leaving a car wash. He noticed that there were now two occupants in the vehicle and the rag that had previously covered the license plate had been removed. Lichty dialed 911 and gave the dispatcher the tag number and a description of the vehicle. A resulting investigation led law enforcement officers to Defendant, who was arrested at the Carriage House Apartments complex later that day.

On 14 October 2013, a Pitt County grand jury returned bills of indictment charging Defendant with three counts of robbery with a dangerous weapon, three counts of conspiracy to commit robbery with a dangerous

weapon, and having attained the status of an habitual felon. The indictments also alleged two statutory aggravating factors: (1) that Defendant "induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason"; and (2) that Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense."

A jury trial was held before the Honorable Robert H. Hobgood beginning on 18 November 2013. At the close of the State's evidence, the trial court reduced the three counts of robbery with a dangerous weapon to common law robbery but denied Defendant's motion to dismiss or reduce the counts of conspiracy to commit robbery with a dangerous weapon. The jury found Defendant guilty of all charges, including attaining the status of an habitual felon, and also found that for each offense the State had proven the existence of an aggravating factor — that Defendant had induced Friason to participate in the commission of the offense or occupied a position of leadership or dominance over Friason — beyond a reasonable doubt. The trial court entered judgment on the jury's verdicts and sentenced Defendant as an habitual felon to three consecutive sentences of 150 to 192 months imprisonment for each of the common law robbery offenses. The trial court consolidated the three conspiracy to commit robbery with a dangerous weapon offenses and imposed a concurrent sentence of 50 to 72 months. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's brief addresses the following three issues: (1) the admission of a videotaped interview of Friason by law enforcement officers; (2) the trial court's instruction to the jury defining the term "firearm"; and (3) the trial court's interpretation of N.C. Gen. Stat. § 14-7.6 as mandating the imposition of consecutive terms of imprisonment when sentencing an habitual felon.[1] We address each of these arguments in turn.

I. Admission of Videotaped Interview

Defendant first argues on appeal that the admission of a videotaped interview between law enforcement officers and Friason constituted

1. In the "Questions Presented" section of his appellate brief, Defendant raised the additional issue of whether the trial court erred by denying his motion to dismiss the three counts of conspiracy to commit robbery with a dangerous weapon. However, Defendant failed to include any substantive argument addressing this issue in the remainder of his brief. Accordingly, this issue is deemed abandoned on appeal. *See* N.C.R. App. P. 28(b)(6) (explaining that any issue "not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned").

plain error because some portions of the video that were "highly inflammatory" to Defendant were not "muted" or referenced with specificity in the trial court's curative instruction to the jury. Defendant asserts that the officers questioning Friason repeatedly attacked Defendant's character during the interview by referring to him in derogatory terms, calling him — among other things — a "coward" and "a piece of crap" who was "trying to set [Friason] up to take the fall."

Defendant concedes that his trial counsel only objected once during the presentation of the video to the jury — an objection which was sustained by the trial court and followed by a curative instruction in which the court instructed the jury to disregard the words "career criminal" and "habitual" that had been used to describe Defendant. As such, Defendant requests that we review the admission of the remainder of the videotaped interview for plain error. The plain error doctrine "is to be applied cautiously and only in the exceptional case" and requires a defendant to demonstrate that the asserted error "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

A. Rule 403 Argument

[1] Defendant's primary argument concerning the admission of the video is that its probative value was substantially outweighed by the danger of unfair prejudice to him such that the trial court should have excluded the video under Rule 403 of the North Carolina Rules of Evidence. Pursuant to Rule 403, a trial court may exclude relevant evidence if it determines that the probative value of such evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403.

However, it is well established that plain error review is inapplicable to issues that "fall within the realm of the trial court's discretion," which include a trial court's determination as to the admissibility of evidence based on the Rule 403 balancing test. *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (citation and quotation marks omitted). For this reason, Defendant's Rule 403 argument concerning the admission of the video is overruled. *See id.* (refusing to review under plain error standard defendant's argument relating to trial court's application of Rule 403).

B. Admission for Corroborative Purposes

[2] Defendant also contends that the statements contained in the video did not corroborate Friason's trial testimony and, therefore, constituted inadmissible hearsay that "injected fundamental unfairness into [Defendant's] trial." Because, unlike his argument based on Rule 403, this contention does not involve a purely discretionary ruling by the trial court, plain error review is appropriate.

The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 740-41 (2009). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Lloyd*, 354 N.C. 76, 103, 552 S.E.2d 596, 617 (2001) (citation and quotation marks omitted). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *Id.* (citation omitted). The trial court "has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes." *State v. Bell*, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (citation and quotation marks omitted), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004).

Defendant claims that while Friason's statements in the videotaped interview suggested that Defendant had influence over him and induced him to commit the robberies, these implications were absent from his trial testimony. Consequently, he asserts, the prior statements were "contradictory" to Friason's testimony at trial and were "not admissible under the guise that [the statements] tended to add weight or credibility to his trial testimony."

Our Supreme Court has explained that "prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). As such, when a prior statement substantially strengthens or confirms in-court testimony, "it is not rendered incompetent by the fact that there is some variation. Such variations affect only the weight of the evidence which is for the jury to determine." *Lloyd*, 354 N.C. at 104, 552 S.E.2d at 617 (citations and quotation marks omitted).

Here, Friason's statements during the interview established a timeline of the robberies, an account of how they were committed, and

Friason's and Defendant's respective roles in the commission of the crimes — topics that were all covered in his testimony at trial. While the statements Friason made in his interview did, in fact, contain the additional suggestion that he likely would not have committed the robberies absent Defendant's involvement, the statements made during the interview did not contradict his trial testimony and, indeed, his accounts of the robberies in both contexts were substantially similar. Both during his interview and at trial, Friason consistently acknowledged that going to the various stores was his idea, that Defendant transported them to each location, and that he and Defendant split the proceeds of the robberies. Accordingly, we cannot conclude that the trial court committed error — much less plain error — in admitting the videotape for corroborative purposes.[2]

II. Jury Instruction Defining "Firearm"

[3] Defendant next argues that the trial court erred in defining the term "firearm" in its jury instructions. Both at trial and in his videotaped interview, Friason referred to the weapon he carried during the robberies as a "BB gun" or a "fake gun." In response to a question from the jury as to "how the law defines firearm in regards to the conspiracy charge," the trial court instructed the jury that a firearm "is a weapon that when fired, that the projectile fired therefrom can cause death or serious bodily injury to a human being if the projectile strikes and enters a vital part of the human body."

Defendant acknowledges that his trial counsel failed to object to this instruction and that as a result, he is entitled only to plain error review on appeal as to this issue. As noted above, under the plain error standard, Defendant bears the burden of demonstrating to this Court that the instructional error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citation and quotation marks omitted).

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2. Defendant also argues that Friason's statements in the interview were the only evidence of the aggravating factor that Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" and therefore contradicted his trial testimony. Contrary to the contentions made in Defendant's brief, however, this aggravating factor was not even submitted to the jury for determination. Rather, the only aggravating factor actually submitted to the jury was whether Defendant "induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason." As such, Defendant cannot show that the admission of such evidence prejudiced him. *See State v. Simpson*, ___ N.C. App. ___, ___, 748 S.E.2d 756, 760 (2013) (explaining that defendant must establish prejudice in order to show plain error).

Defendant contends that the trial court plainly erred in giving this instruction because (1) "Friason testified, without contradiction, that he used a BB gun in all of the cases for which [Defendant] was on trial"; and (2) the General Assembly has recognized a distinction between firearms and BB guns. However, we need not determine the propriety of the trial court's definitional instruction because even assuming, without deciding, that the instruction was erroneous, Defendant has failed to show sufficient prejudice to warrant a finding of plain error.

Here, Defendant was convicted on the charge of *conspiracy* to commit robbery with a dangerous weapon — not the charge of robbery with a dangerous weapon itself. "[C]riminal conspiracy is an agreement between two or more persons to do an unlawful act . . . . [and] no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975). Notably, Defendant does not argue on appeal that the instruction was erroneous on the theory that the evidence only supported a finding of the lesser-included offense of conspiracy to commit common law robbery. Indeed, as noted above, Defendant has abandoned on appeal his contention that the trial court erred in denying his motion to dismiss the charges of conspiracy to commit robbery with a dangerous weapon. Rather, he appears to be contending that the instruction was misleading solely because of Friason's testimony that he used a BB gun or a "fake gun" to actually commit the robberies.

However, proof that a dangerous weapon was actually used to commit the robberies was not required to establish that Defendant and Friason *conspired* to commit the robberies with a dangerous weapon. *See id.* at 616, 220 S.E.2d at 526 ("The conspiracy is the crime and not its execution."). While a determination of whether the instrument used was, in fact, a firearm capable of endangering life would have been necessary to the resolution of the issue of whether Defendant was guilty of robbery with a dangerous weapon, that issue was never placed before the jury because the trial court reduced the robbery with a dangerous weapon charges to common law robbery at the conclusion of the State's case.[3]

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3. While not the basis for our ruling on this issue, we note that the evidence presented at trial did not conclusively establish that the weapon used in the commission of the robberies was, in fact, a BB gun. The weapon was never recovered, and witnesses testified both that the weapon appeared to be real and that the robber had threatened to shoot them if they did not comply with his demands. *See State v. Joyner*, 312 N.C. 779, 787, 324 S.E.2d 841, 846 (1985) (upholding trial court's denial of motion to dismiss robbery with a dangerous weapon charge despite fact that defendant presented

Accordingly, Defendant has not established prejudice from the trial court's instruction. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 (concluding that defendant could not "show the prejudicial effect necessary" to establish plain error where trial court's jury instruction regarding conspiracy to commit robbery with a dangerous weapon was erroneous).

III. Sentencing

[4] Defendant's final argument on appeal is that this matter must be remanded for resentencing because the trial court imposed consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. We agree.

N.C. Gen. Stat. § 14-7.6 provides that

> [w]hen an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted; but under no circumstances shall an habitual felon be sentenced at a level higher than a Class C felony. In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. *Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.*

N.C. Gen. Stat. § 14-7.6 (2013) (emphasis added).

During the sentencing hearing, the trial court sentenced Defendant as an habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that "the law requires consecutive sentences on habitual felon judgments." However, based on the language of N.C. Gen. Stat. § 14-7.6, a trial court is only required to impose a sentence consecutively to "any sentence being served by" the defendant. *Id.* Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences. *See* N.C. Gen.

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evidence indicating that weapon used was inoperative because "the statement of the robber to the victim during the course of the robbery that he would kill the victim" constituted evidence that weapon was capable of endangering or threatening life of victim).

Stat. § 15A-1354(a) (2013) (explaining that generally "sentences may run either concurrently or consecutively, as determined by the court").

In *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010), we analyzed the meaning of nearly identical language contained in N.C. Gen. Stat. § 90-95, which describes the penalties for various drug offenses and states that "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." This Court determined that the above-quoted language

> means that if the defendant is already serving a sentence, the new sentence under N.C. Gen. Stat. § 90-95(h) must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. When this occurs, the trial court has the discretion to run the sentences either consecutively or concurrently.

Id.

We conclude that the same is true of the corresponding language in N.C. Gen. Stat. § 14-7.6. As such, because Defendant was not already serving a sentence at the time of the sentencing hearing, the trial court was incorrect in its belief that consecutive sentences were mandatory in this case. We must therefore remand for resentencing so the trial court may properly exercise its discretion in determining whether Defendant's sentences should run consecutively or concurrently. *See id.* at 170, 693 S.E.2d at 227 (remanding for resentencing where "trial court erroneously believed that it was mandated by law to impose consecutive sentences" and explaining that "[w]hen a trial judge acts under a misapprehension of law, this constitutes an abuse of discretion").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial, free from prejudicial error. We remand, however, for a new sentencing hearing so the trial court may (1) exercise its discretion as to whether Defendant should receive consecutive or concurrent terms for his offenses; and (2) sentence Defendant accordingly.

NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA,
v.
JULIE ANN ENGLISH, DEFENDANT

No. COA14-952

Filed 19 May 2015

Homicide—second-degree murder—voluntary manslaughter—motion to dismiss—sufficiency of evidence

The trial court did not err in a voluntary manslaughter case by denying defendant's motion to dismiss the charges of second-degree murder and its lesser-included offense, voluntary manslaughter. Based on the circumstantial evidence presented and viewed in the light most favorable to the State, it was reasonable for the jury to infer that defendant intentionally struck the victim with her car.

Appeal by Defendant from a judgment entered 4 March 2014 by Judge Claire V. Hill in Brunswick County Superior Court. Heard in the Court of Appeals 18 February 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Melissa L. Trippe, for the State.

Glover and Petersen P.A., by Ann B. Petersen, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Julie Ann English ("Defendant") appeals from a judgment after a jury found her guilty of voluntary manslaughter. Defendant contends it was error to deny her motion to dismiss. We disagree.

I. Factual and Procedural History

On 24 February 2014, Defendant was tried before a jury based on an indictment charging her with second-degree murder in Brunswick County. At trial, the State's evidence tended to show the following:

On 27 May 2012, Defendant and her boyfriend, Michael Pate ("Pate"), had a party celebrating Pate's birthday at their shared residence ("Pate residence"). Dixie Costlow ("Costlow"), Defendant's employer, and her son, Timothy Staruch ("Staruch"), attended the party.

The State called Staruch, who arrived at the party at approximately 1:30 pm, as its first witness. He testified partygoers grilled out, drank

alcohol, and swam in the pool. Staruch admitted he did "a little bit of drugs, a little marijuana and a few hits of crack." He observed both Defendant, a casual acquaintance, and Pate, whom he had never previously met, doing drugs and drinking alcohol. After the party ended and the partygoers dispersed, Staruch remained behind to purchase drugs with Defendant and Pate. He asked Pate for a ride to Costlow's house for drug money. Pate admitted he "drank too much that day and he didn't want to get a DUI" so Defendant drove Staruch to Costlow's house, where he obtained the purchase money. He watched as Defendant arranged by phone for a drug dealer to deliver cocaine to the Pate residence. At approximately 9:00 pm, Staruch and Defendant returned to the Pate residence. After Defendant pulled in the driveway, Staruch exited the car and walked up the stairs toward the porch.

Staruch testified just as he reached the top of the steps, Pate came out of the porch door, accusing Staruch of "messing around" with his wife. Staruch testified when Pate "pushed at" him, he "came down off the steps." He observed Defendant step between the two men. After he turned to leave, Staruch "heard" a punch and immediately turned back around. He saw Defendant lying on the ground. He then watched Defendant stand up and resume her argument with Pate. Thinking "she obviously can handle it," Staruch turned and walked away.

As he walked, Staruch heard arguing and sounds of people "running in and out of the house." He stopped about 200 yards away and looked back toward the Pate residence. Although it was dark and trees were in his line of sight, he claimed he could "see and hear silhouettes." Staruch watched a figure run out of the house and into the car; another figure unsuccessfully tried to get into the car. He observed the back-up lights of the car switch on. Thinking Defendant was leaving the house and might stop to pick him up, Staruch turned and continued to walk away from the house. He then heard "a wreck, a boom," and immediately turned around. He saw the car "tilted up" on the porch. Staruch walked back to the Pate residence and observed "most of [Pate's] body . . . behind the tire, and [his] legs . . . sticking out." Staruch testified Defendant was on her cell phone and she appeared "hysterical."

The State called Chief Mark Hewett ("Chief Hewett") of the Civietown Fire and Rescue Squad, who was the first official to arrive at the Pate residence. He testified that after receiving a call from 911 dispatch, he arrived at the Pate residence, where Defendant was standing in the yard and motioning toward the car. Chief Hewett saw Pate's body under the car, immediately checked for a pulse, and determined "[Pate] was already gone." He observed damage to the left-hand side of

the steps. Chief Hewett smelled alcohol on Defendant, who was crying and screaming "Help him."

The State called Corporal Jeff Elwood ("Corporal Elwood") of the Brunswick County Sheriff's Office, who arrived at the Pate residence at the same time as First Sergeant Long. He testified that Chief Hewett informed him the "gentleman under the car was deceased." He observed that the vehicle was "up towards the front porch, and the rail was leaning where it looked like the vehicle had struck the rail." Corporal Elwood heard Sergeant Long direct Defendant to sit in a lawn chair in the yard and instruct her she was not free to leave. Corporal Elwood read Defendant her *Miranda* rights.

The State called Captain Donna Simpson ("Captain Simpson") of the Brunswick County Sheriff's Office, who arrived at the Pate residence at approximately 10:30 pm. Captain Simpson testified Defendant appeared a "little shaken up" and was bleeding from the left side of her face. Captain Simpson walked Defendant to the EMS truck, where she advised Defendant of her *Miranda* rights, conducted a recorded interview, and took some photographs. The recorded interview was played for the jury.[1] In the interview, Defendant stated:

> I walked up on the porch and said "Mike what are you doing?" And he took his fists -- as soon as I walked on the steps, and he hit me in the face and knocked me from the porch to the yard, and my face started pouring blood. So I went inside and got my pocketbook, got my keys, and got in my car and went to back up. . . . He was standing in the yard. . . . He hit me in the face, I'm just going to knock the porch down. . . . And I seen him standing in the yard. . . . I don't know how he got under my car. . . . I went to pull back and I couldn't pull back, probably because Mike was under my car.

Following the interview, Captain Simpson retrieved Defendant's cell phone from inside the Pate residence and examined the area outside the car. She testified the "vehicle was next to the front of the residence, where it hit a couple of steps" and there were "tire tracks on the concrete."

The State called Detective John Holman ("Detective Holman"), the lead investigator on the case. Holman first interacted with Defendant

1. This Court was not provided with a transcript of this interview. The recording on the CD is incredibly difficult to understand at certain times.

at the hospital and testified "[she] [t]old me that they had gotten into an argument, that her and [Staruch] were walking onto the porch, and [Pate] confronted [Staruch] and attempted to push him. She got upset, got hit, walked in, got the keys, and got into the vehicle." Shortly after midnight, Detective Holman and Captain Simpson conducted a formal recorded interview of Defendant in her room at Brunswick Novant Hospital. The recorded interview was played for the jury.[2]

In the interview, Defendant explained: "I've never been hit like that before in my life. . . . [h]e hit me and knocked me all the way into the yard [and] I laid there for a bit." Detective Holman asked about the source of Defendant and Pate's argument; Defendant responded: "He was jealous over that -- over Timmy -- thought I was messing with him and I can swear on my daddy's life that it wasn't like that." When asked "what happened after he hit you?", Defendant responded: "I went back in and got my pocketbook and keys and went and got in the car. [inaudible] My thought was that I'd back up and run into the porch steps. I seen him out in the yard part out in the sand." Defendant admitted the reason behind hitting the steps was: "I just got hit in the face. I was being evil too I guess." Detective Holman asked "[a]nd at no point in time you saw him in front of you?"; Defendant responded:

> No, he was standing out in the -- well he walked around my car and when he walked around my car I said I got to go to the hospital. I see him standing in the dirt in the front yard not even on the concrete part so I turned the car to hit the step. I don't know if he ran up there at the same time I was pulling up or what -- or how he got in that position.

Following the interview, Detective Holman drew a warrant for Defendant's arrest.

The State called Dr. John Almeida, who performed a forensic autopsy on Pate's body on 29 May 2012. Dr. Almeida testified that Pate's injuries consisted of a broken right ankle, abrasions throughout the body, a pelvic fracture, broken ribs, and a punctured left lung from a sharp piece of rib. He opined: "I believe the cause of death to be multiple blunt trauma with crushed ribs and crushed chest and pelvis." Dr. Almeida explained that Pate's pelvic and rib fractures were the result of "extreme pressure" and "extreme compression of the chest" and Pate's abrasions could have been "caused by being struck by a vehicle" or "by the body itself striking

2. This Court was not provided with a transcript of this interview. The recording on the CD is difficult to understand at times.

something, such as a porch." Although tripping over the lip of concrete could cause a fractured ankle, Dr. Almeida testified that it was more likely "there was some pressure brought on [Pate's] ankle." He further explained: an ankle fracture is a "characteristic injury that is seen in motor vehicle accidents when a pedestrian is struck by a vehicle."

At the close of the State's evidence, Defendant's counsel moved to dismiss for insufficient evidence of second-degree murder, stating "*[t]here may be enough evidence for voluntary manslaughter* but not second-degree murder[.]" The motion was denied. Defendant then presented the testimony of her expert witness and testified on her own behalf.

Defendant, a cosmetologist with two sons, began her testimony by explaining the nature of her relationship with Pate. Defendant testified she started dating Pate in 2001 and in the beginning, "[i]t was like [they] couldn't do without each other, [they] were in love." She respected the fact that Pate was a hard worker and a Christian man, and her sons even called him "Pop" and "Dad." Defendant admitted that the couple drank alcohol recreationally and between 2003 and 2005, they started using cocaine "[j]ust [on the] weekends." Under the influence of drugs and/or alcohol, Defendant claimed the couple began to "argue and fight." Defendant explained: "[s]ometimes [the fighting] would be physical" and "[t]here was a lot of cussing and yelling and calling each other names, to the point where I had to leave or I was made to leave. And a few days later, [Pate] would call me back, and it would start over again, and we would do the same thing again." She continued:

> I was scared most of the time, didn't know what to look forward to when I got home, I didn't know how he was going to be, how he was going to act, if he was going to be drunk[.]. . . I was just always scared. I felt like I was stuck. Once I'd move out and move back in, then I would have nowhere to go. It was kind of like if he got mad, he would say, "Get your stuff and get out," you know. So I felt trapped, I guess, to say.

Defendant then testified as to the events of 27 May 2012. She recounted Pate began drinking alcohol at approximately 11:00 am. She "believed" Pate and other partygoers smoked crack cocaine because they "were gathering in the bathroom or in the bedroom." Defendant claimed she did not smoke crack at the party, but admitted she "had a glass of wine with [her] most of the time[.]" Because Staruch "wanted to get some drugs," Defendant drove him to Costlow's house to pick

up the purchase money. When Defendant and Staruch returned to the Pate residence, Defendant suspected that Pate was "pretty drunk." She watched Staruch walk up the stairs and heard Pate "cussing and fussing" at Staruch. As Defendant stepped up on the stairs between Staruch and Pate, Pate hit her left cheek with his fist, propelling her from the stairs to the yard. She thought "[o]h my God, I've never been hit like that before[,]" as blood poured down her cheek.

Defendant testified after getting hit, she "didn't really understand what was going on with [Pate], but [she] went to a different state of mind." Intending to go to the hospital, she locked herself in her car, but was forced to exit the car to retrieve her keys from the yard. Defendant returned to the car and locked the doors. Before starting the engine, she observed Pate walk to the driver's side of the car and look in the window. Defendant then watched Pate leave the window and "walk[] off" around the back of her car. She claimed she "didn't see [Pate] after he went to the back of [her] car." Although she initially intended to back out and put her car in gear, Defendant testified that she changed her mind and thought "I'll just hit those steps, and then I'll back out and leave." She drove forward and struck the porch stairs. Unable to back up her car, Defendant emerged from the driver's seat, thinking "my bumper [must be] hung on the steps or something." She heard Pate moan and saw his hand under the car. She attempted to pull Pate out by his hand, retrieved her phone from her car, and called 911. A recording of the 911 call was played for the jury.

Defendant called Dr. Jennifer Sapia, who evaluated Defendant four times in fourteen months at the Brunswick County Detention Facility. Dr. Sapia testified that in the course of evaluating Defendant, she performed clinical interviews, conducted psychological testing, and reviewed law enforcement investigation records. Dr. Sapia opined: Defendant's "judgment, planning, and problem-solving were more likely than not appreciably impaired by the acute effects of alcohol intoxication as well as the emotionally aroused state of mind due to that physical assault."

The State then offered the testimony of Richard Smith, a neighbor of Defendant and Pate, as a rebuttal witness. Smith testified he observed Defendant and Pate argue outside their home on two occasions prior to 27 May 2012 and, both times, Defendant hit Pate "like a girl hits" and Pate walked away.

After the close of all the evidence, Defendant renewed her motion for the court to dismiss the charge of second-degree murder. The motion was again denied. The judge submitted four possible verdicts to the jury:

(1) second-degree murder, (2) voluntary manslaughter, (3) involuntary manslaughter, and (4) not guilty. The jury found Defendant guilty of voluntary manslaughter and the trial court sentenced her to a minimum term of fifty-one months and a maximum term of seventy-four months imprisonment.

II. Standard of Review

This Court reviews the trial court's ruling with respect to a motion to dismiss for insufficient evidence on a *de novo* basis. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). "[T]he question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant's being the perpetrator of such offense." *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983) (citation omitted). Substantial evidence is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Bunn*, 173 N.C. App. 729, 733, 619 S.E.2d 918, 921 (2005). The evidence can be circumstantial or direct, or both. *State v. Bruton*, 264 N.C. 488, 497, 142 S.E.2d 169, 175 (1965). However, "the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "In considering such motions, the trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight." *Malloy*, 309 N.C. at 178, 305 S.E.2d at 720 (citations omitted). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000). If, however, the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator . . . the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720.

III. Analysis

Defendant contends the trial court erred as a matter of law by denying her motion to dismiss the charge of second-degree murder and its lesser-included offense, voluntary manslaughter. We disagree.

Voluntary manslaughter is the "unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001) (citation and internal quotation marks omitted). "Generally,

voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor." *Id.* However, "[n]either second degree murder nor voluntary manslaughter has as an essential element an intent to kill." *Id.* (citation and quotation marks omitted). Therefore, the term intentional killing "is not used in the sense that a specific intent to kill must be admitted or established" but, "refers to the fact that the *act* which resulted in death is intentionally committed and is an assault which in itself amounts to a felony or is likely to cause death or serious bodily injury." *Id.* (citation and quotation marks omitted).

At trial, Judge Hill instructed the jury on the essential elements of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The judge explained for a conviction of voluntary manslaughter, the State must prove, beyond a reasonable doubt, that: (1) Defendant killed Pate by an "intentional and unlawful act" and (2) Defendant's act was the "proximate cause of Michael Pate's death." During deliberation, the jury asked the court for clarification on the first element of voluntary manslaughter, specifically "what 'act' is referring to [in the context of] the act being an 'intentional and unlawful act[.]' " The judge explained:

> Pursuant to your jury instructions, intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

The judge further explained the State is not required to prove Defendant intended to kill, but only must show Defendant intended to act in a manner that was an assault, which, in itself, amounts to a felony or is likely to cause death or serious injury.

On appeal, Defendant contends there was not sufficient evidence presented showing Defendant killed Pate by an intentional and unlawful act, the first essential element of voluntary manslaughter. Defendant argues that without evidence of her intent to strike Pate with a car, there is no evidence of an intentional assault, which in itself amounts to a felony or is likely to cause death or serious bodily injury.

In *State v. Jackson*, this Court found sufficient evidence to support a jury's conviction of voluntary manslaughter, where the defendant struck and killed the victim with his car. *Jackson*, 145 N.C. App. at 88,

550 S.E.2d at 228. At trial, the State offered the defendant's statement, explaining the victim "[got] in the middle of the street in front of [defendant's] car[.]" *Id.* (internal quotation marks omitted). In the statement, the defendant also admitted he hit the victim and kept driving because he "wasn't going to stop to get jumped or get [his] car messed up." *Id.* Officers present at the scene testified that the defendant was speeding and failed to slow down or swerve to avoid the victim, who did not make any sudden movements toward the car. *Id.* at 91, 550 S.E.2d at 230. The defendant testified in his own defense. He admitted that after being assaulted by the victim, he was "upset" and "angry" while driving away and "he could not avoid striking decedent when he jumped into the path of defendant's automobile." *Id.* at 89, 550 S.E.2d at 228. On appeal, this Court concluded that the eyewitness' testimony, the defendant's written statement to police, and the nature of the assault itself constituted sufficient evidence of the defendant's intent to strike the victim with his car. *Id.* at 91, 550 S.E.2d at 230.

Defendant correctly asserts the facts in *State v. Jackson* are distinguishable from the facts in this case. In *Jackson*, eyewitness testimony was presented at trial that both contradicted the defendant's prior statements to officers and described the victim's behavior before being hit with the car. *See id.* In this case, Staruch did not witness Defendant strike Pate with the car, so there is neither eyewitness testimony contradicting Defendant's prior statements nor describing Pate's actions immediately preceding the crash. Additionally, the defendant in *Jackson* admitted in a written statement that he hit the victim and continued driving because he did not want to stop. See id. In this case, there is no direct evidence that Defendant was aware she hit Pate until she got out of the car, heard him moan, and observed his body. This Court's determination of a defendant's intent, however, is not limited to the evidence we considered in *Jackson*.

"Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence[.]" *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). Intent is "a mental attitude" so it "must ordinarily be proven by circumstances from which it can be *inferred*." *Jackson*, 145 N.C. App. at 90, 550 S.E.2d at 229 (citations omitted) (emphasis added). Accordingly, when the jury asked for clarification on the issue of intent at trial, they were instructed that it "is seldom provable by direct evidence." The evidence presented to the jury included the following: (1) Pate had a history, while under the influence of drugs and/or alcohol, of acting emotionally and physically

abusive toward Defendant; (2) when Pate was angry, he would tell Defendant to "[g]et her stuff and get out," so Defendant felt "trapped"; (3) on 27 May 2012, Pate drank alcohol and allegedly smoked crack before hitting Defendant in the face with a closed fist, knocking her from the porch to the yard; (4) Defendant felt scared and went "to a different state of mind" after being hit; (5) before driving forward, Defendant observed Pate standing in the sandy part of the yard, near the concrete patio steps; and (6) Defendant struck the stairs because she "wanted to be evil too."

From this evidence, a jury could find Defendant felt trapped in a cycle of emotional and physical abuse, and after a particularly violent physical assault, she decided it was time to break free. Based on Dr. Almeida's testimony, a jury could find Pate did not trip and fall in front of the car, for his right ankle fracture was consistent with being struck by an automobile. A jury could also find Defendant was aware of Pate's location when she put the car in drive, as she testified she had seen him prior to moving the car forward. "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). Based on the evidence presented, viewed in the light most favorable to the State, it was reasonable for the jury to infer Defendant intentionally struck Pate with her car.

Defendant contends the State is bound by the purported truth of her statements to Captain Simpson and Detective Holman, in which she denied intentionally striking Pate. *See State v. Morgan*, 299 N.C. 191, 208, 261 S.E.2d 827, 837 (1980) (citations omitted) (holding "[w]hen the state introduces into evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the state is bound by those statements"). However, when evidence of the defendant's intent contradicts a previous exculpatory statement, the State is not bound by the truth of the prior statement and the matter is properly submitted to the jury. *See id.* at 209, 261 S.E.2d at 838 (explaining where inconsistencies in defendant's statement present a jury question as to whether a killing was accidental or intentional, "the state is not bound by the exculpatory portions of defendant's statement and is entitled to go to the jury on the issue of defendant's guilt of the crime charged[]"). Here, Defendant contends that neither eyewitness testimony nor physical evidence contradict her statements to investigating officers, in which she denies intentionally striking Pate with her car. However, Defendant discounts the significance of circumstantial evidence, from which a jury could

infer intent. As discussed above, the jury was presented with circumstantial evidence suggesting Defendant intentionally struck Pate with her car. Therefore, as there was evidence that contradicted Defendant's prior statements, the trial court was not bound by the purported truth of the statements.

IV. Conclusion

On appeal, this Court must only determine whether there was sufficient circumstantial or direct evidence, in the light most favorable to the State, supporting the jury's conviction of voluntary manslaughter. We hold that there was sufficient evidence offered to prove all essential elements of voluntary manslaughter. Therefore, the motion to dismiss was properly denied and the matter was correctly submitted to the jury.

NO ERROR.

Judges STEPHENS and TYSON concur.

STATE OF NORTH CAROLINA
v.
DANIEL LEE FENNELL, DEFENDANT

No. COA14-760

Filed 19 May 2015

Costs—jail fees—daily rate—improper version of statute used

The trial court erred in a drugs case by calculating the amount of jail fees assessed against defendant by using the daily rate provided in the revised version of N.C.G.S. § 7A-313 (2013). That version was inapplicable to defendant because it did not become effective until after defendant had completed his pretrial confinement. The case was remanded for recalculation of jail fees using the correct daily rate of $5.00 per diem and for the limited purpose of subtracting $1,760.00 from the amount of costs assessed against defendant.

Appeal by defendant from judgment entered 17 April 2014 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 4 December 2014.

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

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

GEER, Judge.

Defendant Daniel Lee Fennell appeals from a judgment entered after his fourth sentencing hearing on his convictions for sale of a schedule II controlled substance, possession of a schedule II controlled substance, and being a habitual felon. Defendant's sole argument on appeal is that the trial court erred in calculating the amount of jail fees assessed against him by using the daily rate provided in the revised version of N.C. Gen. Stat. § 7A-313 (2013) -- a version that was inapplicable to defendant because it did not become effective until after defendant had completed his pretrial confinement. We agree and remand for recalculation of jail fees using the correct daily rate.

Facts

On 2 June 2011, defendant was found guilty by a jury of possession of a schedule II controlled substance, selling a schedule II controlled substance, and delivering a schedule II controlled substance. Defendant pled guilty to being a habitual felon and stipulated to having a prior record level of VI. The trial court entered a consolidated judgment and sentenced defendant to a presumptive-range term of 150 to 189 months imprisonment and ordered him to pay $720.00 in restitution. Defendant appealed to this Court. In an opinion filed 6 March 2012, this Court held that defendant received a trial free of prejudicial error and that the trial court did not err in ordering restitution. The Court, however, remanded for a new sentencing hearing due to an error in the trial court's prior record level determination. *State v. Fennell*, 219 N.C. App. 401, 722 S.E.2d 212, 2012 WL 698252, at *3, 2012 N.C. App. LEXIS 302, at *8 (2012) (unpublished).

At his new sentencing, defendant stipulated that he had a prior record level of V, and the trial court sentenced him to a presumptive-range term of 125 to 159 months imprisonment. The trial court also ordered defendant to pay $4,454.50 in costs, $2,606.25 in attorneys' fees, and $60.00 in miscellaneous fees, for a total of $7,120.75. However, the trial court did not order payment of any restitution.

Defendant again appealed to this Court, arguing that the trial court again erred in calculating his prior record level and by imposing a more severe monetary judgment than the original sentence. This court held that the trial court erroneously relied on a structured sentencing chart

that was inapplicable to defendant, remanded for resentencing, and deemed defendant's remaining arguments concerning the monetary judgment moot. *State v. Fennell*, ___ N.C. App. ___, 739 S.E.2d 628, 2013 WL 1121500, at *1, 2013 N.C. App. LEXIS 297, at *3 (2013) (unpublished).

Defendant's third sentencing hearing was held on 30 April 2013. Defendant stipulated to having a prior record level of IV. The trial court sentenced defendant to a presumptive-range term of 111 to 143 months imprisonment and again ordered defendant to pay $4,454.50 in costs, $2,606.25 in attorneys' fees, and $60.00 in miscellaneous fees, for a total of $7,120.75. However, the costs and fees were not imposed during the sentencing hearing, but rather were only imposed in the written judgment signed and entered after defendant had left the courtroom.

Defendant appealed and argued that the trial court erred in imposing costs and fees outside of his physical presence. This Court agreed and remanded "for a determination of what costs and fees, if any, to impose after defendant is afforded notice and an opportunity to be heard." *State v. Fennell*, ___ N.C. App. ___, 758 S.E.2d 185, 2014 WL 859271, at *3, 2014 N.C. App. LEXIS 242, at *7 (2014) (unpublished).

A fourth hearing was held on 17 April 2014. A new judgment was entered ordering defendant to pay $120.00 in restitution, $4,120.00 in costs, $2,531.25 in attorney's fees, and $60.00 in appointment/miscellaneous fees, for a total of $6,831.25. Defendant timely appealed to this Court.

Discussion

On appeal, defendant challenges only the amount of jail fees the trial court assessed against him. N.C. Gen. Stat. § 7A-304(a) (2013) sets forth certain costs that "shall be assessed and collected" in every criminal case in which the defendant is convicted or enters a plea of guilty. Among the fees listed in the statute are "jail fees . . . [that] shall be assessed as provided by law." N.C. Gen. Stat. § 7A-304(c). "Jail fees" are governed by N.C. Gen. Stat. § 7A-313 and relate only to a defendant's pre-trial confinement in jail.

In this case, defendant spent 352 days in jail awaiting trial prior to the original judgment being entered on 3 June 2011. N.C. Gen. Stat. § 7A-313 (2009), as it existed at that time, provided:

> Persons who are lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours' confinement, or fraction thereof, except that a

> person so confined shall not be liable for this fee if the case or proceeding against him is dismissed, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill.

Effective 1 August 2011, the General Assembly amended N.C. Gen. Stat. § 7A-313 to increase the jail fee from $5.00 a day to $10.00 a day. *See* 2011 N.C. Sess. Laws ch. 145, § 31.26(e); 2011 N.C. Sess. Laws ch. 192, § 7(n). At defendant's sentencing hearing, the trial court calculated the amount of jail fees using the $10.00 rate in the amended version of the statute. Defendant contends that this was error because his pretrial confinement was completed prior to the effective date of the amendment increasing the jail fee. The State does not dispute that the jail fees should have been calculated at a rate of $5.00 per day, but argues that the issue is not properly before this Court.

At the sentencing hearing, defendant objected to the jail fees, but not on the specific grounds he now raises on appeal. Rather, defense counsel requested that the trial court not impose jail fees because it was a substantial amount of money and it was "unjust to put a man in jail against his will and charge him for being there." In response, the trial court noted that the jail fees were statutorily mandated pursuant to N.C. Gen. Stat. § 7A-313. Defense counsel later conceded that "in terms of the mandated jail fees, I guess we don't have a choice in that, given the wording of the statute."

The trial court then inquired as to the date of defendant's original judgment and specific date that the statute was amended. Defense counsel, the State, and the trial judge consulted the 2011 General Statutes book and noted that the book did not indicate the exact date in 2011 that the statute was amended. The inquiry concluded with the following exchange:

> [DEFENSE COUNSEL]: Logically speaking, your Honor, if it's a 2011 statute book it comes out the first of the year, it probably was changed prior to the date of the judgment.
>
> THE COURT: You would think so. It didn't come out in 2012. It says it came out in 2011. This isn't a hardback, it looks like it's a 2011 edition. So assuming that it was in place on that date, it should have been imposed on that particular date.

The State first contends that defendant did not preserve the issue for appeal because he did not object below to the trial court's use of

a rate of $10.00 per day. Generally, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1).

Nevertheless, certain errors may be reviewable despite a defendant's failure to object at trial. Pertinent to this case, N.C. Gen. Stat. § 15A-1446(d)(18) (2013) authorizes appellate review of alleged errors in sentencing if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." In this case, defendant's challenge to the trial court's assessment of court costs amounts to a sentencing error reviewable pursuant to N.C. Gen. Stat. § 15A-1446(d)(18). *See State v. Patterson*, ___ N.C. App. ___, ___, 735 S.E.2d 602, 603 (2012) (applying N.C. Gen. Stat. § 15A-1446(d)(18) and reviewing alleged error in imposition of court costs despite defendant's failure to object at sentencing hearing).

Additionally, it is well settled that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). As recognized by both the trial court and defendant at the sentencing hearing, the assessment of jail fees is statutorily mandated. *See* N.C. Gen. Stat. § 7A-304(a) (providing that jail fees "*shall* be assessed and collected" (emphasis added)); N.C. Gen. Stat. § 7A-313 ("[p]ersons who are lawfully confined in jail awaiting trial *shall* be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours' confinement, or fraction thereof" (emphasis added)). The trial court acted contrary to the statutory mandate in calculating the jail fees and prejudiced defendant by ordering him to pay twice the amount of jail fees authorized by statute. Accordingly, the issue of jail fees is also preserved under the rule articulated in *Ashe*.

Alternatively, the State argues that defendant is barred from raising this issue by the doctrine of res judicata. The State cites *State v. Speaks*, 95 N.C. 689, 691 (1886), and *State v. Melton*, 15 N.C. App. 198, 200, 189 S.E.2d 757, 758 (1972), for the proposition that "[t]he doctrine of res judicata prohibits a defendant from raising on appeal issues that could have been raised in a prior appeal." The State reasons that res judicata applies in this case because even though the trial court imposed jail fees in defendant's second and third judgments, defendant did not challenge the per diem rate used to calculate those fees in his appeals of those

judgments. We believe that the State misconstrues the doctrine of res judicata as applied with respect to appeals in criminal cases.

"Under the doctrine of res judicata . . . a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies [and] prevents the relitigation of all matters . . . that were or should have been adjudicated in the prior action." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (internal citations and quotation marks omitted). As explained in *State v. Perry*, 122 N.C. 1018, 1019, 29 S.E. 384, 384 (1898), with respect to criminal cases, "[w]here there is an affirmance of a judgment, this necessarily is an adjudication upon every assignment of error, and of any matter which might have been urged[.]" However, when "a new trial [is] granted upon another point, . . . the judgment [is] only *res judicata* upon the errors ruled upon in the opinion." *Id.*

In this case, the only matters that have been conclusively determined in defendant's previous appeals are the validity of defendant's underlying convictions, the proper calculation of his prior record level, and defendant's right to be heard prior to the imposition of court fees. There has not, however, been any final judgment or adjudication on the issue for which defendant seeks review -- the applicable rate for jail fees. Because defendant was granted a new sentencing hearing on another point and this Court did not previously address the jail fees issue, defendant was not barred by res judicata from seeking review of the jail fees issue.

Accordingly, we hold that the trial court should have applied the $5.00 per diem rate in calculating the jail fees. We vacate defendant's judgment and remand for the limited purpose of subtracting $1,760.00 from the amount of costs assessed against defendant.

VACATED IN PART AND REMANDED IN PART.

Judges STEELMAN and STEPHENS concur.

STATE v. GODBEY

[241 N.C. App. 114 (2015)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
MICHAEL JOHN GODBEY, DEFENDANT

No. COA14-1374

Filed 19 May 2015

1. Evidence—of prior criminal complaint—door opened on direct examination

In defendant's trial for assault on a female, the trial court did not err by admitting evidence that defendant's criminal complaint against another man for assault had been dismissed. Defendant opened the door to cross-examination on this subject when he testified about it in his direct testimony.

2. Appeal and Error—improper sentence—already served—dismissed as moot

The Court of Appeals dismissed as moot defendant's argument that the trial court improperly changed his sentence in response to his notice of appeal. Defendant had already served his term of imprisonment and did not argue that any collateral legal consequences may result from his sentence.

Appeal by defendant from judgment entered 12 August 2014 by Judge Anderson Cromer in Iredell County Superior Court. Heard in the Court of Appeals 6 May 2015.

Attorney General Roy Cooper by Special Deputy Attorney General Elizabeth Leonard McKay, and Associate Attorney Karmina J. Ishak, for the State.

Winifred H. Dillon for defendant-appellant.

STEELMAN, Judge.

It was not error or plain error for the trial court to allow the State to cross-examine defendant about a case that defendant discussed in his direct testimony. Defendant's argument regarding his active, non-probationary, sentence is dismissed as moot, since his sentence has expired.

I. Factual and Procedural Background

On 8 August 2013 Michael Godbey (defendant) went to the Iredell County courthouse annex, where he was involved in an incident with

a female security guard. He was charged with assault on a female, was convicted in district court on 4 March 2014, and appealed to Superior Court for trial *de novo*. The charge against defendant came on for trial at the 11 August 2014 criminal session of Superior Court for Iredell County. Defendant, who is hearing impaired, used the services of an interpreter during the trial.

A. The State's Evidence

On 8 August 2013 Marsha Isenhour[1] was employed by the Wilson Security Company as a security officer at the Iredell County courthouse annex. Ms. Isenhour checked courthouse visitors through a metal detector and, if an alarm sounded when a person passed through the metal detector, she used a metal detection wand to determine the source of the alarm. At around 10:00 a.m. defendant entered the courthouse and when he passed through the metal detector the alarm sounded. Ms. Isenhour knew that defendant was hearing impaired, so she held up her hands, gestured to defendant to stop, and spoke clearly so he could read her lips. Defendant continued to walk towards Ms. Isenhour and when she turned to seek assistance from a co-worker, defendant shoved her from behind into the wall, pushing her "with both hands quite forcefully." Her co-worker restrained defendant until a bailiff escorted him outside. Once outside, defendant made "threatening gestures," and looked at Ms. Isenhour while holding his hand "like he was shooting a gun."

Lloyd Elliott also worked for Wilson Security at the courthouse annex. On 8 August 2013 he heard the alarm sound and turned to see Ms. Isenhour holding up her hands in front of defendant and yelling "Stop!" However, defendant did not stop, but "slammed her into the wall." Mr. Elliott saw that defendant had not tripped, but intentionally pushed Ms. Isenhour into the wall. He stayed between defendant and Ms. Isenhour until a deputy took defendant outside. When defendant was outside, he had an "enraged look" on his face and made threatening gestures towards him and Ms. Isenhour.

B. Defendant's Evidence

Defendant testified on his own behalf, with the assistance of an interpreter. In August 2013 he was the prosecuting witness in a criminal case and on 8 August 2013 he went to the Iredell County courthouse to learn why the case had been dismissed. He approached the metal detector and

1. Although the witness's name is spelled "Eisenhour" in the trial transcript, defendant and the State agree that the correct spelling is "Isenhour."

removed coins and keys from his pockets in order to walk through the checkpoint, but Ms. Isenhour and Mr. Elliott told him to get out of the building. He wrote a note asking Ms. Isenhour why she was telling him to leave the building and showed it to her. In response, she threatened him with the metal detector wand. At that point a deputy arrived and took him outside. Defendant testified that he did not understand why Ms. Isenhour was trying to bar him from the building and denied touching her or making threatening gestures. Defendant also testified about a criminal case that had been dismissed in which he had "filed assault charges" against a man and was also cross-examined about the case.

On 12 August 2014 the jury found defendant guilty of assault on a female. Defendant stipulated that he had a prior record level III for purposes of misdemeanor sentencing. As discussed below, the trial court initially imposed a split sentence of 30 days imprisonment followed by a term of probation, but subsequently changed the judgment to 120 days imprisonment without probation.

Defendant appeals.

II. Cross-examination of Defendant

[1] In his first argument, defendant contends that the trial court "committed plain error in admitting evidence that [defendant's] criminal complaint against [another man] was dismissed for insufficient evidence because the admission amounted to a judicial opinion that [defendant] was not credible." Defendant has failed to establish the existence of error or plain error.

A. Standard of Review

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

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

> affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

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

B. Analysis

On direct examination, defendant testified that he went to the courthouse annex on 8 August 2013 to learn why a criminal case in which he was the prosecuting witness had been dismissed two days earlier. Defendant stated that he "didn't have [a] chance to tell [his] side of the story on August the 6th,"and that he had never been told why the case was dismissed. Defendant testified that:

> I just want to know why the case I had filed against the gentleman [had] been dismissed. I just went to the DA's office to try to find out what was going on and explain my side of the case. The DA apparently wasn't doing his job of representing me.

Defendant also testified that on both 6 August and 8 August 2013 Ms. Isenhour and Mr. Elliott had prevented him from entering the courthouse, telling him to "get out" and "leave the building." Thus, defendant offered testimony regarding the case that had been dismissed, including assertions that he had not been informed of the reasons for the dismissal and that he had been prevented from entering the courthouse to discuss the case with the prosecutor.

On cross-examination, defendant was questioned about the case in which he was the prosecuting witness, and the State introduced documents associated with the case, including the reports he filed with a magistrate about the alleged assault, and the records of the district court proceedings in that case. Defendant testified that in April 2013 he swore out a warrant before a magistrate, charging another man with simple assault. On 12 June 2013 defendant testified in district court as a prosecution witness. After the evidence was presented, the district court judge dismissed the charge. On 27 June 2013 defendant returned to the magistrate and initiated a new assault proceeding against the same defendant for the same alleged assault. A trial date was set for 6 August 2013, but when defendant went to court on that date, he learned that the second charge had been dismissed because the defendant in that case had been acquitted of the assault at the earlier district court trial. Defendant testified that on August 6th Ms. Isenhour prevented him from entering the courthouse, that he returned on 8 August 2013 to learn

more about the dismissal of the assault charge, and that Ms. Isenhour and Mr. Elliott were "lying" about the incident on 8 August 2013.

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981) (citations omitted). "In such a case, the defendant has 'opened the door' to this testimony and will not be heard to complain." *State v. Stanfield*, 292 N.C. 357, 364, 233 S.E.2d 574, 579 (1977) (citation omitted). We hold that, by testifying about the earlier assault case in his direct testimony, defendant opened the door to cross-examination on this subject and that the trial court's decision to allow the testimony and introduction of documents pertaining to the earlier case was not error. Because the trial court did not err, we do not reach the issue of plain error.

Defendant, however, contends that the documents detailing dismissal of the charge constitute a "judicial opinion" on defendant's credibility, given that defendant testified under oath before a magistrate and at the district court trial. However, a charge may be dismissed for a variety of reasons; for example, a witness's unimpeached and credible testimony may simply not establish the elements of a criminal offense. The bare fact that the earlier charge was dismissed does not constitute a judicial opinion on defendant's credibility.

This argument is without merit.

III. Sentencing

[2] In his second argument, defendant contends that he is "entitled to a new sentencing hearing because the trial court erred when it based its imposition of sentence on [defendant's] exercise of his right to appeal." We conclude that, although the trial court erred, the issue is now moot, given that defendant has served his sentence and cannot be resentenced.

At the sentencing hearing, the trial court listened to the arguments from the prosecutor and defense counsel, and questioned defendant about his living situation. The trial court then engaged in the following dialog with counsel:

> THE COURT: All right. Stand, please. Find there's a factual basis for all of this. I've accepted the verdict of the jury. On a conviction of and a guilty finding of assault on a female, the Court's going to enter the following judgment. It's a class A1 misdemeanor, record level III with six priors.

> It's 150 days suspended for one year upon the following terms and conditions. You pay the court costs. Are you court-appointed?
>
> MR. LITTLE: I am court-appointed, Your Honor. At this time I have a total right at 21 hours. . . .
>
> THE COURT: At what rate?
>
> MR. LITTLE: That's, I believe, the $60 rate.
>
> THE COURT: Be an additional $1,260. You can pay this while you're on probation; however, this includes the following terms and conditions. It will be a 30-day sentence starting today in the Iredell County Jail. When you get out, you're to move to Buncombe County, live with your mother for the remainder of the probation period and not reside, if not with your mother, then at a place in Buncombe County that's been secured for you. Probation will be transferred up there. You're to also enroll in anger management classes and complete anger management class before the end of your probation. First anger management class missed is to result in an arrest by the probation officer and placed under a $50,000 secured bond. That's my judgment. He's in custody of the Sheriff's Department for 30 days.
>
> MR. LITTLE: Your Honor, if I may, Mr. Godbey has told me he does wish to file notice of appeal in this matter. We would ask that the active portion of the sentence be held in abeyance during the pendency of the appeal. I know that that could take quite awhile. No idea how it might go, might not go, but we'd ask that the active portion of the sentence be held in abeyance [during] the pendency of the appeal.
>
> THE COURT: Well, my judgment has changed. This will be an active sentence of 120 days, no probation, notice his appeal, appoint appellate counsel. I'm not waiving -- I'm not setting a bond. He's in the custody of the Sheriff's Department for 120 days.

On appeal, defendant argues that, although the 120 day sentence is within the statutorily permissible range, the transcript indicates that the trial court changed his judgment from a split sentence of 30 days followed by a period of probation to an active term of imprisonment in response to defendant's decision to appeal.

"A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citing *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967)). "It goes without saying that no person should ever be penalized for exercising a constitutional right or his right of appeal." *State v. Stafford*, 274 N.C. 519, 525, 164 S.E.2d 371, 375 (1968).

In this case, the trial court first entered a detailed judgment and then, immediately after defense counsel informed the court that defendant wished to appeal, the trial judge stated "Well, my judgment has changed." We agree with defendant that the only reasonable interpretation of the above dialog is that the trial court's decision to change its judgment was an improper response to defendant's notice of appeal. However, we are not required to reach a definitive conclusion on this issue, because the issue of alleged error in defendant's sentence has become moot.

The record reflects that on 12 August 2014 defendant was sentenced to 120 days in the custody of the Iredell County Sheriff. We take judicial notice of the records of Iredell County, which show that defendant's custody was transferred to Mecklenburg County, pursuant to the Statewide Misdemeanant Confinement Program, and that defendant was released on 10 December 2014, following expiration of his sentence. Generally, " 'this Court will not hear an appeal when the subject matter of the litigation . . . has ceased to exist.' " *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (quoting *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968)). "Once a defendant is released from custody, 'the subject matter of [a sentencing error] has ceased to exist and the issue is moot.' " *State v. Stover*, 200 N.C. App. 506, 509, 685 S.E.2d 127, 130 (2009) (quoting *Swindell*, 326 N.C. at 475, 390 S.E.2d at 135). "In the instant case, defendant already has served his [term of imprisonment]. Furthermore, defendant has not argued to the Court any collateral adverse legal consequences that may result from the . . . defendant's sentence. Therefore, we hold that the issue of whether defendant's active sentence [was improperly imposed] is moot." *Stover*, 200 N.C. App. at 509, 685 S.E.2d at 130-31.

IV. Conclusion

We conclude that the trial court did not err by allowing the State to cross-examine defendant about a criminal case that defendant had

testified about in his direct testimony. The issue of whether defendant's sentence was improperly imposed is dismissed as moot.

NO ERROR IN PART, DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
RAYMOND L. HARGETT

No. COA14-1252

Filed 19 May 2015

1. Appeal and Error—preservation of issues—failure to renew objection

Although defendant appealed from the denial of a pretrial motion to suppress evidence and from judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status, he failed to preserve the error based on a failure to renew his objection. Thus, the appeal was dismissed.

2. Constitutional Law—effective assistance of counsel—failure to preserve appeal—failure to show prejudice

Defendant's motion for appropriate relief based on ineffective assistance of counsel was denied based on failure to show prejudice. Even if defense counsel properly preserved defendant's right to appellate review of the trial court's denial of his motion to suppress or properly raised a plain error argument in his opening brief, defendant would not have prevailed.

Appeal by Defendant from order entered 7 April 2014 and judgments entered 9 April 2014 by Judge Jack W. Jenkins in Craven County Superior Court. Heard in the Co urt of Appeals 8 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.

Appellate Defendant Staples Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant.

STEPHENS, Judge.

Evidence and Procedural Background

Defendant Raymond L. Hargett appeals from the denial of a pretrial motion to suppress evidence and from the judgments entered upon his convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and possession of drug paraphernalia, as well as his subsequent guilty plea to habitual felon status. Because Hargett failed to preserve the error he alleges in this appeal, we must dismiss.

The charges against Hargett arose from the events of 23 May 2013. On that morning, the New Bern Police Department ("NBPD") received a call from a citizen who requested a security check on a residence at 708 A Street in New Bern. The caller stated that the owner of the residence was incarcerated, but that he had driven past that morning and noticed that "the window shades had been pushed back." Officer Edwin D. Santiago, Jr., and Detective David Upchurch of the NBPD responded to the residence, and, upon arriving, Officer Santiago saw "that the shade had been — the screen had been pushed to the side. [It l]ooked like it had been pulled back. . . . and that the window was up." Concerned that someone might have broken into the residence, Officer Santiago knocked on the front door and got no response. Officer Santiago knocked several more times before finally getting a response. After Officer Santiago identified himself as a police officer, Hargett opened the door. At the suppression hearing, Officer Santiago testified as follows about what happened next:

> I asked him if he was the homeowner of the residence, and he hesitated to answer that question, didn't come out and immediately say no. He finally did answer the question and said no. And then I asked him for his name, in which he hesitated giving me his name, but then he initially gave me his name as Raymond Hargett.
>
> . . . .
>
> He finally told me his name was Raymond Hargett, and then I asked him if he was the — if he was the owner of the residence, and he stated no. Then I asked him for ID. He didn't have any ID on him.

. . . .

> While talking to him, at that point I asked him to step out of his residence and I detained him. I told him he was — I told him he was not under arrest, but because he couldn't tell me who he was and who the homeowner is at the residence, that he was being detained so that I could find out who the actual homeowner of the house was.

. . . .

> While I was talking to him, he kept putting his hands in his pocket, and I asked him, "Don't put your hands in your pocket." He kept putting his hands in his pocket. So when he came out, and based on, you know, not knowing who he was at the time because he couldn't produce any ID, and he hesitated to tell me who his name was and he hesitated on telling me he wasn't — you know, who the homeowner was and everything, I detained him.

Officer Santiago testified that he was concerned for his safety and unsure whether Hargett might have a weapon. As a result, he handcuffed Hargett and

> patted him down from the top up, from the waist and then down towards his legs, you know, his pocket area, his groin area, then down his legs. When I patted down towards his left leg, I could smell an odor of marijuana, and I felt two bulges in his left — left pant leg. When I lifted it up, there was two bulges in his sock. He had his socks up.

. . . .

> The smaller bulge felt to me as a small baggy of marijuana, through my training and experience. And then the large bag had just — had several but, I mean, I couldn't tell what that was. But when I rolled down the sock — when I rolled his sock down, of course, the small bag came out and it was marijuana. And when I opened the other bag, what came out was a brown paper bag. When I opened that up, there was several other baggies of marijuana inside.

When asked about his training and experience in identifying controlled substances such as marijuana, Officer Santiago explained:

> Through, of course, basic law enforcement training, they teach us and they show us what — you know, they put it in

> your pocket so you can feel what it feels like when you're patting somebody down. Also, the odor of marijuana. We do controlled burns and stuff like that. And I have arrested numerous individuals with marijuana in their pocket, based on the odor of marijuana, and it felt the same way.

Officer Santiago then arrested Hargett, and, shortly thereafter, two other NBPD officers arrived at the residence. Officer Santiago had the other officers conduct a security sweep of the residence to determine whether anyone else was inside. The officers did not find any other person in the home, but did discover more plastic baggies and a smoking pipe made from a soda bottle. In addition, as Hargett was being placed into a patrol car after his arrest, Officer Santiago frisked him again and discovered a small baggie containing at least twenty smaller baggies of cocaine in Hargett's sock.

On 14 October 2013, Hargett was indicted on one count each of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, possession of drug paraphernalia, and having attained the status of an habitual felon. On 2 February 2014, Hargett moved to suppress the cocaine, marijuana, and drug paraphernalia discovered by officers on 23 May 2013. Hargett's case came on for trial at the 7 April 2014 session of Craven County Superior Court. Following a hearing on his motion, Hargett's motion to suppress was denied by the trial court. The jury returned guilty verdicts on all three possession offenses, and Hargett then entered a plea of guilty on the habitual felon charge. The trial court consolidated certain convictions and entered two judgments with concurrent sentences, the greater of which imposed 90-120 months imprisonment. Hargett gave notice of appeal from those judgments in open court.

Preservation of Hargett's Appellate Issue

[1] The law in this State is now well settled that "a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original). In *Oglesby*, our Supreme Court considered the exact question presented in this appeal: whether a "defendant should be barred from raising this issue [error in the denial of a motion to suppress evidence] on appeal since he did not renew his objection at trial and has not argued, alternatively, that the trial court committed plain error by allowing the [challenged evidence] entered into evidence." *Id.* at 553-54, 648 S.E.2d at 821 (citations

omitted). The Court noted that, in failing to object to the challenged evidence at his trial in May 2004, the

> defendant may have relied to his detriment on a 2003 amendment to [] North Carolina Rule[] of Evidence [103(a)(2)], which provides in pertinent part: Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, *either at or before trial*, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. There is a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1),[1] which this Court has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.

Id. at 554, 648 S.E.2d at 821 (citations and internal quotation marks omitted; emphasis in original). *Oglesby* was the first Supreme Court case to address the conflict between the amended evidentiary rule and Rule of Appellate Procedure.[2] The Court held Rule 103(a)(2) unconstitutional because

> [t]he Constitution of North Carolina expressly vests in this Court the exclusive authority to make rules of procedure and practice for the Appellate Division. Although Rule 103(a)(2) is contained in the Rules of Evidence, it is manifestly an attempt to govern the procedure and practice of the Appellate Division as it purports to determine which issues are preserved for appellate review. Accordingly, we hold that, to the extent it conflicts with Rule of Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail.

Id. (citations and internal quotation marks omitted). However, because "the amendment to Rule 103(a)(2) was presumed constitutional at the time of [the] defendant's trial, which was held before the Court of Appeals decision in *Tutt* [and g]iven the harsh consequences of barring review when a defendant has relied to his detriment on existing law,"

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1. Former North Carolina Rule of Appellate Procedure 10(b)(1) is now Rule 10(a)(1). *See* N.C.R. App. P. 10(a)(1).

2. As the Supreme Court noted in *Oglesby*, a panel of this Court had already addressed the issue and reached the same holding in *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005).

the Supreme Court elected to exercise its "discretion under Appellate Procedure Rule 2 to prevent manifest injustice to [the] defendant and to review his contention on the merits." *Id.* at 555, 648 S.E.2d at 821-22. Those circumstances are not present in this case.

Here, at trial, Hargett objected to admission of two out of five bags of cocaine, but did not object to the other three bags of cocaine, the eight bags of marijuana, or drug paraphernalia introduced at trial. Hargett did not object to any testimony from the officers about their discovery of the drugs and drug paraphernalia. On appeal, in his opening brief, Hargett did not acknowledge his failure to object to the majority of the evidence he contends should have been suppressed, did not cite *Oglesby*, and did not argue plain error or request that this Court review his argument under Rule 2 of our Rules of Appellate Procedure.

In response to the State's discussion of Hargett's failure on these grounds, Hargett has filed a reply brief with this Court, in which for the first time he acknowledges the actual procedural posture of his appeal and that "[t]here is some support for the State's position in the authorities cited." This is an understatement to the point of inaccuracy. The authorities cited by the State, including *Oglesby*, are straightforward and clear that the denial of a motion to suppress does not preserve that issue for appellate review in the absence of a timely objection when the evidence is introduced at trial. Almost three dozen appellate opinions in our State cite *Oglesby* for this very proposition. Unlike the defendant in *Oglesby*, Hargett was not relying on a recent amendment to a rule of evidence in failing to object to the challenged evidence when it was introduced at trial. Thus, unlike the defendant in *Oglesby*, who might have relied to his detriment on the then-existing law, Defendant here went to trial seven years after the filing of our Supreme Court's decision in *Oglesby* and without the possibility of being misled by a lack of clarity in the pertinent case law.

Hargett's contentions in the reply brief regarding his right to appellate review are largely an argument that *Oglesby* was either wrongly decided or should not apply to Hargett because his trial counsel may have been confused by apparent conflicts between the holding of that case and certain sections of our State's Criminal Procedure Act. In support of this position, Hargett contends that provisions of Chapter 15A "did not allow . . . Hargett to assert a meaningful Fourth Amendment objection to Officer Santiago's substantive testimony at trial." For example, Chapter 15A provides that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive method of challenging the admissibility of evidence* upon [constitutional] grounds," N.C. Gen.

Stat. § 15A-979(d) (2013) (emphasis added), but limits renewal of a previously denied pretrial motion to suppress during trial to circumstances where the defendant can show "that additional pertinent facts have been discovered" since the original ruling. N.C. Gen. Stat. § 15A-975(c) (2013). Further, section 15A-979 states that "[a]n order finally denying a motion to suppress evidence *may be reviewed upon an appeal from a judgment of conviction*, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (emphasis added); *see also* N.C. Gen. Stat. § 15A-1446(a) (2013) ("No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court."). In sum, Hargett characterizes his trial counsel's failure to object to much of the evidence he sought to suppress as understandable and excusable.[3]

These arguments are neither appropriate nor persuasive. As noted *supra*, our Supreme Court has held that "a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821 (citations omitted; emphasis in original). This Court "has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (citations, internal quotation marks, and brackets omitted). We are bound by *Oglesby*: Hargett has not preserved his right to appellate review of the denial of his motion to suppress.

Hargett also acknowledges that he is not *entitled* to plain error review because he did not assert plain error in his opening brief. *See State v. Dinan*, __ N.C. App. __, 757 S.E.2d 481, *disc. review denied*, __ N.C. __, 762 S.E.2d 203 (2014) (holding that assertion of plain error for the first time in a reply brief is insufficient to obtain such review). However, Hargett cites *State v. Miller*, 198 N.C. App. 196, 197-99, 678 S.E.2d 802, 804-05 (2009), as an example of a case where we elected to review for plain error in circumstances similar to his own, to wit, the defendant's pretrial motion to suppress was denied, he failed to object to admission of the evidence at trial, failed to argue plain error in his primary brief, and made an argument of plain error only in his reply brief. We find *Miller* distinguishable on several bases. First, although Miller

3. The sincere and thoughtful argument made by Hargett's appellate counsel on this point is undercut by the fact that Hargett's trial counsel did, in fact, object at trial to admission of two out of five bags of cocaine the State sought to admit.

did not argue plain error in his primary brief, he did request discretionary review under Rule 2 in the event that "this Court find[s] that the argument presented in this brief [is] not properly preserved or presented for appellate review[.]" In addition, the Court noted that the "defendant properly assigned plain error on appeal." *Id.* at 198, 678 S.E.2d at 805. Finally, that case involved a trial held in July 2008, less than a year after the filing of the Supreme Court's opinion in *Oglesby* in August 2007, while Hargett's trial took place some seven years after *Oglesby* when the law on the pertinent point was well settled. In sum, we find *Miller* inapplicable here.

We are mindful of the harsh consequences of our holding on Hargett and sympathetic to his appellate counsel's predicament as well. However, to address the merits of Hargett's appeal, despite his failure to recognize and comply with long-standing case law both at trial and in his brief to this Court, would not prevent manifest injustice. Rather, we believe it would be an injustice to the numerous other defendants who have had their appeals dismissed by application of the holding of *Oglesby*. *See*, *e.g.*, *State v. Bryant*, __ N.C. App. __, 753 S.E.2d 397 (2013) (unpublished); *State v. Berrier*, 217 N.C. App. 641, 720 S.E.2d 459 (2011) (unpublished); *State v. Black*, 217 N.C. App. 196, 719 S.E.2d 255 (2011) (unpublished); *State v. Gause*, __ N.C. App. __, 688 S.E.2d 550 (2009) (unpublished); *State v. Toler*, __ N.C. App. __, 657 S.E.2d 446 (2008) (unpublished); *State v. Sullivan*, __ N.C. App. __, 652 S.E.2d 71 (2007) (unpublished). Hargett has not convinced this panel that invocation of Rule 2 is appropriate here. Accordingly, his appeal is dismissed.

Hargett's Motion for Appropriate Relief

[2] On 9 February 2015, Hargett filed a motion for appropriate relief ("MAR") pursuant to N.C. Gen. Stat. §§ 15A-1415(b)(3) and 15A-1418(a), which was referred to this panel by order entered 20 February 2015. In his MAR, Hargett raises an ineffective assistance of counsel ("IAC") claim based upon his trial counsel's failure to preserve his right to appellate review of the denial of his motion to suppress by objecting at trial to the admission of evidence of the drugs and drug paraphernalia seized from him. We deny Hargett's MAR.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness.

> Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and internal quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Hargett contends that his defense was prejudiced because, had his trial counsel preserved his right to appeal the denial of his motion to suppress, this Court would have reversed that order and granted Hargett a new trial. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Here, Hargett does not challenge any of the trial court's factual findings, but contends only that the findings of fact do not support the conclusion that Officer Santiago's investigatory seizure and search of Hargett's person were constitutional because he had "a reasonable, articulable suspicion that criminal activity [might] be afoot."

The trial court correctly applied our State's search and seizure case law in denying Hargett's motion to suppress.

> The Fourth Amendment, applicable to the states through the Fourteenth Amendment, protects the right of people to be free from unreasonable searches and seizures. This protection applies to seizures of the person, including brief investigatory detentions. As our Supreme Court has explained, only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

> A court must consider the totality of the circumstances — the whole picture in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. It is well-settled that the standard for reasonable suspicion is less demanding than that for probable cause.

State v. Campbell, 188 N.C. App. 701, 704-05, 656 S.E.2d 721, 724-25 (citations, internal quotation marks, brackets, and ellipsis omitted), *appeal dismissed*, __ N.C. __, 664 S.E.2d 311 (2008). Further, in the context of an investigatory stop, a law enforcement officer may perform a pat down or frisk of the outer clothing to check for weapons if the officer has reasonable suspicion that the suspect may be armed. *State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 861 (2000). To conduct such a frisk, "the officer need not be absolutely certain that the individual is armed. Rather, the officer is entitled to formulate common-sense conclusions about the modes or patterns of operation of certain kinds of lawbreakers in reasoning that an individual may be armed." *State v. King*, 206 N.C. App. 585, 589, 696 S.E.2d 913, 915 (2010) (citations, internal quotations marks, and brackets omitted). In addition, under

> the plain feel doctrine, when conducting a . . . frisk for weapons, if a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. The officer may seize the object if he or she has probable cause to believe it is contraband. Probable cause exists if the facts and circumstances within the knowledge of the officer were sufficient to warrant a prudent man in believing that the suspect had committed or was committing the offense.

State v. Reid, __ N.C. App. __, __, 735 S.E.2d 389, 399 (2012) (citations and internal quotation marks omitted).

Here, the unchallenged evidence reveals that a police officer received a report from a tipster, for whom a first name, street address, and telephone number were provided. The tip was that a residence

whose owner was incarcerated had a front window that appeared to have been tampered with. The officer confirmed that a window screen at the home had been pushed aside and the window was open, suggesting the possibility of a breaking and entering. When the officer repeatedly knocked on the door of the residence, there was initially no response. Then, as the trial court found,

> [f]inally, there was a response; it was a slow response. That essentially, the individual inside asked, "Who's there?" The officer responded, "It's the police." The individual inside indicated, "Okay," and did come to the door, did open the door, and they engaged in some limited conversation. Essentially, the officer asked the identity of the person inside. The individual gave a very long, slow response, finally indicated his name was Raymond Hargett. There was a slow response. He did not provide any ID, could not provide any ID. He was asked who the owner of the house is. He either would not or could not give the name of the owner, at least at that time.
>
> . . . .
>
> [Hargett] was asked repeatedly to keep his hands, you know, in a visible place and not have them in his pockets. [Hargett], according to the testimony, several times continued to put his hands in his pockets, was asked to take them out. [Hargett] would take them out and then put them right back in.

The tip that the home's owner was incarcerated, the pried-open screen and open window, and Hargett's inability to identify the owner of the home were sufficient to create reasonable suspicion in Officer Santiago that Hargett might have broken into the home through the window. *See Campbell*, 188 N.C. App. at 704, 656 S.E.2d at 725. These circumstances, along with Hargett's refusal to comply with the officer's instructions to keep his hands out of his pockets, further supported Officer Santiago's "common-sense conclusion" that Hargett might be armed and thus justified his frisk of Hargett. *See King*, 206 N.C. App. at 589, 696 S.E.2d at 915. In turn, during that frisk, the officer discovered and identified the baggies of marijuana in Hargett's sock by plain feel. *See Reid*, __ N.C. App. at __, 735 S.E.2d at 399. In sum, the trial court properly denied Hargett's motion to suppress because Officer Santiago had reasonable, articulable suspicion that criminal activity might be afoot. Thus, even had Hargett's trial counsel properly preserved Hargett's right to appellate review of

the trial court's denial of his motion to suppress (or had his appellate counsel properly raised a plain error argument in his opening brief), Hargett would not have prevailed. Accordingly, Hargett cannot demonstrate the prejudice required to sustain his IAC claim.

Appeal DISMISSED; motion DENIED.

Judges STEELMAN and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
PURCELL ORLANDO JONES, JR.

No. COA14-1057

Filed 19 May 2015

1. Evidence—unrelated charges—untimely objection—no prejudice

The trial court did not err in a robbery with a dangerous weapon and common-law robbery case by admitting evidence of unrelated charges and denying defendant's motion for a mistrial. Defendant's objection to this evidence was untimely. Even if defendant offered a timely objection, the admission of the evidence did not prejudice defendant's case.

2. Robbery—common law—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the common law robbery charge. Viewing the evidence in the light most favorable to the State, there was substantial evidence to support the charge when the victim fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help.

3. Witnesses—denial of motion to sequester—no basis for request—no prejudice

The trial court did not abuse its discretion in a robbery with a dangerous weapon and common-law robbery case by denying defendant's motion to sequester the victims. Defendant failed to provide a basis for his request. Further, defendant failed to show prejudice.

Appeal by defendant from judgments entered 17 April 2014 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 April 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Adrian M. Lapas for defendant-appellant.

McCULLOUGH, Judge.

Purcell Orlando Jones, Jr., ("defendant") appeals from judgments entered upon his convictions for two counts of robbery with a dangerous weapon and one count of common-law robbery. For the following reasons, we find no error.

I. Background

On 9 July 2013, a Wake County Grand Jury indicted defendant on one count of first-degree burglary, three counts of robbery with a dangerous weapon, and three counts of first-degree kidnapping in connection with the robbery of a mobile home in Knightdale during the early morning hours of 13 May 2013. The case came on for jury trial in Wake County Superior Court before the Honorable Henry W. Hight, Jr., on 14 April 2014.

The evidence at trial tended to show that the mobile home was the home of Brian Jones ("Brian"), his wife Adrienne Jones ("Adrienne"), and his two young children. On the morning of 12 May 2013, Adrienne woke Brian up when two men came to the mobile home to borrow jumper cables. Brian knew one of the men as Millie, later identified by his real name Devaunte Lewis ("Devaunte"), and allowed him to borrow jumper cables. Brian's friend Sloan Schmitt ("Sloan"), who at the time was asleep on a couch in the mobile home, woke up and noticed the two men but did not recognize either of them.

That day Brian and Sloan hung around the mobile home all afternoon and then began drinking whiskey and beer later in the evening. Brian also smoked marijuana. After the children had gone to bed around seven or eight o'clock and after Adrienne had gone to bed around ten or eleven o'clock, Brian and Sloan stayed up watching a movie on Brian's computer. Sloan "passed out" during the movie and Brian went to bed once the movie had finished.

Shortly thereafter in the early morning hours of 13 May 2013, Sloan woke up to someone knocking on the door. Sloan testified he could see three figures outside the front door and he opened the door because someone said they had jumper cables for Brian. At that instant, the men rushed the mobile home, pushing their way in and pushing Sloan into the bathroom near the front door. Sloan thought three people rushed in, but he was not one hundred percent certain. Sloan testified he was tasered and forced to the bathroom floor, where one of the men held him down. Sloan indicated he fought back initially, but then stopped because he kept getting tasered. Sloan recalled that the men demanded money, but only took his cell phone from the couch where he was sleeping.

Brian testified the next thing he remembered after going to bed was being awakened by someone trying to drag him out of bed. Brian recalled he started to struggle with someone but was then tasered and hit the floor, where he was stomped and punched several times. Brian testified he could tell he was fighting one person and a totally different person came around behind him and tasered him. Brian testified that the men demanded money and took items belonging to him and Adrienne before fleeing the mobile home.

Brian identified defendant as the person punching and stomping him. Brian explained that he knew defendant and Devaunte through Brett Stewart ("Brett"), a friend of Brian's who lived in the mobile home park. Brian indicated he had hung out with defendant on two occasions prior to this incident.

During the commotion, Adrienne was able to escape the mobile home and run to a neighbor's mobile home for help. Both law enforcement and EMS responded. Brian, Adrienne, and Sloan were all treated for injuries at the scene but refused to go to the hospital.

Detective Alfredo Hicks ("Detective Hicks") with the Wake County Sheriff's Office testified that they had been looking for defendant on May 13 and 14 before defendant turned himself in. Defendant initially told Detective Hicks he was turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges and repeatedly denied knowing anything about the robbery of the mobile home. Yet after defendant made a statement including facts about the robbery that the police had not disclosed to defendant, defendant changed his story and told police that he was present at the mobile home during the robbery.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court dismissed the two second degree kidnapping

charges related to Adrienne and Brian, but allowed the remainder of the charges to go forward.

Defendant then took the stand in his own defense and admitted he was present, but denied knowing anything about the robbery before entering the mobile home. Defendant testified that he spent much of 12 May 2013 drinking and, after midnight, got in his mother's van with Terrence Williams ("Terrence") and Devaunte to go home. Terrence drove because defendant had been drinking. Defendant recalled that they stopped and picked up Brett before he dozed off in the front passenger seat. When defendant woke up, they were at Brian's mobile home. Defendant recalled that Terrence said he was returning jumper cables to Brian.

Defendant testified Terrence and Devaunte approached the mobile home and began knocking on the door. Defendant then turned away and when he looked back, Terrence and Devaunte were gone. At that point, defendant said he approached the mobile home, knocked on the door, and entered. Once inside, defendant heard yelling and saw Brian coming at him. Defendant testified that Brian struck him in the face with a fist and he retaliated. Defendant testified he struggled with Brian in the master bedroom, but was able to kick free of Brian and leave out of the front door. Defendant recalled that he heard Terrence yelling "Where is the money?" during the incident, but defendant did not recall anyone getting tasered.

Defendant later found out from his mother that the police were looking for him and he turned himself in. Defendant stated he initially did not tell the police the truth because he was scared of consequences from Terrence.

Upon deliberation of the evidence, on 17 April 2014, the jury returned verdicts finding defendant not guilty of first degree burglary and second degree kidnapping, but guilty on two counts of robbery with a dangerous weapon and one count of common-law robbery. The trial court entered judgments on defendant's convictions and sentenced defendant to three consecutive terms totaling 160 to 226 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant raises the following three issues: whether the trial court erred by (1) admitting evidence of unrelated charges and denying his motion for a mistrial; (2) denying his motion to dismiss one

of the counts of robbery with a dangerous weapon; and (3) denying his motion to sequester the alleged victims.

Evidence of Unrelated Charges and Mistrial

At trial, Detective Hicks testified about the investigation and indicated that there were other criminal charges pending against defendant at the time defendant turned himself in to the police on 14 May 2013. Specifically, in response to the State's question, "And what did this [d]efendant tell you at first?" Detective Hicks testified as follows:

> I -- I usually start my interviews by asking that person why they think they are there at that time to speak with me. [Defendant] indicated that he was there turning himself in on a warrant for failure to appear for possession of marijuana and Ecstasy charges that were initiated by the Raleigh Police Department.

Upon hearing Detective Hicks' testimony, defendant immediately requested to approach the bench. Following an unrecorded bench conference, the State continued to question Detective Hicks. At the conclusion of the State's direct examination of Detective Hicks, the trial court then excused the jury and defendant objected to Detective Hicks' testimony and moved for a mistrial. In support of his motion, defendant argued direct evidence of his prior convictions was improperly offered to the jury and was prejudicial.

Upon hearing from both sides, the trial court clarified that Detective Hicks testified defendant said "he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department[;]" Detective Hicks did not testify defendant "was convicted of anything at all." The trial court then emphasized that the defense was aware of defendant's statement to Detective Hicks prior to trial and could have objected sooner. Specifically, the trial court explained the following:

> I think the [d]efendant is in a position to have objected earlier if he had desired to do so and failed to do so. And, therefore, the late objection does not provide grounds for a mistrial in this particular case.
>
> Further, that may show the state of mind of the [d]efendant as to the reason that he was with the -- this officer in making his statement.

Despite defendant's untimely objection, the trial court offered to issue a curative instruction and defendant agreed. The trial court then instructed the jury as follows:

> Ladies and gentlemen, the evidence was received before you that this [d]efendant told this officer that he was turning himself in for failure to appear on a warrant for possession of marijuana and Ecstasy charges initiated by the Raleigh Police Department. That evidence is offered solely for the purpose of providing motivation of why the [d]efendant turned himself in to this officer.
>
> It is not proof of any crime. It is not proof that the [d]efendant committed any action in this case at all or the [d]efendant was guilty of any of the charges against him in this case. It is not evidence that the [d]efendant was, in fact, guilty of any offense at all, most particularly for what may have been in any supposed warrants in this particular case.
>
> And, therefore, I tell you to disregard that information completely in your determination in this case of -- of determining whether the [d]efendant was guilty of -- or innocent of any of the charges facing him at this time.

Defendant then proceeded to cross-examine Detective Hicks.

[1] Now on appeal, defendant contends the trial court erred in admitting Detective Hicks' testimony that defendant turned himself in on unrelated charges and erred in denying his motion for a mistrial because the challenged testimony was irrelevant and unduly prejudicial to his case.

"Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). "The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and internal quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

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

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted). "Furthermore, a [m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. . . . Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Dye*, 207 N.C. App. 473, 481-82, 700 S.E.2d 135, 140 (2010) (citations and internal quotation marks omitted).

Although we agree Detective Hicks' testimony that defendant turned himself in on unrelated drug possession charges was irrelevant to the charges in the present case, defendant failed to preserve the issue concerning the admission of the evidence for appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2015). In this case, defendant did not object until the State had completed its direct examination of Detective Hicks. As indicated by the trial court, defendant could have objected sooner. The defense was aware of the defendant's statement to Detective Hicks and should have objected immediately upon Detective Hicks testifying about defendant's statement. Instead, defendant waited until the State concluded its direct examination of Detective Hicks and the trial court excused the jury. This objection was untimely.

In a footnote, defendant suggests that he objected during the unrecorded bench conference immediately following Detective Hicks' statement but the trial court waited until a more reasonable time to allow defendant to more thoroughly voice his objection. Upon review of the record, we are not convinced and we will not assume that such objection was made during the unrecorded bench conference when, in addressing defendant's objection and motion for a mistrial at the conclusion of the

State's direct examination of Detective Hicks, the trial court made clear that "[d]efendant [was] in a position to have objected earlier if he had desired to do so[,]" adding "the late objection does not provide grounds for a mistrial in this particular case."

Moreover, even if defendant offered a timely objection to Detective Hicks' testimony, the admission of the evidence did not prejudice defendant's case. The trial court's thorough curative instruction limited the jury's consideration of the evidence to explain why defendant turned himself into police and eliminated any prejudice that could have resulted from Detective Hicks' testimony. Additionally, during the State's cross-examination of defendant, defendant testified about his prior drug convictions and offered testimony almost identical to the challenged testimony when he confirmed that "[he] thought that [he was] there because [he was] turning [him]self in on a failure to appear in court for possession of Ecstasy and marijuana[.]"

Given that defendant failed to timely object to Detective Hicks' testimony and given that any prejudice resulting from the testimony was eliminated by the trial court's curative instruction and defendant's own testimony at trial, we hold the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Motion to Dismiss

Both at the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss all the charges against him. With the exception of the two counts of second degree kidnapping related to Adrienne and Brian, which the trial court dismissed at the conclusion of the State's evidence, the trial court allowed all the charges to go to the jury.

[2] In this second issue on appeal, defendant now contends the trial court erred in failing to dismiss the robbery with a dangerous weapon charge related to Adrienne.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence

is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Pertinent to this issue on appeal, we note that the jury found defendant guilty of common-law robbery of Adrienne, a lesser included offense of robbery with a dangerous weapon. Because defendant was found not guilty of robbery with a dangerous weapon of Adrienne and was convicted of the lesser included offense of common-law robbery, we address defendant's arguments as they relate to the lesser included offense.

"To withstand a motion to dismiss a common-law robbery charge, the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person's will, by violence or putting the person in fear." *State v. Davis*, 325 N.C. 607, 630, 386 S.E.2d 418, 430 (1989). While reviewing a defendant's convictions for robbery with a dangerous weapon in *State v. Tuck*, this Court recognized that " '[t]he word "presence" . . . must be interpreted broadly and with due consideration to the main element of the crime – intimidation or force . . . .' " 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (quoting *State v. Clemmons*, 35 N.C. App. 192, 196, 241 S.E.2d 116, 118-19 (1978)). Thus, where the evidence in *Tuck* tended to show that the defendant entered a store, pointed a gun at a store employee causing the store employee to flee the store, and then took money from the store's cash register, this Court concluded "that the State produced sufficient evidence from which the jury could find that [the] defendant took property from [a store employee's] person or in her presence, despite [the store employee's] flight during the incident." *Id.* at 68, 618 S.E.2d at 271.

We find no reason "presence" should be interpreted differently in this case for common-law robbery, a lesser included offense of robbery with a dangerous weapon.

In support of his argument that the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge and lesser included offenses related to Adrienne, defendant contends "no evidence was presented that Adrienne Jones was intimidated, threatened[,] or assaulted in order to deprive her of any property[]" because

Adrienne did not testify and neither Brian nor Sloan testified about why, how, or when Adrienne fled the mobile home or whether there was any force or intimidation involved. Therefore, defendant contends the evidence was insufficient as a matter of law. We disagree.

Evidence in this case tended to show that Adrienne lived at the mobile home with Brian and their two young children at the time of the robbery. Brian, Adrienne, and their youngest child slept in the master bedroom and their other child slept in a second bedroom. The night of the robbery, Adrienne went to bed around eleven o'clock while Brian and Sloan were up watching a movie. The children had gone to bed earlier. Later that night when the movie was finished and after Sloan had "passed out" on the couch, Brian went to sleep in the master bedroom where Adrienne and their youngest child were already asleep. The next thing Brian remembered was waking up to someone dragging him out of bed in the middle of the night. Although Brian could not see exactly what was going on with Adrienne as he was being beaten and tasered by the intruders, Brian recalled hearing Adrienne screaming in the hallway. Sloan also testified that, while one of the intruders was on top of him in the bathroom, he heard yelling from the other side of the mobile home where Brian and Adrienne were. By the time the intruders fled and Brian and Sloan were able to gather themselves, Adrienne was outside yelling. Brian testified "[Adrienne] was running around outside the neighborhood screaming." She was trying to get help, "going from door to door knocking, holding the baby." Both Brian and Sloan testified that Adrienne had a busted lip. Brian further explained that "they had punched her, and her teeth had gone into her lips. And she had a -- a gash right there (indicating) on her." The State then introduced exhibits 36 and 37 into evidence, which Brian stated showed damage to Adrienne's face that she did not have prior to the incident. Wake County Sheriff's Deputy M. D. Reitman, who responded to the robbery that night, also testified about the injuries sustained by the alleged victims. Concerning Adrienne, Deputy Reitman testified that "she was also beaten very badly. Her mouth was -- she had several lacerations on his [sic] her mouth. She had blood all over her face. It looked like somebody had drawn all over her mouth with lipstick." In addition to items belonging to Brian and Sloan, the evidence further revealed that a Louis Vuitton wallet, a Dooney & Bourke purse, and a cell phone belonging to Adrienne were taken from on, in, or near a nightstand next to the bed where Adrienne slept.

Viewing this evidence in the light most favorable to the State, we hold there was substantial evidence to support the charge of common-law robbery of Adrienne Jones. The evidence was sufficient to support

a conclusion that Adrienne fled the mobile home as a result of violence or fear and items were taken from her presence upon her fleeing to find help. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Motion to Sequester

[3] Upon the State's first witness being called and sworn, defendant requested to sequester the alleged victims. The trial court summarily denied defendant's request and allowed the State to continue with its first witness. In this last issue on appeal, defendant contends the trial court's summary denial of his request to sequester the alleged victims without inquiry was error.

N.C. Gen. Stat. § 15A-1225 provides that "[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify . . . ." N.C. Gen. Stat. § 15A-1225 (2013), *see also* N.C. Gen. Stat. § 8C-1, Rule 615 ("At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."). Recognizing that the statute states the judge "may" order sequestration, our courts have long held that

> " '[a] ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the [action] was so arbitrary that it could not have been the result of a reasoned decision.' "

State v. Roache, 358 N.C. 243, 276-77, 595 S.E.2d 381, 404 (2004) (quoting *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998))).

When making his request to sequester in this case, defendant did not give a specific reason for sequestration and did not attempt to argue his position. Nevertheless, defendant now contends the trial court's denial could not have been the result of a reasoned decision because no inquiry was made. We disagree.

Although " '[t]he [better] practice should be to sequester witnesses on request of either party unless some reason exists not to[,]' " *State v. Sprouse*, 217 N.C. App. 230, 238, 719 S.E.2d 234, 241 (2011) (quoting *State v. Anthony*, 354 N.C. 372, 396, 555 S.E.2d 557, 575 (2001) (alterations in original) (internal quotation marks and citation omitted)), we

hold the trial court did not abuse its discretion in denying defendant's request to sequester in this case where defendant did not provide a basis for his request. *See State v. Sparrow*, 276 N.C. 499, 511, 173 S.E.2d 897, 905 (1970) (holding a defendant's argument meritless where the "record discloses no reason for sequestration of the witnesses, and no abuse of discretion has been shown.").

Moreover, defendant has failed to show prejudice as a result of the trial court's denial of his request to sequester the alleged victims. Defendant points to two instances where he claims Brian tailored his testimony to Sloan's testimony, resulting in prejudice. First, defendant points to Sloan's testimony that "[he and Brian] were drinking and [he] passed out on the couch[]" and claims that Brian tailored his subsequent testimony to show Sloan did not pass out drunk, but "just went and laid down. . . . [J]ust that he was ready for bed." Defendant contends Brian's testimony prejudiced his case because "[a] true description of Sloan's state of intoxication, that is 'passed out,' would have necessarily impacted the jury's consideration of Sloan's description of what happened." Second, defendant points to Sloan's testimony that one of the intruders wanted money and claims that Brian tailored his testimony to be consistent when he testified he heard an intruder ask, "Where is the money?"

Upon review of the record, we are not convinced that Brian tailored his testimony in either instance; nor was defendant prejudiced.

In regard to the first instance, although Sloan testified he was drinking, Sloan did not specify how much he had to drink, that he was intoxicated, or that he passed out from intoxication. Sloan merely stated he "passed out." Like Sloan, Brian also initially testified that "[he thought] Sloan passed out before I did, if I remember correctly." It was not until a follow-up question that Brian clarified that Sloan just went and laid down because he was ready for bed. Upon review of the testimony, we cannot say that Brian's testimony did not give an accurate impression of Sloan's condition. In fact, an agent from the Wake County CCBI who investigated the incident indicated Sloan did not appear intoxicated, stating it did not appear to him that Sloan had been drinking. Moreover, the jury heard the evidence that Sloan and Brian were drinking and heard Brian's own testimony that "I wasn't sober, but I wasn't drunk." It was within the province of the jury to weigh the credibility of the witnesses. *See State v. Taylor*, _ N.C. App. _, _, 767 S.E.2d 585, 589 (2014) ("It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury.") (citation omitted).

Concerning the second instance, there is no indication that from Brian's testimony that the intruders wanted money was a reflection of Sloan's prior testimony. The fact that Brian's testimony was consistent with Sloan's does not prove it was tailored. Contrary to defendant's assertion, a review of the record shows that Brian's testimony at trial was consistent with a witness statement he provided to police on 13 May 2013. At trial, Brian was asked to read the witness statement in which he told police "I was woken up to a black guy fighting me. While fighting back, I heard someone asking 'Where is your money at?' " Moreover, there can be no prejudice where even defendant testified that he heard Terrence ask, "Where is the money?"

Because defendant has not shown that Brian altered his testimony and has not shown prejudice, we hold the trial court did not abuse its discretion.

III. Conclusion

For the reasons discussed, we hold defendant received a fair trial free of prejudicial error.

NO ERROR.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
ALEKSANDR SERGEYEVICH KISELEV

No. COA14-1020

Filed 19 May 2015

Criminal Law—motion to dismiss—granted after jury verdict—violation of statute

The trial court erred in defendant's trial for driving while impaired by granting defendant's motion to dismiss after the jury returned its guilty verdict, in violation of N.C.G.S. § 15A-1227(c). Because the trial court would have ruled in defendant's favor if it had ruled at the proper time, the trial court's error was prejudicial. The Court of Appeals dismissed the State's appeal.

Appeal by the State of North Carolina from order entered 2 June 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 4 February 2015.

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

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

DIETZ, Judge.

At the close of the evidence in Defendant Aleksandr Sergeyevich Kiselev's criminal trial for driving while impaired, Kiselev moved to dismiss for insufficient evidence. The trial court determined that it needed to review the transcript of certain trial testimony by the arresting officer before ruling on the motion. While waiting for the court reporter to prepare the transcript, the trial court permitted the jury to begin deliberations.

The parties concede that the trial court's decision to take Kiselev's motion under advisement and permit the jury to deliberate was error. By statute, when a defendant moves to dismiss based on insufficient evidence, the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c) (2013).

Shortly after the jury returned a guilty verdict, the court reporter completed preparation of the transcript and the trial court reviewed it. The court then granted Kiselev's motion to dismiss, explaining that the transcript showed the State had not met its burden of proof as a matter of law. The State appealed, and Kiselev moved to dismiss the appeal.

As explained below, double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes *before* the jury verdict. But the State can appeal that ruling if it comes *after* the verdict (because, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). This is why the General Assembly enacted § 15A-1227(c), which prohibits trial courts from reserving judgment on these motions until after the verdict, to the defendant's detriment.

In an earlier case, this Court held that a violation of § 15A-1227(c) is prejudicial if the defendant can show that the trial court would have

ruled in his favor had the court ruled at the proper time. *See State v. Hernandez*, 188 N.C. App. 193, 205, 655 S.E.2d 426, 434 (2008). Kiselev made that showing here; the trial court stated on the record that its ruling turned on what was in the transcript (which would not have changed) and further explained that the ruling should be treated as having been made before the jury returned its verdict.

Consistent with *Hernandez*, we hold that a trial court's violation of § 15A-1227(c) that prejudices a defendant precludes an appeal by the State. Had the trial court complied with the law, no appeal would be possible. Our only remedy for this prejudicial error is to return the parties to the position they would be in absent that error—meaning the State is not permitted to appeal. Accordingly, we dismiss this appeal and let the trial court's grant of the motion to dismiss stand as if it were rendered before the jury returned a verdict, as the law required.

Facts and Procedural History

In the early morning hours of 7 February 2011, Deputy Allen Nolan observed Defendant Aleksandr Sergeyevich Kiselev driving north on a highway in Union County. Kiselev approached an intersection, stopping at a red light. He remained stationary the entire time the light was green, then accelerated to drive through the intersection once the light turned yellow.

As Kiselev continued driving, his speed fluctuated between 40 and 50 miles per hour in a 45-mile-per-hour zone. He weaved in his lane of travel. On three separate occasions, Kiselev crossed the center double yellow lines with both of his driver's-side tires.

Based on these observations, Deputy Nolan activated his patrol lights, and Kiselev pulled into a grocery store parking lot. When Deputy Nolan approached Kiselev's vehicle to request his license and registration, he noticed an odor of alcohol. Deputy Nolan also observed that Kiselev's eyes were red and glassy. Kiselev admitted that he had been drinking earlier that evening.

Deputy Nolan then asked Kiselev to step out of his car and perform field sobriety tests. Kiselev passed most of the tests, but when asked to recite the alphabet, Kiselev twice made the identical mistake—leaving out the letter "Y" when reciting the alphabet from "A" to "Z." Kiselev was born in Russia and speaks both Russian and English. He later explained that he mistakenly left out the letter "Y" because of confusion between the English alphabet and the Russian one. Kiselev also did not count out loud as Deputy Nolan had instructed during the walk-and-turn test,

although he properly performed the other portions of the walk-and-turn test. Based on his observations of the sobriety tests, Deputy Nolan placed Kiselev under arrest.

The State ultimately charged Kiselev with driving while impaired. In Union County District Court, Kiselev pleaded not guilty but stipulated to facts sufficient to convict him of the crime. The district court found Kiselev guilty and sentenced him to 120 days unsupervised probation, with a condition that he serve two days in custody. Kiselev appealed to Superior Court.

In Union County Superior Court, Kiselev waived formal arraignment and the matter was calendared for a jury trial. At trial, Deputy Nolan testified for the State, recounting the night he arrested Kiselev and offering his opinion "[t]hat [Kiselev's] mental and physical faculties were impaired by an impairing substance . . . of alcohol." At the close of the State's evidence, Kiselev moved to dismiss, arguing that the State failed to present an "adequate showing as to appreciable impairment." The trial court denied this motion. Kiselev then testified on his own behalf, and the State recalled Deputy Nolan for rebuttal evidence.

At the close of all evidence, Kiselev again moved to dismiss the charge against him for insufficient evidence. The trial court called counsel to the bench and indicated that the court had a concern about Deputy Nolan's testimony. The court then informed counsel that it would hold the motion "open under advisement" pending preparation of a portion of the transcript that the court needed to review before ruling on the motion. Neither Kiselev nor the State objected to the trial court's decision to defer ruling on the motion.

Although the trial court had not yet ruled on Kiselev's motion to dismiss because it was awaiting a copy of the transcript, the trial court charged the jury and let them begin deliberations. The jury returned a guilty verdict later that day.

By the following day, the court reporter had prepared the portion of the transcript requested by the trial court. The court and the parties reviewed the transcript and the court heard additional argument on Kiselev's still-pending motion to dismiss. Noting that the proceedings were "[s]omewhat out of order," the trial court explained that it deferred ruling on the motion because "the Court had a concern which the Court believed was not hers to share, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably." The State responded that there was evidence in

the record sufficient to show appreciable impairment, but the trial court rejected that argument:

> [T]he Court also notes that under that argument, as long as I take it there was an odor, the requisite driving, and something noticeable to the officer; such as red glassy eyes, under that argument, that would be noticeable impairment, and therefore that no opinion would be necessary, and the Court can't go that far.

The trial court announced its ruling, explaining that it was "allow[ing], however belatedly, the defendant's motion . . . at the close of all the evidence" and dismissing all charges against Kiselev. The State appealed the trial court's ruling on Kiselev's motion to dismiss.

Analysis

The dispositive issue in this appeal is whether the State has any right to appeal. Indeed, Kiselev's appellate brief does not even address the merits of the trial court's ruling on the motion to dismiss. Kiselev's only argument is that the State has no right to appeal under the circumstances present in this case. For the reasons discussed below, we agree with Kiselev and dismiss this appeal.

The State may appeal an adverse ruling in a criminal prosecution only in narrow circumstances authorized by statute. *See State v. Scott*, 146 N.C. App. 283, 285, 551 S.E.2d 916, 918 (2001), *rev'd on other grounds*, 356 N.C. 591, 573 S.E.2d 866 (2002). Section 15A-1445(a)(1) of our General Statutes authorizes an appeal by the State "[w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts," but not if "the rule against double jeopardy prohibits further prosecution." N.C. Gen. Stat. § 15A-1445(a)(1) (2013).

Ordinarily, if a criminal defendant is subjected to a trial and then has the charges against him dismissed *before* the jury returns a verdict, the State cannot appeal. In that circumstance, a reversal on appeal would require a new trial (because there was no jury verdict), thus subjecting the defendant to a second trial for the same offense in violation of the double jeopardy clause of the U.S. Constitution. *See State v. Murrell*, 54 N.C. App. 342, 344-45, 283 S.E.2d 173, 174 (1981).

But where a motion to dismiss is granted *after* a jury renders a guilty verdict, reversal of the ruling on appeal does not implicate the double jeopardy clause. On remand after reversal, the trial court can simply enter judgment in accordance with the jury's verdict, without subjecting the defendant to a second trial.

As a result of these timing issues, it is in the State's interest, and against the criminal defendant's interest, for a trial court to defer ruling on a motion to dismiss until after the jury returns its verdict. This is a common practice in civil trials, where the court will take a motion for directed verdict under advisement and wait to see what the jury does. Recognizing the potential injustice of this practice in criminal cases, the General Assembly prohibits it. Section 15A-1227(c) of the General Statutes states that the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c).

It is undisputed in this case that the trial court violated this statutory mandate and impermissibly permitted the trial to proceed without first ruling on the motion to dismiss.[1] But that does not end our inquiry. To resolve this appeal, we must also determine whether that error prejudiced Kiselev and what remedy, if any, is available to him as a result of that violation.

With regard to prejudice, our analysis is controlled by *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008), which established the test for whether a violation of § 15A-1227(c) prejudiced the defendant. *Hernandez* involved a nearly identical procedural history. The defendant moved to dismiss at the close of all the evidence and, as in this case, the trial court reserved its ruling on the motion until after the jury deliberated, in violation of § 15A-1227(c). This Court held that "[t]o determine whether or not the error was prejudicial, the issue is whether there is a reasonable possibility that the trial court would have granted defendants' motions to dismiss" if the trial court had complied with the statute and ruled before sending the case to the jury. *Id.* at 205, 655 S.E.2d at 434. The defendants in *Hernandez* were unable to show prejudice under that test. *Id.*

Here, unlike *Hernandez*, the record readily demonstrates a reasonable possibility (indeed, a near certainty) that the trial court would have granted Kiselev's motion had it ruled at the proper time. The trial court deferred ruling on the motion to review a portion of the transcript involving Deputy Nolan's testimony. That transcript took time to be prepared, so the trial court permitted the jury to deliberate in the interim.

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1. Kiselev did not object to the trial court's violation of the statute during the trial. But this Court previously has held that the defendant need not object to a violation of § 15A-1227(c) in order to preserve the issue for appeal. *Hernandez*, 188 N.C. App. at 204, 655 S.E.2d at 433.

But in later granting Kiselev's motion to dismiss after the jury returned a guilty verdict, the trial court explained that its ruling turned on what it found in that transcript, and even stated that it considered its ruling as one made "at the close of all the evidence":

> [T]his matter came about somewhat under unusual circumstances or awkwardly, in that the defendant made a general motion to dismiss at both the close of the State's evidence and all the evidence. *That in reviewing – it was the Court that had a concern which the Court believed was not hers to share*, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably. *However, the Court was not absolutely certain of that fact and required the court reporter to go over that and indeed print out the relevant portions of the officer's opinion*, which the Court does find does not state an opinion that the defendant was appreciably impaired. . . . So the Court will specifically find there was no statement by the officer that the defendant was appreciably impaired *and will allow, however belatedly, the defendant's motion at the close of – and actually I'm going to say at the close of all the evidence*, because the officer was re-tendered and still didn't state appreciable impairment. *So the case is dismissed at the close of all the evidence.*

In short, the trial court expressly stated that its ruling turned on a review of the transcript. Had the court waited on preparation of that transcript without sending the jury to deliberate, as the law required, the transcript still would have been the same. Thus, the trial court's ruling would have been the same.

Moreover, the trial court expressly indicated that its ruling would have been the same by stating that it considered the ruling one made "at the close of all the evidence." Thus, it is clear that the court was not merely waiting (improperly) to see what the jury would decide in the case. Accordingly, Kiselev has satisfied his burden to show prejudice by demonstrating "a reasonable possibility that the trial court would have granted [his] motion[ ] to dismiss" had the court ruled at the proper time. *Hernandez*, 188 N.C. App. at 205, 655 S.E.2d at 434.

We must now determine what remedy is appropriate—a determination not made in *Hernandez* because the Court found no prejudice in that case. We hold that dismissal of the State's appeal is the appropriate

remedy for a violation of § 15A-1227(c) that prejudiced the defendant. Dismissal is the only remedy that can do justice on these unique facts. We cannot reverse the trial court's ruling—the typical remedy for reversible error—because Kiselev is the appellee and seeks to affirm the court's ultimate ruling. But we are unwilling to affirm the trial court's judgment both because we have not reached the merits of the trial court's decision and because we *should not* reach the merits. After all, the prejudice to Kiselev in this case is the State's ability to appeal the trial court's decision to this Court in the first place.

The purpose of remedying prejudicial error in criminal cases is to actually *remedy* the prejudice—to provide the defendant with the outcome that would have resulted had the trial been free of prejudicial error. The only means to do so in this case is to return the parties to the position they would be in absent that error—which would preclude any appeal by the State. Accordingly, we remedy the trial court's prejudicial error by dismissing this appeal and returning the parties to the positions they would be in had the trial court complied with the statutory command of N.C. Gen. Stat. § 15A-1227(c).

Conclusion

The trial court violated N.C. Gen. Stat. § 15A-1227(c) by reserving judgment on the defendant's motion to dismiss for insufficiency of the evidence until after the jury returned a verdict. That error prejudiced the defendant by permitting the State to appeal a ruling that otherwise would be unappealable. We remedy this prejudicial error by dismissing the appeal.

DISMISSED.

Judges STEELMAN and INMAN concur.

STIKELEATHER REALTY & INVESTMENTS CO., PLAINTIFF-APPELLANT
v.
ELISHA BROADWAY, DEFENDANT-APPELLEE

No. COA14-1136

Filed 19 May 2015

Landlord and Tenant—Residential Rental Agreements Act—no working smoke or carbon monoxide alarms—not uninhabitable

In a summary ejectment action on a residential lease, the trial court erred by granting defendant tenant's counterclaim for rent abatement under the Residential Rental Agreements Act (RRAA). The trial court's conclusion that plaintiff landlord violated the RRAA by failing to provide working smoke and carbon monoxide alarms was unsupported by the findings of facts. Such violations alone would not render a rental uninhabitable. The trial court's judgment awarding plaintiff trebeled rent abatement and attorney fees was reversed.

Appeal by plaintiff from judgment entered 18 July 2014 by Judge Matt Osman in Mecklenburg County District Court. Heard in the Court of Appeals 18 March 2015.

The Law Firm of Ross S. Sohm, PLLC, by Ross S. Sohm, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HUNTER, JR., Robert N., Judge.

Stikeleather Realty & Investments Co. ("Plaintiff-Landlord") appeals from a bench trial judgment awarding trebled rent abatement and attorney's fees to Elisha Broadway ("Defendant-Tenant") on claims of breach of the implied warranty of habitability and unfair and deceptive trade practices. We reverse.

I. Factual & Procedural History

On 19 March 2014, Plaintiff-Landlord initiated a summary ejectment action against Defendant-Tenant for breach of a residential lease agreement for failure to pay rent for the month of March. On 31 March 2014, Defendant-Tenant filed an answer and asserted the defense of retaliatory eviction pursuant to N.C. Gen. Stat. § 42-37.1, as well as counterclaims

for (1) breach of the implied warranty of habitability pursuant to N.C. Gen. Stat. § 42-42, (2) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 *et seq.*, (3) unfair debt collection practices pursuant to N.C. Gen. Stat. § 75-50 *et seq.*, (4) negligence, and (5) negligence per se.

On 22 April 2014, Plaintiff-Landlord filed an amended complaint, alleging Defendant-Tenant also breached the lease by keeping an unauthorized pet. On 2 May 2014, Defendant-Tenant filed an amended answer and counterclaim, which contained no substantive changes pertinent to this appeal. On 8 May 2014, the magistrate entered judgment in favor of Plaintiff-Landlord on the primary claim of possession and in favor of Defendant-Tenant on his counterclaim of breach of the implied warranty of habitability only, awarding him $1,000.00 in damages. Plaintiff appealed to the district court.

On 30 June 2014, the case was heard in Mecklenburg County District Court before the Honorable Matt Osman. At that time, Defendant-Tenant had already surrendered possession of the property. Therefore, the sole issue before the trial judge was Defendant-Tenant's counterclaim for breach of the implied warranty of habitability. The transcript of this bench trial, as well as the record on appeal, reveals the following pertinent facts.

In May 2010, Defendant-Tenant entered into a residential lease to rent a home located at 2600 Catalina Avenue in Charlotte ("the property") for $500 per month. At this time, the property was neither owned nor managed by Plaintiff-Landlord. The lease contained a page signed by Defendant-Tenant stating that a "Carbon/Smoke Detector"[1] existed in the home and that it was in good working condition when Defendant-Tenant took possession of the property. The lease also provided that Defendant-Tenant shall make requests for repairs in writing.

On 4 June 2013, Mr. Kluth, a real estate broker, visited the property to obtain general information to list the house. On 10 June 2013, Mr. Kluth returned to the property for another inspection, this time bringing an interested buyer, Mr. Stikeleather, managing partner of Plaintiff-Landlord, a limited liability corporation in the business of buying and selling residential properties.

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1. While the word "detector" appears throughout the record on appeal, this Court uses "alarm" synonymously, in order to reflect amendments by the N.C. General Assembly to this same effect. *See* 2012 N.C. Sess. Laws 350, 350-52, ch. 92, § 1-4 (replacing the word "detector" with "alarm" throughout provisions of the Residential Rental Agreements Act).

During this second pre-sale inspection, Mr. Stikeleather asked Defendant-Tenant if the property had a smoke alarm and carbon monoxide alarm. Defendant-Tenant responded that it did not. Mr. Kluth then went to his truck and returned with a smoke alarm and carbon monoxide alarm for Defendant-Tenant to put in the property.

On or around 26 June 2013, Plaintiff-Landlord purchased the property and sent a letter to Defendant-Tenant notifying him that Plaintiff-Landlord was the new owner and property manager. The letter also directed Defendant-Tenant to call Plaintiff-Landlord to set up an inspection of the property and to put any requests for repairs in writing.

On or around 24 September 2013, Mr. Stikeleather went by the house to do an inspection, but it had to be "quick" because of the presence of an unauthorized pet on the premises. During this inspection, Mr. Stikeleather testified that he observed an alarm in the living room, plugged into an electrical outlet in the wall, but he admitted he did not verify whether it was working properly.

Near the middle of March 2014, Defendant-Tenant called Mr. Stikeleather and told him he would be late with March's rent; Mr. Stikeleather responded that he would file eviction papers, which he did on 19 March 2014. Two days after the parties appeared in small claims court near the end of March 2014, Plaintiff-Landlord sent his repairman to install a smoke alarm and carbon monoxide alarm in the premises. Defendant-Tenant felt it was unfair to be evicted for being only a few days late on rent, so he went to City Code Enforcement, which issued an inspection report that does not mention any issue with the property's smoke alarm and carbon monoxide alarm. Defendant-Tenant did not pay rent for the months of March, April, or May 2014.

The day after the bench trial, on 1 July 2014, the trial judge entered a judgment containing the following pertinent findings of fact, whose order has been reorganized by this Court in an effort to improve clarity:

> 3. [Defendant-Tenant] lived at 2600 Catalina, Charlotte, NC ("the property"), for four years and three months.
>
> . . . .
>
> 43. [Defendant-Tenant's] son, Ronald Broadway (RB), lived with his father at the property.
>
> . . . .

4. At the time [Defendant-Tenant] took possession of the property in 2010 it was owned and managed by a different landlord than the Plaintiff in this action.

. . . .

65. [Mr.] Stikeleather is the managing partner of the LLC that is [Plaintiff-Landlord].

. . . .

76. [Plaintiff-Landlord's] LLC owns approximately 200 properties and manages another 300 properties.

. . . .

55. Mike Kluth is a real estate broker in Charlotte and he sold the property to [Plaintiff-Landlord].

56. Prior to selling the house, Mr. Kluth visited the property in June 2013 to obtain general information to list the house.

. . . .

58. During a second pre-sale inspection of the property in June 2013, [Defendant-Tenant] told Mr. Kluth and [Mr. Stikeleather] about the flooding in the basement. The basement was dry when Mr. Kluth and [Mr. Stikeleather] saw it.

59. During the second inspection [Mr. Stikeleather] asked [Defendant-Tenant] about a Smoke/Carbon detector. [Defendant-Tenant] said there was not one present in the property.

60. Mr. Kluth then went to his car and got a Smoke/Carbon detector to place in the house.

61. Mr. Kluth does not know whether the detector, which was not new, was operational. The detector could be plugged into the wall and could also be run on batteries.

62. [Defendant-Tenant] testified that the detector provided by Mr. Kluth did not work.

. . . .

38. In June 2013, [Plaintiff-Landlord] notified [Defendant-Tenant] in writing that the property had been sold and

that [Plaintiff-Landlord] was the new owner and property manager. Plaintiff[-Landlord] admitted Plaintiff's Exhibit 2, a letter dated June 26, 2013, detailing the change in ownership.

39. In addition to telling [Defendant-Tenant] about the new management company, Plaintiff[-Landlord's] Exhibit 2 also directed [Defendant-Tenant] to put any requests for repair in writing and asked [Defendant-Tenant] to call [Plaintiff-Landlord] to set up an inspection.

. . . .

66. The only potential repair issue that [Plaintiff-Landlord] was aware of at the time of the purchase was the basement and the flooding.

. . . .

2. The parties have also stipulated to the existence of a lease between [Defendant-Tenant] and

Plaintiff[-]Landlord. . . .

. . . .

21. The lease contains a page signed by [Defendant-Tenant] stating that the property had a "Carbon/Smoke Detector" in the unit and that it was in good working condition when [Defendant-Tenant] took possession in 2010.

. . . .

29. Paragraph 17 of the lease states that [Defendant-Tenant] shall make a request for repair in writing.

. . . .

70. After taking ownership of the property, [Mr. Stikeleather] went by the house in the fall of 2013 to do a quick inspection. It was a quick inspection due to the presence of [Defendant-Tenant's] dog.

71. [Mr. Stikeleather] testified that the dog was not permitted at the property[.]

72. [Mr. Stikeleather] did observe a detector that was plugged in during [the] fall 2013 inspection but did not verify whether it was working properly.

. . . .

32. [Defendant-Tenant] called [Mr. Stikeleather] to tell him that he would be late with the March [2014] rent and [Mr. Stikeleather] said that he would file eviction papers.

. . . .

75. [Plaintiff-Landlord] sent his repairman to install a detector after the first hearing in small claims court in late March 2014.

. . . .

22. [Defendant-Tenant] and [Defendant-Tenant's] son[, RB,] were present when a new detector was installed by [Plaintiff-Landlord's] employee in 2014.

. . . .

47. RB testified that the property did not have a Smoke/Carbon detector upon initial[] occupancy. There [was] a blank spot where it appeared one had previously been with a painted[-]over bracket.

48. RB was present when [Plaintiff-Landlord's] staff came out and installed a Smoke/Carbon detector, a few days after the first court appearance in 2014. RB watched the installation and [Plaintiff-Landlord's] staff did not remove an old detector prior to installing a new one.

. . . .

33. [Defendant-Tenant] did not think it was fair to be evicted for being seventeen days late on the rent so he went to City Code Enforcement.

. . . .

40. The city inspected the property and issued a list of code violations. Plaintiff[-Landlord] admitted the Code Enforcement report as Plaintiff's Exhibit 3.

41. The Code Enforcement report does not list the carbon/smoke detector.

. . . .

> 68. [Mr. Stikeleather] told [Defendant-Tenant] several times to put repair requests in writing, as required by the lease.
>
> 69. [Mr. Stikeleather] testified that he never received any written or verbal repair requests from [Defendant-Tenant].
>
> . . . .
>
> 78. [Mr. Stikeleather] testified that he has made numerous requests for access and for a key to the Property, including by certified mail, so that he could do an inspection and make repairs to the property. [Defendant-Tenant] never responded to those requests.
>
> 79. [Defendant-Tenant] did not introduce any portion of the Charlotte City Housing Code.
>
> . . . .
>
> 1. [Defendant-Tenant] did not pay rent for March, April or May 2014, and that the monthly rent was $500.

Based upon these findings, the trial judge concluded the following as a matter of law:

> 2. [Defendant-Tenant] has failed that [sic] show that [Plaintiff-Landlord] breached the implied warranty of habitability for the issues related to the flooded basement, broken step, inoperable and broken windows and faulty electrical system because [Defendant-Tenant] failed to provide proper written notice of these issues and also failed to provide reasonable access to [Plaintiff-Landlord] to permit an inspection to determine if there were any structural or electrical issues;
>
> 3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement;
>
> . . . .

> 6. [Defendant-Tenant] is entitled to rent abatement of $150 per month;
>
> 7. [Plaintiff-Landlord's] continued collection of rent without verifying that [Defendant-Tenant] had been provided an operable smoke alarm and carbon monoxide detector constituted an Unfair and Deceptive Trade Practice;
>
> 8. Because [Plaintiff-Landlord] has committed an Unfair and Deceptive Trade Practice, [Defendant-Tenant's] damages shall be trebled;
>
> 9. [Defendant-Tenant's] damages shall be offset by an abatement credit of $350 for March 2014 where [Defendant-]Tenant did not pay rent but before the new detector was installed and $500 per month for April and May 2014 where [Defendant-]Tenant did not pay rent but after the new detector was installed for a total abatement credit of $1350.

Based upon the foregoing, the trial judge entered the following judgment:

> 1. Defendant[-]Tenant's claim for rent abatement and Unfair and Deceptive Trade Practices is granted;
>
> 2. Defendant[-]Tenant is awarded damages in the amount of $2250 ($1200 in rent abatement, trebled to $3600 pursuant to Chapter 75 minus tenant's abatement credit of $1350);
>
> 3. Defendant-[Tenant] is entitled to reasonable attorney fees, pursuant to Chapter 75. [Defendant-Tenant] shall submit an affidavit for attorney fees and [Plaintiff-Landlord] shall have an opportunity to respond;
>
> 4. All other counterclaims filed by [Defendant-Tenant] are denied.

Plaintiff-Landlord appeals.

II. Analysis

Plaintiff-Landlord contends the trial court erred by (1) granting Defendant-Tenant's counterclaim for rent abatement under the Residential Rental Agreements Act ("RRAA"), (2) improperly calculating the damage award under the RRAA, (3) concluding the alleged RRAA violation constituted a breach of North Carolina's Unfair and Deceptive

Trade Practices Act ("UDTP"), and (4) awarding Defendant-Tenant reasonable attorney's fees under UDTP. Because we agree the trial court erred in concluding Plaintiff-Landlord violated the RRAA, the damages awarded for rent abatement, which were trebled under UDTP, as well as the attorney's fees awarded under UDTP, must necessarily be reversed.

A. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotation marks and citation omitted). "In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith." *Cardwell v. Henry*, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (internal quotation marks and citations omitted). The trial court's findings of fact must include "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). Put another way, the trial court must make "specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted). The trial court's conclusions of law are reviewed *de novo*, wherein this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted).

B. Violation of the RRAA

Plaintiff-Landlord first contends the trial court erred in granting Defendant-Tenant's claim for rent abatement in violation of the RRAA. We agree.

Specifically, Plaintiff-Landlord challenges the trial court's conclusion of law No. 3, which states:

> 3. Where [Plaintiff-Landlord] knew on or about June 26, 2013, that the property did not have a smoke alarm or

> carbon monoxide detector and did not verify that the previously used device provided on or about that date by Mr. Kluth was operable, [Plaintiff-Landlord] violated the Residential Rental Agreement[s] Act which requires provision of an operable smoke alarm and carbon monoxide detector. [Defendant-Tenant] is therefore entitled to rent abatement[.]

This singly-enumerated conclusion actually contains two legal conclusions: first, that Plaintiff-Landlord violated the RRAA; second, that Defendant-Tenant is entitled to rent abatement. We therefore discuss each conclusion separately.

Pursuant to the RRAA, codified at N.C. Gen. Stat. §§ 42-38 to -49 (2013), "a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987) (citation omitted). The RRAA requires landlords to provide fit premises and imposes upon them the following duties:

> (a) The landlord shall:
>
> (1) Comply with the current applicable building and housing codes[] . . . to the extent required by the operation of such codes[.]
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
>
> (3) Keep all common areas of the premises in safe condition.
>
> (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

N.C. Gen. Stat. § 42-42(a)(1)-(4) (2013). It is well established that the RRAA provides an affirmative cause of action to a tenant for recovery of rent due to a landlord's breach of the implied warranty of habitability. *See, e.g.*, *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694 (1987) ("Tenants may bring an action for breach of the implied warranty

of habitability, seeking rent abatement, based on their landlord's noncompliance with [N.C. Gen. Stat.] § 42-42(a)" (citation omitted)); *see also Allen v. Simmons*, 99 N.C. App. 636, 644, 394 S.E.2d 478, 482 (1990) ("Tenants may bring an action seeking damages for breach of the implied warranty of habitability and may also seek rent abatement for their landlord's breach of the statute.").

The purpose of the restitutionary remedy of rent abatement is to compensate tenants for defective conditions of a premises which render it unfit for human habitation. *See Miller*, 85 N.C. App. at 368, 355 S.E.2d at 193 (noting that rent abatement is "in the nature of a restitutionary remedy[]"). This Court has held:

> [A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with [N.C. Gen. Stat. §] 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Id. at 371, 355 S.E.2d at 194 (citations omitted). However, N.C. Gen. Stat. § 42-42(a) also imposes duties upon landlords which are not necessarily related to a premises' fitness for human habitation. Pertinent to the instant case, the RRAA requires landlords:

> (5) *Provide operable smoke alarms*[] . . . and install the smoke alarms in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke alarm is operable and in good repair at the beginning of each tenancy. . . .
>
> . . . .
>
> (7) *Provide a minimum of one operable carbon monoxide alarm per rental unit per level*[] . . . and install the carbon monoxide alarms in accordance with either the standards of the National Fire Protection Association

> or the minimum protection designated in the manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. A landlord that installs one carbon monoxide alarm per rental unit per level shall be deemed to be in compliance with standards under this subdivision covering the location and number of alarms. The landlord shall replace or repair the carbon monoxide alarms within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a carbon monoxide alarm is operable and in good repair at the beginning of each tenancy. . . .

N.C. Gen. Stat. § 42-42(a)(5), (7) (2013) (emphasis added). Breaches of provisions of the RRAA such as these, while technically included within the implied warranty of habitability, are not necessarily best remedied by retroactive rent abatement, particularly without proof that a tenant has suffered actual damage. We conclude that a landlord's violation of N.C. Gen. Stat. § 42-42(a)(5) or (7), without more, cannot sustain an action for rent abatement.

In the instant case, in reviewing the trial court's decision *de novo*, we hold its findings of fact do not support its conclusions that Plaintiff-Landlord breached the RRAA nor that Defendant-Tenant is entitled to rent abatement. Therefore we reverse.

First, as to the alleged breach of the implied warranty of habitability, it is true the RRAA imposed upon Plaintiff-Landlord a duty to verify the property had an operable smoke alarm and carbon monoxide alarm once it became the new property owner and manager on 26 June 2013. However, the trial court never made any specific findings of the ultimate facts essential to conclude that Plaintiff-Landlord violated the RRAA. For instance, the trial court failed to make any findings as to the current applicable building and housing codes and which, if any, of the codes were violated. Nor did the trial court make any findings as to how verifying the operability of an alarm would put or keep the premises in a fit and habitable condition, or how doing so would keep the safety of the premises. Not only did the trial court fail to make findings of whether Plaintiff-Landlord knew or had reason to know the alarm provided by Mr. Kluth was not new or in good or safe working order, but also it made no findings as to how failing to verify the operability of an alarm rendered the premises unfit for human habitation, or how this unfitness devalued the fair rental value of the property such that Defendant-Tenant should be entitled to rent abatement.

Second, as to the award of rent abatement, the trial court did not articulate its rationale with any specificity in declaring how Plaintiff-Landlord's alleged failure to verify the property had an operable smoke alarm and carbon monoxide alarm—without more—entitles Defendant-Tenant to a restitutionary remedy such as rent abatement. The trial court made no finding that the premises was uninhabitable during the period in which Defendant-Tenant paid rent. There was no finding that the premises was unfit or of the value of the premises in its "uninhabitable" state. Without a finding that the property was unfit for human habitation, or of the fair rental value of the property in its unwarranted condition as required by our case law, an award of rent abatement cannot be sustained.

In summary, lacking these and other specific findings of the ultimate facts essential to support its conclusions that Plaintiff-Landlord breached the RRAA or that Defendant-Tenant is entitled to rent abatement, the trial court's judgment is unsupported by competent evidence. Furthermore, our independent review of the record fails to disclose any evidence to support the trial court's conclusions or its ensuing judgment. Therefore it must be reversed.

Because we conclude that Plaintiff-Landlord never breached the RRAA, Defendant-Tenant's claims for rent abatement and UDTP, as well as the award of trebled damages and attorney's fees pursuant to UDTP, necessarily fail.

III. Conclusion

Based upon the foregoing and our review of the record, we reverse the trial court's judgment.

REVERSED.

Judges STEPHENS and TYSON concur.

BRUCE D. TAYLOR, PLAINTIFF
v.
HOWARD TRANSPORTATION, INC. AND TRAVELERS INDEMNITY COMPANY OF AMERICA, DEFENDANTS

No. COA14-922

Filed 5 May 2015

Workers' Compensation—subject matter jurisdiction—last act of employment contract

The Industrial Commission lacked subject-matter jurisdiction over plaintiff employee's workers' compensation claim. Plaintiff's contract of employment was not made in North Carolina. The last act of the employment contract took place in Mississippi. Thus, the opinion and award was vacated.

Appeal by defendants from opinion and award entered 14 April 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 January 2015.

Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Neil P. Andrews and M. Duane Jones, for defendants-appellants.

STROUD, Judge.

Howard Transportation, Inc. ("HT") and Travelers Indemnity Company of America (collectively "defendants") appeal from an opinion and award by the Full Commission. Defendants contend that the Commission (1) lacked subject-matter jurisdiction over a workers' compensation claim by Bruce D. Taylor ("plaintiff") and (2) erred in concluding that plaintiff is entitled to ongoing disability compensation. We vacate the Commission's opinion and award.

I. Factual Background

In 2002, plaintiff, a resident of Burlington, North Carolina, sent an employment application to Dorothy Ivey, a recruiter for HT, a trucking company. On 25 September 2002, Ivey sent plaintiff's employment application to HT's safety department in Ellisville, Mississippi. After HT's employees confirmed plaintiff's eligibility, Ivey arranged for a van to pick

up plaintiff and take him to HT's headquarters in Laurel, Mississippi. After arriving in Mississippi on 9 December 2002, plaintiff successfully completed HT's orientation, a road test, a drug test, and a physical exam. HT then hired plaintiff as a truck driver. On or about 13 June 2003, plaintiff resigned his employment with HT and began working for another trucking company.

On or about 14 May 2004, Michele King, a recruiter for HT, sent plaintiff a letter inviting him to reapply to work for HT. Plaintiff called King from his North Carolina residence and told her that he would be willing to work for HT if HT gave him a better truck and assigned him to a different dispatcher. King responded that she would need to talk with Suzanne Skipper and Larry Knight, two of HT's managers. King called plaintiff and told him that Skipper and Knight were willing to meet plaintiff's conditions if plaintiff would "come back to work." Plaintiff responded that he would "come back to work," and King arranged for a van to pick up plaintiff and take him to Laurel, Mississippi. On 16 August 2004, plaintiff arrived in Mississippi. Over the next three days, he completed HT's orientation, a road test, a drug test, a physical exam, and employment paperwork. On 19 August 2004, HT rehired plaintiff as a truck driver.

On 6 October 2006, while working for HT, plaintiff was struck by a pick-up truck at a truck stop in Maryland. Plaintiff sustained injuries to his left knee, hip, and back.

II. Procedural Background

On 3 June 2008, plaintiff filed Industrial Commission Form 18 giving notice of his workers' compensation claim. On 14 August 2008, defendants filed Form 61 denying plaintiff's claim. On or about 19 August 2010, Deputy Commissioner Philip Baddour found that the Commission lacked subject-matter jurisdiction over plaintiff's claim and ordered that plaintiff's claim be dismissed with prejudice. Plaintiff appealed to the Full Commission. In its 11 March 2011 opinion and award, the Full Commission by Commissioner Bernadine Ballance found that the Commission had subject-matter jurisdiction over plaintiff's claim, reversed the deputy commissioner's opinion, and remanded the case for a full evidentiary hearing. Defendants appealed to this Court. On 6 March 2012, this Court held that the Full Commission's 11 March 2011 opinion and award was a non-appealable interlocutory order and dismissed defendants' appeal. *Taylor v. Howard Transp., Inc.*, 219 N.C. App. 402, 722 S.E.2d 212 (2012) (unpublished).

On or about 12 September 2013, Deputy Commissioner Myra Griffin awarded plaintiff, *inter alia*, $579.73 per week in temporary total disability benefits from 6 October 2006 to 18 June 2007 and from 5 November 2009 continuing until "Plaintiff returns to work or further order of the Commission." Defendants appealed to the Full Commission. In its 14 April 2014 opinion and award, the Full Commission by Commissioner Danny Lee McDonald affirmed with modifications Deputy Commissioner Griffin's opinion and award. On or about 21 April 2014, defendants received by certified mail the Full Commission's 14 April 2014 opinion and award. On 19 May 2014, defendants timely gave notice of appeal.

III. Subject-Matter Jurisdiction

Defendants contend that the Commission (1) lacked subject-matter jurisdiction over plaintiff's workers' compensation claim and (2) erred in concluding that plaintiff is entitled to ongoing disability compensation. Because we hold that the Commission lacked subject-matter jurisdiction over plaintiff's claim, we do not reach defendants' second issue.

A. Standard of Review

> As a general rule, the Commission's findings of fact are conclusive on appeal if supported by any competent evidence. It is well settled, however, that the Commission's findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record.

Perkins v. Arkansas Trucking Servs., Inc., 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (citations and quotation marks omitted).

B. Analysis

N.C. Gen. Stat. § 97-36 provides:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) if the contract of employment was made in this State, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State[.]

N.C. Gen. Stat. § 97-36 (2013). Neither HT's principal place of business nor plaintiff's principal place of employment was in North Carolina. Thus, in order for the Commission to have subject-matter jurisdiction, plaintiff's contract of employment must have been made in North Carolina. *See id.*

"To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test. For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (citations, quotation marks, and brackets omitted) (citing *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 926 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991)).

In *Murray*, the defendant's agent telephoned the plaintiff at his North Carolina residence and offered him a position in Mississippi to work as an instrument and pipe foreman. *Id.* at 295, 506 S.E.2d at 725. The plaintiff had previously worked for the defendant. *Id.*, 506 S.E.2d at 725. The plaintiff accepted the offer on the phone and traveled to the Mississippi work site. *Id.*, 506 S.E.2d at 725. The plaintiff was required to fill out certain administrative paperwork, but because he was a rehire, he was not required to submit to a physical exam, drug test, or go to the local employment security office. *Id.*, 506 S.E.2d at 725. This Court held that, because the paperwork was "mostly administrative[,]" the last act of the employment contract took place in North Carolina. *Id.* at 297, 506 S.E.2d at 726-27.

In *Thomas*, the plaintiff, a North Carolina resident and experienced truck driver, applied for a job with the defendant by filling out an application form and submitting it at the defendant's terminal in North Carolina. *Thomas*, 101 N.C. App. at 91, 398 S.E.2d at 922. The defendant arranged for the plaintiff to fly to Indiana where he completed an orientation, a road test, and a physical exam. *Id.* at 91, 94, 398 S.E.2d at 922, 924. While the plaintiff was in Indiana, the defendant offered to hire the plaintiff, and the plaintiff accepted. *Id.* at 94-95, 398 S.E.2d at 924-25. This Court held that the last act of the employment contract took place in Indiana, not North Carolina. *Id.* at 97, 398 S.E.2d at 926.

On or about 14 May 2004, King sent plaintiff a letter inviting him to reapply to work for HT. Plaintiff called King from his North Carolina residence and told her that he would be willing to work for HT if HT gave him a better truck and assigned him to a different dispatcher. King responded that she would need to talk with Skipper and Knight.

King called plaintiff and told him that Skipper and Knight were willing to meet plaintiff's conditions if plaintiff would "come back to work." Plaintiff responded that he would "come back to work," and King arranged for a van to pick up plaintiff and take him to Laurel, Mississippi. On 16 August 2004, plaintiff arrived in Mississippi. Over the next three days, he completed an orientation, a drug test, a physical exam, and employment paperwork. In her deposition, Ivey stated that HT's orientation includes a road test, and plaintiff admits that he completed a road test during his 2004 orientation. Additionally, plaintiff testified that HT would not have allowed him to drive one of their trucks if he had not passed the drug test and physical exam:

> [Defendants' lawyer]: Now when you were down there in August of '04, did you—did you pick up your truck down there, also?
>
> [Plaintiff]: Yes.
>
> . . . .
>
> [Defendants' lawyer]: Okay. And you actually didn't get assigned your truck until after you completed your physical and passed your DOT exam, correct?
>
> [Plaintiff]: Yeah—about three days.
>
> [Defendants' lawyer]: Okay. And so you were there for three days before they let you take a truck and leave, correct?
>
> [Plaintiff]: Yes.
>
> . . . .
>
> [Defendants' lawyer]: Right. And you agree that Howard wouldn't—as a new hire, [HT] wouldn't let you take one of their trucks out of their Mississippi terminal until you had passed your DOT physical, correct?
>
> [Plaintiff]: Yes.
>
> [Defendants' lawyer]: And you agree that [HT] won't let you take one of their trucks out of their terminal in Mississippi until you'd passed their drug test?
>
> [Plaintiff]: Yes.

Additionally, in her deposition, Ivey similarly stated that plaintiff would not have been hired as an employee if he had failed one of these tests:

[Defendants' lawyer]: If any of these things weren't completed in terms of the written test or the road test or the criminal checks or things of that nature, would [plaintiff] be considered an employee of [HT] before that?

. . . .

[Ivey]: No.

. . . .

[Defendants' lawyer]: Okay. Well, do you have an opinion of when someone would be effectively an employee of [HT]?

. . . .

[Ivey]: Again, as I said, they have to go down and pass their physical, their drug screen, their road test, and complete the final paperwork in Mississippi.

[Defendants' lawyer]: Have you sent people down to Mississippi that weren't hired by [HT]?

[Ivey]: I have.

[Defendants' lawyer]: And what reasons were they not hired?

[Ivey]: Various things—failing drug screens, not being able to pass the physical. I've actually had drivers . . . send me an application that someone else filled out for them, and when they would get to Mississippi wouldn't be able to read or write, things like that.

[Defendants' lawyer]: All right. So you're aware of people who—who have gotten the quote approval, went down to Mississippi, and then never became employees of [HT]?

[Ivey]: Yes.

[Defendants' lawyer]: How often does that happen, percentage wise, to your knowledge?

[Ivey]: Maybe one out of ten.

On 19 August 2004, at the end of the orientation, Skipper signed a payroll change notice form in which she rehired plaintiff. The effective date of the payroll change is 16 August 2004, the day plaintiff began the orientation.

We hold that this case is more closely analogous to *Thomas* than to *Murray*. Like in *Thomas* and unlike in *Murray*, plaintiff was required to complete a three-day orientation, a road test, a drug test, and a physical exam outside North Carolina, a hiring procedure extending well beyond "mostly administrative" paperwork. *See Thomas*, 101 N.C. App. at 91, 94, 398 S.E.2d at 922, 924; *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 726-27. HT did not consider plaintiff an employee until after he had successfully completed the orientation, road test, drug test, and physical exam.

Plaintiff mentions that he was paid during the orientation since the effective rehire date listed on the payroll change notice form is 16 August 2004, the date he arrived in Mississippi. But Skipper signed that form on 19 August 2004, at the end of the orientation. The fact that plaintiff was paid for this three-day period does not vitiate the fact that plaintiff's employment was contingent upon his successful completion of the orientation, road test, drug test, and physical exam. Following *Thomas*, we hold that the last act of the employment contract took place in Mississippi. *See Thomas*, 101 N.C. App. at 97, 398 S.E.2d at 926. Accordingly, we hold that the Commission lacked subject-matter jurisdiction to hear plaintiff's claim. *See* N.C. Gen. Stat. § 97-36.

IV. Conclusion

Because the Industrial Commission lacked subject-matter jurisdiction to hear plaintiff's claim, we vacate the Commission's 14 April 2014 opinion and award.

VACATED.

Judges BRYANT and HUNTER, JR concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MAY 2015)

COOPER v. CAMERON No. 14-1017	Carteret (12CVS150)	Affirmed
CRABTREE v. EVP PROPS., LLC No. 14-928	N.C. Industrial Commission (PH-3192) (Y16592)	Reversed and Vacated
GEORGE v. COOPER No. 14-1195	Lincoln (12CVS1518)	Dismissed in Part, No Error in Part.
GRAHAM v. JENKINS No. 14-1128	Brunswick (10CVS1979)	Affirmed
HUGGINS v. MARLATEX CORP. No. 14-1232	N.C. Industrial Commission (W12544)	Dismissed
IN RE D.A.C. No. 14-1242	Randolph (13JA16)	Affirmed
IN RE I.L-M. No. 14-1233	Cumberland (06JT561)	Affirmed
IN RE L.S. No. 14-1122	Onslow (11JA158) (13JA41)	Affirmed in part; Vacated and Remanded in Part
IN RE LALL No. 14-1325	Iredell (10SP706)	Affirmed
IN RE M.S. No. 14-1273	Beaufort (11JA91)	Affirmed
INTEGON NAT'L INS. CO. v. MOORING No. 14-1303	Wayne (13CVS609)	Affirmed
MAVILLA v. ABSOLUTE COLLECTION SERV. No. 14-1097	Wake (11CVS6878)	Dismissed
N.C. STATE BAR v. GILBERT No. 14-1139	Disciplinary Hearing Commission (03DHC16)	Affirmed

STATE v. BAILEY No. 14-1151	Buncombe (14CRS816-818)	Affirmed
STATE v. BERRY No. 14-800	Craven (13CRS50605) (13CRS831) (13CRS950-951) (13CRS953)	No Error
STATE v. BOLICK No. 14-1072	Catawba (13CRS1448-50)	No Error
STATE v. BRANCH No. 14-1180	Duplin (12CRS51582)	No Error
STATE v. BRYANT No. 14-1218	Lenoir (12CRS51477)	No Error
STATE v. CLYBURN No. 14-1275	Union (09CRS53667)	Reversed and Remanded
STATE v. GOMEZ No. 14-1174	Durham (11CRS52203)	No Error
STATE v. GRAHAM No. 14-1229	Cabarrus (13CRS2333) (13CRS50468)	No Error
STATE v. HAMMONDS No. 14-1134	Union (80CRS2302) (80CRS3176)	Affirmed
STATE v. HOYLE No. 14-1238	Lincoln (13CRS51677) (13CRS51679) (13CRS51687)	NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. JEFFERIES No. 14-1104	Cleveland (13CRS50720) (13CRS789)	No Prejudicial Error
STATE v. JOHNSON No. 14-1170	Mecklenburg (11CRS212187)	No Error
STATE v. MACK No. 14-1221	Guilford (12CRS24304) (12CRS68166) (12CRS68172) (12CRS68173-76) (12CRS68178)	Affirmed

STATE v. McPHAIL No. 14-1280	Mecklenburg (11CRS218388)	Vacated and Remanded
STATE v. ROBERTSON No. 14-1149	Guilford (12CRS85608-09) (13CRS24320)	No prejudicial error
STATE v. ROBINSON No. 14-917	Guilford (13CRS81488)	No Prejudicial error
STATE v. SPRY No. 14-1279	Guilford (13CRS68566)	Affirmed
STATE v. STURDIVANT No. 14-1053	Cabarrus (12CRS53689)	Affirmed
STATE v. WEST No. 14-983	Forsyth (12CRS51921) (12CRS51925) (13CRS146-147)	No Error
STATE v. WILLIAMS No. 14-1113	Wake (12CRS223032) (13CRS204337)	No error in part; reversed and remanded in part.
STATE v. WILSON No. 14-638	Onslow (09CRS54843-44)	Affirmed; Remanded for Resentencing.
STATON v. JOSEY LUMBER CO. No. 14-1001	N.C. Industrial Commission (X93563)	Affirmed
STATON v. UNION CNTY. DEP'T OF SOC. SERVS. No. 14-1014	Union (13CVS273)	Affirmed
TAYLOR v. CAROLINAS HEALTHCARE SYS. No. 14-835	N.C. Industrial Commission (Y18410)	Affirmed

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MAY 2015)

BLEDSOE v. BLEDSOE No. 14-876	Nash (10CVD491)	Vacated in part and remanded
CMTY.ONE BANK, N.A. v. BOONE STATION PARTNERS, LLC No. 14-932	New Hanover (13CVS3888)	Dismissed
CORNETT v. CORNETT No. 14-919	Cabarrus (08CVD3928)	Affirmed
ELAM v. WILLIAM DOUGLAS MGMT., INC. No. 14-1377	Mecklenburg (13CVS14231)	Affirmed
FERGUSON v. HAWKINS No. 14-1093	Iredell (12CVS2593)	Dismissed
FRYE v. FRYE No. 14-1169	Rowan (11CVD739)	Remanded for further proceedings
HOBCO AUTO SALES, INC. v. DEW No. 14-976	Wake (13CVS850)	Affirmed
IN RE C.E.N. No. 14-1243	Forsyth (14JB38)	The district court's adjudication order is Affirmed. Juvenile's arguments regarding the disposition order are Dismissed.
IN RE J.C. No. 14-1327	Cherokee (11JT23-25)	Affirmed
IN RE SUTTON No. 14-761	Guilford (11SP3688)	Affirmed
IN RE T.A.P. No. 14-1382	Caldwell (12JA65-66)	Vacated and Remanded
IN RE T.E.B. No. 14-1408	Wake (14JB529)	Dismissed
LUCIANO v. WYATT No. 14-1203	Catawba (13CVD2495)	Affirmed

O'NEAL v. INLINE FLUID POWER, INC. & AUTO. PARTS CO., INC. No. 14-1144	N.C. Industrial Commission (X51359)	Affirmed
SMITH v. N.C. DEPT. OF PUB. SAFETY No. 14-1282	Rowan (12CVS2810)	Dismissed
STATE v. BARNES No. 14-840	Nash (12CRS53727-28) (12CRS55355)	No Error
STATE v. DAVIS No. 14-1322	Buncombe (12CRS64161)	No Error
STATE v. GRISSETT No. 14-1361	Brunswick (12CRS4222-23) (12CRS55968)	No Error
STATE v. McKENZIE No. 14-1216	Scotland (11CRS52610)	No Error
STATE v. McKINNEY No. 14-1245	Beaufort (09CRS51863) (10CRS51469) (12CRS50693-95)	Vacated and Remanded
STATE v. MILLER No. 14-1310	Mecklenburg (12CR246557) (12CR246559)	Dismissed
STATE v. MOORE No. 14-1263	Haywood (13CRS51819-23) (13CRS51825-26)	No Error
STATE v. ODOM No. 14-964	Rowan (10CRS52393-94)	No Error
STATE v. OVANDO No. 14-1188	Carteret (03CRS404) (03CRS50433)	Affirmed
STATE v. RIESON No. 14-965	Rockingham (12CRS1674) (12CRS51735)	No Error
STATE v. ROBINSON No. 14-726	Columbus (11CRS52384-85) (11CRS52388) (11CRS52390) (11CRS52393) (11CRS52396)	Vacated in part; no error in part

STATE v. RUMLEY No. 14-1162	Rockingham (12CRS53045)	No error
STATE v. SYKES No. 14-1099	Wake (11CRS213829-30) (11CRS7982)	Affirmed
STATE v. WILLIAMS No. 14-1129	Wilson (12CRS55006)	No error as to trial, Dismissed as to ineffective assistance of counsel claim
WOLFE v. THE ARCHIMEDES ACAD. No. 14-1132	Durham (13CVD5392)	Affirmed

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