242 N.C. App.—No. 1 Pages 1-253

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 23, 2017

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
DONNA S. STROUD
ROBERT N. HUNTER, JR.
J. DOUGLAS McCULLOUGH
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]
PHIL BERGER, JR.[2]
HUNTER MURPHY[3]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JOHN S. ARROWOOD
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[4]

[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2016 [4]Retired 31 December 2016

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
SHELLEY LUCAS EDWARDS

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 7 JULY 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

APPEAL AND ERROR

EVIDENCE

dismissed a refiled complaint where the statute of limitations had expired and the initial complaint did not satisfy N.C.G.S. § 1A-1, Rule 8(a)(1)'s pleading requirements. In order to benefit from the one-year filing extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure (but Rule 12(b)(6) is not a rule setting out a pleading requirement). **Murphy v. Hinton, 95.**

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

CHINA GROVE 152, LLC AND DAVID R. INVESTMENTS, LLC, PLAINTIFFS
v.
TOWN OF CHINA GROVE, DEFENDANT

No. COA14-972

Filed 7 July 2015

1. Judgments—findings and conclusions—distinguished

The trial court's determinations that the an Adequate Public Facilities Ordinance (APFO) was "illegal" and "not specifically authorized by North Carolina law" were conclusions of law, not findings of fact and were reviewed de novo. The labels "findings of fact" and "conclusions of law" employed by the trial court in a written order did not determine the nature of the review, nor did the words "found" or "finding" in a statute. The dispositive determination under N.C.G.S. § 160A-363(e) turned on whether the APFO was illegal. Because any determination of legality inherently involves the "application of legal principles," the trial court's determinations that the APFO was "illegal" and "not specifically authorized by North Carolina law" were conclusions of law, not findings of fact.

2. Cities and Towns—impact fees—interest

The trial court's legal conclusion that defendant must return an impact fee plus interest was affirmed. Following *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, China Grove's Adequate Public Facilities Ordinance was invalid as a matter of law.

3. Cities and Towns—impact fees—illegally imposed—voluntarily returned—interest

Defendant was entitled to recover interest on an impact fee that was illegally required by defendant-town of plaintiff-developer. Defendant argued that the fee was voluntarily returned and was not the subject of an underlying judgment entered against defendant, so that plaintiffs were barred from bringing their claim for interest. However, the plain language of N.C. Gen. Stat. § 160A-363(e) neither prevents a claim for interest when the city returns the principal amount to a claimant nor bars a claim for interest that arises from a separate civil action.

4. Cities and Towns—impact fees—illegally imposed—accord and satisfaction—interest not included

Plaintiffs' claim for recovery of interest on illegal impact fees was not barred by the common law doctrine of accord and satisfaction. Plaintiffs accepted the return of the impact fee and initialed defendant's letter, so that there was an offer and acceptance of a mutual release. However, the letter contained no reference to interest payments.

Appeal by defendant from order entered 30 June 2014 by Judge Mark E. Klass in Rowan County Superior Court. Heard in the Court of Appeals 18 March 2015.

DeVore, Acton & Stafford, PA, by Derek P. Adler, for plaintiffs.

Brooke & Brooke Attorneys, by Thomas M. Brooke for defendant.

INMAN, Judge.

This case requires us to interpret statutes allowing land developers to recover damages, including interest, for impact fees illegally exacted by cities and towns as a condition of development and construction. Defendant appeals from an order entered 30 June 2014 denying its motion to dismiss plaintiffs' claim, granting plaintiffs' motion for judgment on the pleadings, and awarding plaintiffs $18,221.58 in unpaid interest. After careful consideration, we affirm.

I. Facts and Legal Background

Because the actions taken by the parties in this case are governed by prior appellate decisions and statutes, we summarize the factual background within the chronology of legal developments.

In June 2006, this Court issued *Durham Land Owners Ass'n v. Cnty. of Durham*, 177 N.C. App. 629, 630 S.E.2d 200, *writ denied*, *review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006), holding that a school impact fee imposed by Durham County as a prerequisite to development approval was not specifically authorized by the General Assembly, and was therefore illegal. While the Court ruled that a refund of the fees was an appropriate remedy, it declined to order the County to pay interest on those fees, noting that interest "may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Id.* at 640, 630 S.E.2d at 207 (quotation marks omitted).

In 2007, one year after this Court issued its ruling in *Durham Land Owners Ass'n*, the General Assembly passed Senate Bill 1152, "an act to require counties and cities to pay interest on illegally exacted taxes, fees, or monetary contributions for development that are not specifically authorized by law." *See* 2007 N.C. Sess. Laws ch. 371. That act amended N.C. Gen. Stat. § 153A-324 and N.C. Gen. Stat. § 160A-363 to include the following: "If the [county/city] is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the [county/city] shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum."

Town of China Grove ("defendant") is an unincorporated municipality located in Rowan County. Defendant enacted an Adequate Public Facilities Ordinance ("APFO") requiring land developers to pay impact fees as a condition of obtaining necessary permits for development.[1] In relevant part, the purpose and intent of the APFO is the following:

> A. To ensure that public facilities needed to support new residential development meet or exceed the level of service standards established herein.
>
> . . .
>
> C. To ensure that no application is approved which would cause a reduction in the levels of service for any public facilities below the adopted level of service established in this ordinance.

1. Although the content of the APFO was before the trial court, the record contains no information about the date or manner in which it was enacted.

> D. To ensure that adequate public facilities needed to support new residential development are available concurrent with the impacts of such development[.]

The general purpose of the fee was "to ensure funding existed to accommodate the potentially increased public needs of the newly built neighborhood."

On 6 February 2008, China Grove 152, LLC and David R. Investments, LLC ("plaintiffs") paid a fee of $54,284 required by defendant pursuant to the APFO in order to begin development of the Miller's Grant Subdivision in China Grove.

On 24 August 2012, during the development of the subdivision, the North Carolina Supreme Court issued *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012). In *Lanvale*, the Court struck down Cabarrus County's APFO (which the Court noted was "a very effective means of generating revenue") because it was not specifically authorized by statute. *Id.* at 161, 731 S.E.2d at 814-15. The Court held that "absent specific authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law." *Id.*

On 21 August 2013, plaintiffs sent a letter to defendant requesting reimbursement of the APFO fee with interest in light of our Supreme Court's decision in *Lanvale*. Defendant responded on 5 September 2013 with a letter enclosing a check payable to plaintiffs for $54,284. The letter stated that the sum "represents a return of your payment pursuant to the [APFO] for the expected public facilities impact of the [subdivision]." Defendant's letter further stated that "[w]e will consider our offer and your acceptance of our check in the amount of $54,284.00, as a complete mutual release of all obligations and liabilities under [the APFO][.]"

In April 2014, plaintiffs filed a complaint for declaratory judgment to secure interest owed on the principal APFO sum of $54,284. On 22 May 2014, plaintiffs filed a motion for judgment on the pleadings, and defendant subsequently filed a corresponding motion to dismiss plaintiffs' claim. The trial court denied defendant's motion and granted plaintiffs' motion, ruling that the payment made pursuant to the APFO was an illegally exacted fee not specifically authorized by North Carolina law. Pursuant to N.C. Gen. Stat. § 160A-363(e), the trial court ordered that defendant pay 6% per annum interest on the principal sum from the date plaintiffs paid the APFO fee (8 February 2008) to the date defendant

returned the principal sum to plaintiffs (11 September 2013) for a total of $18,221.58[2].

II. Analysis

a.) Legality of the Fee

[1] Defendant first argues that the APFO is a valid ordinance pursuant to N.C. Gen. Stat. § 160A-372 (2013), and that consequently the trial court erred in entering judgment in favor of plaintiffs. We disagree.

A judgment on the pleadings "is a method by which the trial court may dispose of a claim when it is evident from the face of the pleadings that the claim lacks merit." *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 600, 544 S.E.2d 797, 799 (2001). The reviewing court must scrutinize all facts and permissible inferences in the light most favorable to the nonmoving party. *Id.* A trial court should grant a motion for judgment on the pleadings only when "the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Tradewinds Campground, Inc. v. Town of Atl. Beach*, 90 N.C. App. 601, 602, 369 S.E.2d 365, 365 (1988) (citation and quotation marks omitted).

N.C. Gen. Stat. § 160A-363(e) provides that "[i]f [a] city is *found* to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the city shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum." (Emphasis added.) Presumably based on the General Assembly's use of the word "found" in section 160A-363(e), the trial court, in its findings of fact, determined that the APFO "is an illegally exacted tax, fee, or monetary contribution for development or a development permit and that said tax, fee, or monetary contribution is not specifically authorized by North Carolina law[.]"

However, "[t]he labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Nor does the use of the word "found" or "finding" in a statute control whether the trial court's determination is actually a finding of fact or a conclusion of law. *See, e.g.*, *McMillan v. Ryan Jackson Properties, LLC*, __ N.C. App. __, __, 753 S.E.2d 373, 376 (2014) (holding that the decision to award attorneys'

2. Because defendant does not challenge the amount of interest awarded to plaintiffs, we do not address the trial court's calculation of this sum. *See* N.C. R. App. P. 28.

fees for an action brought "without reasonable cause" was a conclusion of law because it involved the application of legal principles, despite the statute authorizing fees based on a "finding" by the trial court that the action was brought "without reasonable cause").

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

The nature of the inquiry described in section 160A-363(e) is purely an issue of whether a municipal ordinance complies with North Carolina law. The parties agree that the determination of whether the APFO is illegal turns on the holding of *Lanvale*, 366 N.C. at 142, 731 S.E.2d at 800, and the application of various statutes setting out the powers of counties, cities, and towns. These are sources of law, not evidentiary facts. Indeed, the dispositive determination under section 160A-363(e) turns on whether the APFO is "illegal." Because any determination of legality inherently involves the "application of legal principles," *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675, the trial court's determinations that the APFO is "illegal" and "not specifically authorized by North Carolina law" are conclusions of law, not findings of fact. As such, we review these conclusions *de novo*. *See Westmoreland*, 218 N.C. App. at 79, 721 S.E.2d at 716 ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*.").

[2] As to the legality of the APFO, defendant argues that "[n]othing on the face of the ordinance makes Plaintiff's fee illegal," because the nature of the China Grove APFO is distinguishable from the APFO in *Lanvale*. We disagree.

The *Lanvale* Court held that "absent *specific* authority from the General Assembly, APFOs that effectively require developers to pay an adequate public facilities fee to obtain development approval are invalid as a matter of law." *Lanvale*, 366 N.C. at 163, 731 S.E.2d at 815 (emphasis added).

Here, the China Grove APFO states that its purpose is to "ensure that public facilities needed to support new residential development meet

or exceed the level of service standards established herein." Plaintiffs alleged in their complaint, and defendant admitted in its answer, that defendant required plaintiffs to pay an APFO fee of $54,284 "to ensure funding existed to accommodate the potentially increased public needs of the newly built neighborhood." Therefore, because it is undisputed that this was an "adequate public facilities fee" required for plaintiffs to gain development approval, the dispositive question is whether the General Assembly provided specific authority for that fee. *See id.*

Defendant contends that the APFO is actually a subdivision control ordinance as provided for in N.C. Gen. Stat. § 160A-372, and under the language of that statute, defendant argues that the General Assembly specifically authorized the adequate public facilities fee. Even assuming, however, that the APFO is a subdivision control ordinance within the scope of section 160A-372, the ordinance's provision for a public facilities fee has not been specifically authorized by the General Assembly. Nothing in section 160A-372 authorizes a city or town, specifically or generally, to enact an adequate public facilities fee as a condition precedent for development approval. Section 160A-372(c) provides that a subdivision control ordinance "*may* provide that a developer *may* provide funds to the city whereby the city *may* acquire recreational land" for parks, (emphasis added); that language is clearly permissive and does not authorize municipalities to charge fees as a condition precedent to subdivision approval, as the APFO did here. *See Loren v. Jackson*, 57 N.C. App. 216, 219, 291 S.E.2d 310, 312 (1982) (noting that the use of the word "may" in a statute "generally connotes permissive or discretionary action and does not mandate or compel a particular act" (quotation marks omitted)). Contrary to defendant's argument, there are no provisions in section 160A-372 authorizing China Grove to make its development approval contingent on securing funds to subsidize its law enforcement, fire protection, and parks, which was the stated purpose of the APFO.

It is also immaterial that the APFO in *Lanvale* sought to subsidize schools, as distinguished from the APFO here, which sought to subsidize the town's police force, fire departments, and parks. The *Lanvale* Court did not limit its holding to adequate public schooling fees but rather "adequate public *facilities* fee[s]." *Lanvale*, 366 N.C. at 163, 731 S.E.2d at 815 (emphasis added).

Following *Lanvale*, we conclude that China Grove's APFO was invalid as a matter of law. *Id.* Therefore, because China Grove "illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law," we affirm the

trial court's legal conclusion that defendant must "return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum," as required by the plain language of section 160A-363(e).

b.) Defendant's Motion to Dismiss

[3] Next, defendant argues the trial court erred by denying its motion to dismiss plaintiffs' complaint because it failed to state a claim upon which relief can be granted. Specifically, defendant contends that a claimant is not entitled to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e) when the municipality has already voluntarily refunded the illegally extracted fee. We disagree.

"In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be viewed as admitted, and the motion should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action." *Gatlin v. Bray*, 81 N.C. App. 639, 640, 344 S.E.2d 814, 815 (1986). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

The longstanding rule in North Carolina was that interest "may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Durham Land Owners Ass'n*, 177 N.C. App. at 640, 630 S.E.2d at 207; *see also Shavitz v. City of High Point*, 177 N.C. App. 465, 485, 630 S.E.2d 4, 18 (2006) (explaining that "because counties and cities are political subdivisions of the State, it follows that [interest cannot be imposed] against a county or city acting in its sovereign capacity"). Therefore, in *Durham Land Owners Ass'n*, "[d]espite the [c]ounty's unauthorized actions[,]" this Court did not award interest as requested by plaintiffs because there was "no statutory authority for the award of interest[.]" *Durham Land Owners Ass'n*, 177 N.C. App. at 640, 630 S.E.2d at 207.

Following this Court's decision in *Durham Land Owners Ass'n*, the General Assembly enacted N.C. Gen. Stat. § 160A-363(e) and N.C. Gen. Stat. § 153A-324 allowing for developers to seek interest on fees illegally exacted by cities and counties. N.C. Gen. Stat. § 160A-363(e), as previously discussed, states: "If the city is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the city shall return the tax,

fee, or monetary contribution plus interest of six percent (6%) per annum." N.C. Gen. Stat. § 160A-363(e).

Defendant argues that there is no underlying fund from which to recover interest because the principal has already been refunded to plaintiffs. Defendant posits that because the fee was voluntarily returned and was not the subject of an underlying judgment entered against defendant, plaintiffs are barred from bringing their claim for interest. However, N.C. Gen. Stat. § 160A-363(e) is unambiguous: "If the city is found to have illegally exacted a . . . fee, . . . not specifically authorized by law," the fee principal shall be returned with interest. *Id.* The statute's plain language neither prevents a claim for interest when the city returns the principal amount to a claimant nor bars a claim for interest that arises from a separate civil action. Thus, plaintiffs brought an actionable claim to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e). *See Lanvale*, 366 N.C. at 154, 731 S.E.2d at 809-10 ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.").

c.) Doctrine of Accord and Satisfaction

[4] Finally, defendant argues the trial court erred by denying its motion to dismiss because plaintiffs' claim is barred by the common law doctrine of accord and satisfaction. Specifically, defendant asserts that the plaintiffs' acceptance of $54,284, coupled with the initialing of defendant's letter, established an accord and satisfaction and released defendant from any requirement to pay outstanding interest. We disagree.

The doctrine of accord and satisfaction "is recognized as a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement." *Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963) (citations and quotation marks omitted).

A valid contract requires an offer, an acceptance, and sufficient consideration. *Barbee v. Johnson*, 190 N.C. App. 349, 355, 665 S.E.2d 92, 97 (2008). Generally, "the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument." *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010) (citation and quotation marks omitted). "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, . . . and the court cannot look beyond the terms of the contract to determine the intentions

of the parties." *Piedmont Bank and Trust Co. v. Stevenson*, 79 N.C. App. 236, 240, 339 S.E.2d 49, 52, *aff'd per curiam*, 317 N.C. 330, 344 S.E.2d 788 (1986) (citations and quotation marks omitted).

The facts *sub judice* demonstrate that a contract existed. Defendant's letter to plaintiffs constituted an offer, and plaintiffs' initialing of the letter and cashing of the check was an acceptance with consideration. The contract terms, indicated in the body of the letter, referenced a "mutual release . . . of all obligations and liabilities under the [APFO]." Thus, the terms of the contract clearly denote a waiver of all obligations arising out of the APFO to which both parties agreed. However, the letter contains no reference to a waiver of any obligations or liabilities that might arise vis-à-vis defendant regarding interest payments allowed under N.C. Gen. Stat. § 160A-363(e). *See Lynn*, 202 N.C. App. at 431, 689 S.E.2d at 205.

A release of the obligations contained under the APFO, as indicated by the plain terms of the contract, did not amount to a release of the statutory obligation to pay interest under N.C. Gen. Stat. § 160A-363(e). As such, defendant's argument that plaintiffs are barred from seeking interest payments under the accord and satisfaction doctrine is without merit.

III. Conclusion

In sum, we affirm the trial court's order granting plaintiffs' motion for judgment on the pleadings and denying defendant's motion to dismiss because the trial court properly concluded that the $54,284 fee was illegal, plaintiffs' cause of action to recover interest pursuant to N.C. Gen. Stat. § 160A-363(e) properly states a claim upon which relief can be granted, and plaintiffs' claim is not barred by the doctrine of accord and satisfaction.

AFFIRMED.

Judges ELMORE and GEER concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
BB&R, LLC; KENNETH W. FROMNECHT, II, TRUSTEE; ANDY BERRY & SONS, INC.; UNITED COMMUNITY BANK (GEORGIA); MARICIA J. RINGLE, TRUSTEE; AND MACON BANK, INC., DEFENDANTS

No. COA14-1185

Filed 7 July 2015

Eminent Domain—N.C.G.S. § 136-108 evidentiary hearing—closure of road abutting property

The trial court did not err by concluding that the closure of Dowdle Mountain Road, which abutted defendant's property, was a lawful exercise of police power and therefore not a compensable taking. Defendant still had access to Dowdle Mountain Road—the property's access point to the road was simply changed. The change did not restrict access to defendant's property.

Appeal by Defendant BB&R, LLC, from the order entered 9 May 2014 by Judge Bradley B. Letts in Macon County Superior Court. Heard in the Court of Appeals 17 March 2015.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the plaintiff-appellee Department of Transportation.

Cranfill Sumner & Hartzog LLP, by Stephanie H. Autry, George B. Autry, Jr., and Brady W. Wells, for defendant-appellant BB&R, LLC.

McCULLOUGH, Judge.

BB&R, LLC ("defendant") appeals from an order entered by the trial court pursuant to a N.C. Gen. Stat. § 136-108 evidentiary hearing. On appeal, defendant argues the trial court erred in concluding that the closure of Dowdle Mountain Road, which abutted defendant's property, was a lawful exercise of police power and therefore not a compensable taking. For the reasons set forth herein, we affirm the trial court's order.

I. Factual Background

Defendant owns a 1.125 acre tract of land in Franklin, Macon County ("the property"). Located on the property is a convenience store and gas

station, including diesel fuel facilities. The North Carolina Department of Transportation ("DOT") condemned portions of the property for a public use highway construction project. However, DOT and defendant were unable to agree to a purchase price for the property. As a result, on 21 June 2010, DOT brought a condemnation action against defendant taking a "[f]ee simple title to right of way, and a slope easement for providing lateral support to the highway, or land adjacent thereto . . . [and] a temporary construction easement to continue until the completion of the project[.]" DOT did not claim to be acquiring defendant's abutter's rights of access to Dowdle Mountain Road; however, DOT did close the section of Dowdle Mountain Road that abutted the "entire northern frontage" of defendant's property.

On 7 July 2010, defendant filed an answer and admitted that DOT and defendant "ha[d] been unable to agree as to the purchase price of the property." Defendant alleged that the amount DOT deposited with the Clerk of Court was "grossly inadequate" to compensate for the property taken and requested a jury trial to determine proper compensation. On 30 January 2014, DOT filed a motion for a hearing pursuant to N.C. Gen. Stat. § 136-108, specifically requesting that prior to the jury trial, which would address the value of compensation, the court "decide whether the Department of Transportation's actions in closing a portion of Dowdle Mountain Road [wa]s compensable or whether the said actions constitute[d] a non-compensable exercise of the State's police power."

A hearing pursuant to N.C. Gen. Stat. § 136-108 was held at the 10 February 2014 session of Macon County Superior Court, the Honorable Bradley B. Letts presiding. At a hearing pursuant to N.C. Gen. Stat. § 136-108, the trial judge "hear[s] and determine[s] any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken." N.C. Gen. Stat. § 136-108 (2013). At the hearing in this case, the main issue disputed was whether the closing of the portion of Dowdle Mountain Road that abutted the northern front of defendant's property constituted a compensable taking of defendant's property.

Both parties stipulated to the following pertinent facts:

> 2. Before the taking, the subject property's entire northern frontage, a distance of approximately 338 feet, abutted Dowdle Mountain Road.

3. Before the taking, there was an access point on the property that was oriented north and accessed Dowdle Mountain Road on the subject property's northern boundary.

4. After the taking, Dowdle Mountain Road has been physically closed along the property's entire northern boundary and the property has no access to Dowdle Mountain Road along its northern boundary.

5. After the taking, the property's north-pointing access has been changed to point west, toward Oak Forest Road.

6. Due to the re-routing of Dowdle Mountain Road, the property now has access to the rerouted Dowdle Mountain Road at a point on its eastern boundary.

. . . .

9. The subject property is not restricted by any legal "control of access" as a result of this Project or the condemnation.

10. A vehicle coming off of Highway 441 and desiring to turn into the western access point on the subject property now has to travel around the traffic circle which is an additional driving distance of approximately 650 feet more than it had to travel in the before condition.

11. In order for an 18 wheel truck approaching the property from the east that desires to also exit east off of the property, it now has to go around the traffic circle and enter the west entrance of the property which is an additional driving distance of approximately 275 [feet] more than it had to travel in the before condition.

On 6 May 2014, the trial court concluded "that the re-routing and discontinuance of a portion of Dowdle Mountain Road [wa]s a legitimate exercise of NCDOT's police powers and [wa]s not compensable[.]" Based on the stipulated facts, the trial court concluded that DOT "did not substantially interfere with the Defendants' access" because "the Defendants retain access to all of the same roads in the after condition as they did in the before condition," and that the "minor circuity of travel is not compensable." On 31 May 2014, defendant gave this Court notice of appeal of the trial court's order.

II. Interlocutory Appeal

Generally, this Court reviews a final judgment of the Superior Court, pursuant to N.C. Gen. Stat. § 7A-27(b)(1). An interlocutory order is one that "does not determine the issues[,] but directs some further proceeding preliminary to final decree." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708 (1999) (citation and internal quotation marks omitted). An order entered pursuant to N.C. Gen. Stat. § 136-108 is an interlocutory order because "[t]he trial court d[oes] not completely resolve the entire case," but instead "determine[s] all relevant issues other than damages in anticipation of a jury trial on the issue of just compensation." *Id.* at 174, 521 S.E.2d at 708-09. Here, the trial court's order is an interlocutory order. The order is not a final judgment in the proceeding because the jury still must determine the amount of compensation defendant is entitled to for DOT's taking of its property.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Hammer Publ'ns v. Knights Party*, 196 N.C. App. 342, 345, 674 S.E.2d 720, 722 (2009) (citation and internal quotation marks omitted). However an interlocutory order is reviewable by this Court when it "affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709 (citation omitted). The North Carolina Supreme Court has held that condemnation hearing orders "concerning title and area taken are vital preliminary issues" that affect a party's substantial right and thus must be immediately appealed pursuant to N.C. Gen. Stat. § 1-277. *Id.* at 176, 521 S.E.2d at 709 (citation and internal quotation marks omitted).

Here, the issue is whether the loss of access to Dowdle Mountain Road on the northern frontage of defendant's property constitutes a taking of defendant's appurtenant easement, a legal interest in the road that abuts defendant's property. This issue affects a substantial right because the question of what area was taken is a "vital preliminary issue" that must be determined before proceeding to a jury trial regarding proper compensation. *Id.* The North Carolina Supreme Court explained that "[o]ne of the purposes of G.S. 136-108 was to eliminate from the jury trial any question as to what land the [State] is condemning and any question as to its title." *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967). For the jury to determine compensation, it must know whether DOT's action constituted a compensable taking of defendant's appurtenant easement in order to know if the defendant should be compensated for the value of its appurtenant easement. Thus,

the interlocutory order affects defendant's substantial right, and we review the merits of defendant's appeal.

III. Discussion

Defendant raises three issues on appeal. Defendant argues the trial court erred by: (A) concluding that the closure of Dowdle Mountain Road along the northern boundary of defendant's property does not constitute a taking; (B) concluding that "the re-routing and discontinuance of a portion of Dowdle Mountain Road is a legitimate exercise of NCDOT's police powers and is not compensable"; and (C) concluding the precedent regarding abutters' rights of access taken to create controlled access roads is not applicable to the present case. We disagree.

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. . . . [U]nchallenged findings of fact are presumed correct and are binding on appeal. The trial court's conclusions of law are subject to *de novo* review.

DOT v. Webster, __ N.C. App. __, __, 751 S.E.2d 220, 226 (2013) (citations and internal quotation marks omitted)

A. and B.

First, in issue (A), defendant contends it is entitled to compensation for the taking of its easement appurtenant in the portion of Dowdle Mountain Road DOT closed. Furthermore, in issue (B), defendant contends that DOT's closure of the portion of Dowdle Mountain Road that abuts its property was not a lawful exercise of police power, but instead constituted a compensable taking. We disagree. Because defendant's arguments (A) and (B) are so closely related, we address these two issues together.

"An owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway." *DOT v. Harkey*, 308 N.C. 148, 151, 301 S.E.2d 64, 67 (1983). "This right of access is an easement appurtenant." *Snow v. N.C. State Highway Comm'n*, 262 N.C. 169, 173, 136 S.E.2d 678, 682 (1964). Here, defendant had an easement appurtenant in Dowdle Mountain Road because "the [defendant's] property's entire northern frontage . . . abutted Dowdle Mountain Road." However, "not all interferences with easements of access constitute

a compensable taking pursuant to a state agency's power of eminent domain." *Harkey*, 308 N.C. at 152, 301 S.E.2d at 67.

To determine if the State's action is a compensable taking, the trial court must first determine if the action resulted in eliminating all direct access to the roadway. *See Harkey*, 308 N.C. at 155, 301 S.E.2d at 69. If the State's action eliminates all direct access to the abutting road, then the action is "a taking as a matter of law." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71. "[W]hen all direct access is taken no inquiry into the reasonableness of alternative access is required to determine liability." *Id.* at 155-56, 301 S.E.2d at 69. In *Harkey*, the North Carolina Supreme Court determined there was no direct access to the roadway because "[a]ccess [was] only available through a series of *local roads* which are part of the city street system," and "no frontage or service road directly visible and accessible from the highway ha[d] been provided." *Id.* at 158, 301 S.E.2d at 70. Accordingly, in *Harkey* the North Carolina Supreme Court held that there was a taking and that the property owners were entitled to compensation for the loss of direct access to the abutting road. *Id.* at 149, 301 S.E.2d at 65.

Here, however, DOT's closure of the section of Dowdle Mountain Road that abutted the northern frontage of defendant's property did not eliminate all direct access from defendant's property to Dowdle Mountain Road. There is direct access to the re-routed Dowdle Mountain Road at the eastern boundary of defendant's property. Prior to the re-routing of Dowdle Mountain Road, defendant's property had a service road located at the eastern boundary of its property that connected to an unpaved road, which could be used to access Dowdle Mountain Road. After the completion of DOT's construction project, the service road on the eastern side of defendant's property directly abuts the re-routed Dowdle Mountain Road. In comparing Plaintiff's Exhibit 1, which depicts the property's road access prior to construction, and Plaintiff's Exhibit 3, which depicts the property's road access after completion of the construction, it is clear that defendant's property now has direct access to the re-routed Dowdle Mountain Road from a paved driveway on the eastern side of the property, where the unpaved service road had been located. In fact, the trial court properly concluded that "[p]rior to the taking, the Defendants had two access points, one that led to the four lane Highway 441, and the other onto Dowdle Mountain Road," and "[a]fter the taking, the Defendants still had two access points, one that leads to the four lane Highway 441, and the other onto Dowdle Mountain Road." The access to Dowdle Mountain Road from defendant's property accommodates 18 wheel trucks, thus the new route does not restrict

who can access defendant's property. At most, the re-routed road results in a vehicle having to travel a maximum of 650 feet more than it had to travel before to access defendant's property from the highway. These minimal changes do not result in a compensable taking because defendant still has direct access to Dowdle Mountain Road.

Since DOT's actions did not eliminate all direct access to Dowdle Mountain Road, the trial court properly considered whether the DOT exercised its police power in re-routing Dowdle Mountain Road. If direct access to the roadway still exists then the trial court's decision should be "based on a police-power analysis." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71. The North Carolina Department of Transportation has the power "to change or relocate any existing roads that the Department of Transportation may now own or may acquire[.]" N.C. Gen. Stat. § 136-18(2) (2013). Thus, "the determinative question is whether reasonable, direct access [to Dowdle Mountain Road] has been provided." *Harkey*, 308 N.C. at 158, 301 S.E.2d at 71.

Defendant correctly contends that a property owner is entitled to compensation as a matter of law, even if direct access to the abutting road is not completely eliminated, but is substantially interfered with by the State. *State Highway Comm'n v. Yarbourough*, 6 N.C. App. 294, 302, 170 S.E.2d 159, 165 (1969). To determine if the defendant's direct access to the abutting road has been substantially interfered with, the trial court must determine whether a "reasonable means of ingress and egress remains or is provided[.]" *Id.* at 302, 170 S.E.2d at 165. If the trial court determines there is a "reasonable means of ingress and egress" from the street that previously abutted the property, then the State act is not a compensable taking, but instead a "legitimate exercise of the police power." *Id.* The North Carolina Supreme Court explained that "those who . . . purchase and occupy property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest." *Sanders et al. v. Town of Smithfield*, 221 N.C. 166, 170-71, 19 S.E.2d 630, 633 (1942). Therefore, "[t]o justify recovery . . . the damages must be direct, substantial and proximate, and not such as are attributable to mere inconvenience[.]" *Id.* at 171, 19 S.E.2d at 633. "While the abutting owner has a right of access, the manner in which that right may be exercised is not unlimited. . . . the sovereign may restrict the right of entrance to reasonable and proper points." *Nuckles*, 271 N.C. at 21, 155 S.E.2d at 788 (citation and internal quotation marks omitted).

Here, defendant still has "reasonable means of ingress and egress" from Dowdle Mountain Road to the property. *Yarbourough*, 6 N.C. App.

at 303, 170 S.E.2d at 165. Defendant's access to Dowdle Mountain Road was simply re-located to the eastern section of its property due to the re-routing of Dowdle Mountain Road. Defendant erroneously contends the action taken by DOT is analogous to the action taken by the Board of Transportation in *Dr. T.C. Smith Co. v. N.C. Highway Commission*, where the Board of Transportation "completely cut off and totally denied plaintiff's abutter's rights of direct access to [the abutting street] by including it within [a] controlled-access [h]ighway[.]" *Dr. T.C. Smith Co. v. N.C. Highway Comm'n*, 279 N.C. 328, 334, 182 S.E.2d 383, 387 (1971). As a result, the property owner had no direct access to the abutting street, and the North Carolina Supreme Court held that the Board of Transportation's act was not a lawful exercise of police power, but instead constituted a compensable taking. *Id.* at 337, 182 S.E.2d at 388. In the present case, Dowdle Mountain Road was not turned into a controlled access highway. Instead, the portion that abutted the northern frontage of defendant's property was completely closed, and the road was re-routed. Unlike in *Dr. T.C. Smith*, where the property owner lost all direct access to the abutting road, defendant still has direct access to Dowdle Mountain Road. DOT merely used its police powers to re-route Dowdle Mountain Road and as a result changed where the property's access point to Dowdle Mountain Road is located. Therefore, the trial court did not err in concluding DOT's action was a lawful exercise of police power and thus not a compensable taking.

C.

In the last argument, defendant contends the trial court erred in concluding that *Dep't of Transp. v. Harkey*, 308 N.C. 148, 301 S.E.2d 64 (1983) and *Frander v. Bd. of Transp.*, 66 N.C. App. 344, 311 S.E.2d 308 (1984) are not applicable because "[c]ompensation for when NCDOT legally controls access, like in the *Harkey* and the *Frander* cases, is compensated under a different statute, G.S. § 136-89.53, than the one governing compensation in this case, G.S. § 136-112." We disagree.

Defendant argues on appeal that the trial court's conclusion amounts to holding that a compensable taking of a property owner's abutter's right of access only occurs when DOT makes the abutting road a closed access road. Defendant's argument mischaracterizes the trial court's conclusion. The trial court did not conclude that converting a road to a controlled access highway is the only way to have a compensable taking of an abutter's right of access. Instead, the trial court clarified that when the State makes a road a closed access road that action is distinguishable from completely closing a portion of the road, as was done here.

A controlled access highway is "a State highway, or section of State highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right or easement of access." N.C. Gen. Stat. § 136-89.49(2) (2013). In both *Harkey* and *Frander*, all direct access to the roads that previously abutted the defendants' properties was eliminated when the State turned the abutting roads into closed access roads. *See Harkey*, 308 N.C. at 149, 301 S.E.2d at 66 (finding that "the church property will have no direct access to the new [controlled access] highway once it is completed"); *Frander*, 66 N.C. App. at 346, 311 S.E.2d at 310 (concluding the State's controlled access highway project resulted in all direct access from defendant's property to the abutting road being eliminated). The trial court clarified that the State action taken in *Harkey* and *Frander* – making the abutting road a closed access road – is distinguishable from the action in this case. We hold that the trial court properly found these cases were distinguishable from the present case.

Defendant is correct in its contention that the action of creating a closed access road is not required to have a compensable taking. In fact, re-routing a road could result in a compensable taking. The main issue is not what action the State took but whether that action eliminated all direct access to the abutting road, as previously discussed. *See Harkey*, 308 N.C. at 154, 301 S.E.2d at 71.

Not only is the State action of creating a closed access road different from closing a portion of the abutting road, but the applicable statute is also different. N.C. Gen. Stat. § 136-89.53 specifically codifies that when the State converts a road to a closed access road that act results in a compensable taking for property owners with an abutter's right of access to that road. N.C. Gen. Stat. § 136-89.53 (2013)[1]. Defendant is correct that N.C. Gen. Stat. § 136-89.53 does not change the aforementioned case law regarding compensable takings of abutters' rights of access, it simply codifies the result when the State action is converting a road to a closed access road. *Id.* However, the trial court correctly explains that it would be improper to rely upon case law that is governed by a statute that is inapplicable in this case. Thus, the trial court did not err by

1. "The Department of Transportation . . . may designate and establish an existing street or highway as included within a controlled-access facility. When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access." N.C. Gen. Stat. § 136-89.53 (2013).

concluding that *Harkey* and *Frander* were not applicable to the present case based on the fact that DOT did not make Dowdle Mountain Road a controlled access road.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

DOUGLAS C. EARL, AND GALE L. SIMMET, AS CO-TRUSTEES OF THE EARL/SIMMET LIVING TRUST, DATED FEBRUARY 2, 2013, PLAINTIFFS
v.
CGR DEVELOPMENT CORPORATION, A CORPORATION, AND CAREFREE COVE COMMUNITY ASSOCIATION, INC., DEFENDANTS

No. COA14-1219

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—substantial right—arbitration

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Arbitration and Mediation—motion to stay action—motion to compel—sufficiency of findings of fact

The trial court erred by denying defendants' motion to dismiss and alternative motion to stay action pending arbitration and to compel arbitration. The trial court failed to make any of the requisite findings of fact or conclusions to show: (1) whether the parties had a valid agreement to arbitrate; and (2) whether this matter fell within the scope of that agreement.

Appeal by defendants from order entered 20 August 2014 by Judge Richard L. Doughton in Ashe County Superior Court. Heard in the Court of Appeals 18 May 02015.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Frank C. Wilson, III, for plaintiffs-appellees.

Rossabi Black Slaughter, P.A., by Gavin J. Reardon, for defendants-appellants.

TYSON, Judge.

CGR Development Corporation and Carefree Cove Community Association, Inc. (collectively, "Defendants") appeal from order denying their motion to dismiss and alternative motion to stay action pending arbitration and to compel arbitration. We reverse and remand.

I. Factual Background

Carefree Cove is a residential subdivision located within Ashe and Watauga Counties, North Carolina. All lots in Carefree Cove are subject to the Declaration of Covenants and Restrictions of Carefree Cove ("the Restrictive Covenants"). Defendant CGR Development Corporation is the Declarant that filed the Restrictive Covenants, which were recorded on 12 July 2001 in the Ashe County Registry. Defendant Carefree Cove Community Association, Inc. ("the Association") is the homeowner's association for Carefree Cove.

The Association is subject to the Bylaws of Carefree Cove Community Association, Inc. ("the Bylaws"). Article 10 of the Bylaws provides, in part: "Prior to the institution of litigation, the parties to a dispute shall submit the dispute to the American Arbitration Association for binding arbitration."

Plaintiffs own two lots in Carefree Cove, conveyed subject to all covenants and restrictions set out in the Restrictive Covenants. On 17 December 2013, Plaintiffs filed a complaint against Defendants alleging Defendant CGR "refused to perform all affirmative acts required . . . in the Restrictive Covenants, to convey the common areas to the association, turn over the management of Association and allow the members to elect at least majority [sic] of the Board of Administrators of the Association as set forth in . . . the Declaration." Plaintiffs sought a declaratory judgment to require Defendant CGR to perform these affirmative acts. Plaintiffs' claim for relief requested an order compelling Defendant CGR to "convey the common areas to the [A]ssociation, turn over the management of Association and allow the members to elect at least majority [sic] of the Board of Administrators of the Association."

Defendants moved to dismiss the action for failure to state a claim upon which relief can be granted due to the arbitration clause in the Bylaws. Defendants moved, in the alternative, to stay the action pending arbitration and compel arbitration.

The trial court entered an order denying Defendants' motion to dismiss and alternative motion to stay the action pending arbitration and to compel arbitration on 20 August 2014.

Defendants' gave timely notice of appeal to this Court.

II. Issues

Defendants argue the trial erred by (1) failing to include required findings in its order; and (2) denying Defendants' motion to dismiss and motion to stay the action and compel arbitration.

III. Review of Order Denying Request for Arbitration

[1] Defendants' appeal is interlocutory. An order or judgment is interlocutory if it does not settle all the pending issues and "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80 (citation omitted), *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985). The trial court's denial of Defendants' motion to compel arbitration is interlocutory. *Moose v. Versailles Condominium Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005) (citation omitted).

An interlocutory order is generally not immediately appealable. An exception to this rule exists if the appellant shows the order affects a substantial right, which will be lost if it is not reviewed prior to the issuance of a final judgment. N.C. Gen. Stat. §§ 1-277(a) (2013), 7A-27(b)(1) (2013); *Guilford Cnty. ex rel. Gardner v. Davis*, 123 N.C. App. 527, 529, 473 S.E.2d 640, 641 (1996).

This Court has repeatedly held "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted). *See Moose*, 171 N.C. App. at 381, 614 S.E.2d at 422; *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 633, 610 S.E.2d 293, 295 (2005); *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002). We acquired jurisdiction to hear Defendants' appeal from the trial court's interlocutory order denying arbitration.

IV. Analysis

[2] Defendants argue, and Plaintiffs concede, the trial court's order lacks the required findings and conclusions to show whether this matter is subject to mandatory arbitration.

A. Standard of Review

In our review of an arbitration agreement, this Court examines "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that

agreement." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citations and internal quotation marks omitted).

In considering the first prong, "[t]he trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (citation omitted), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). We review *de novo* whether the specific dispute is governed by the arbitration agreement. T*ohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 391, 496 S.E.2d 800, 804 (1998). *See also Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001).

B. Findings of Fact in Trial Court's Order

The entirety of the trial court's order denying Defendants' motion to dismiss and motion to stay and compel arbitration states:

> This cause coming on to be heard upon Defendants' CGR Development Corporation and Carefree Cove Community Association, Inc.'s Motion to Dismiss and Alternative Motion to Stay Action Pending Arbitration and to Compel Arbitration at the August 11, 2014, calendar for the Superior Court of Ashe County, North Carolina, Honorable Richard L. Doughton presiding, and the Court having considered same as well as arguments of counsel for the Plaintiffs and the Defendants in open court, it is
>
> ORDERED, ADJUDGED and DECREED that Defendants' Motion to Dismiss and Alternative Motion to Stay Action Pending Arbitration and to Compel Arbitration is hereby DENIED.

The order appealed from does not state any grounds for the trial court's denial of Defendants' motion to stay and compel arbitration. No findings of fact allow this Court to review and determine whether competent evidence supports the trial court's denial of Defendants' motion to stay and compel arbitration. *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580. *See Barnhouse v. Am. Express Fin. Advisors, Inc.*, 151 N.C. App. 507, 509, 566 S.E.2d 130, 132 (2002) (holding "[t]he order denying defendants' motion to stay proceedings [pending arbitration] does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants' motion").

Without setting forth findings of fact, this Court cannot conduct a meaningful review of the conclusions of law and "test the correctness of [the trial court's] judgment." *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 480, 366 S.E.2d 705, 707 (1988). This Court has repeatedly held "the trial court must state the basis for its decision in denying a defendant's motion to stay proceedings [pending arbitration] in order for this Court to properly review whether or not the trial court correctly denied the defendant's motion." *Steffes v. DeLapp*, 177 N.C. App. 802, 804, 629 S.E.2d 892, 894 (2006). *See Griessel v. Temas Eye Center, P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009) (reversing and remanding trial court's order where trial court "made no finding of fact as to the existence of a valid agreement to arbitrate"); *United States Trust Co., N.A. v. Stanford Group Co.*, 199 N.C. App. 287, 291, 681 S.E.2d 512, 515 (2009) (reversing and remanding trial court's order because "the order does not set out the rationale underlying the trial court's decision to deny defendants' motion"); *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297 (requiring "a determination whether an arbitration agreement exists between the parties").

The trial court's order fails to state whether the parties were bound by an arbitration agreement or whether this matter fell within the scope of that agreement. We are unable to determine any basis for the trial court's ruling.

We are required to remand for entry of an order, which shows the required two-step analysis and includes findings and conclusions necessary to resolve Defendants' motion. *Ellis-Don*, 169 N.C. App. at 635, 610 S.E.2d at 297. Because of our resolution of this issue, it is unnecessary to address Defendants' remaining argument.

V. Conclusion

The trial court failed to make any of the requisite findings of fact or conclusions to show: (1) whether the parties had a valid agreement to arbitrate; and, (2) whether this matter falls within the scope of that agreement. The trial court's denial of Defendants' motion to dismiss and motion to stay and compel arbitration is reversed. The matter is remanded for further findings and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and GEER concur.

IN RE K.M.M.

[242 N.C. App. 25 (2015)]

IN THE MATTER OF K.M.M.

No. COA14-918

Filed 7 July 2015

1. Juveniles—delinquency—misdemeanor larceny—sufficiency of evidence

The trial court did not err by denying a juvenile's motion to dismiss charges of misdemeanor larceny and an adjudication of delinquency arising from the theft of a cell phone from a table at a fast food restaurant where defendant contested his identification as the perpetrator. The State presented evidence of the victim, a witness who chased defendant, and several officers, and defendant was found with a spoon from the restaurant as well as two receipts from the restaurant time stamped for around the time of the theft.

2. Juveniles—delinquency—misdemeanor larceny—sufficiency of findings

The trial court made sufficient findings to support adjudicating a juvenile delinquent where it found in the written order that the juvenile had taken an iPhone valued at $300 from the victim. N.C.G.S. § 7B-2411 does not require any additional findings to support an adjudication of delinquency for misdemeanor larceny.

Appeal by juvenile from adjudication order entered 2 April 2014 by Judge Robert Rader in Wake County Juvenile Court. Heard in the Court of Appeals 20 January 2015.

Michelle FormyDuval Lynch, for respondent.

Attorney General Roy Cooper, by Assistant Attorney General Kathryn H. Shields, for the State.

CALABRIA, Judge.

K.M.M. ("the juvenile") appeals the 2 April 2014 adjudication of the juvenile as delinquent that resulted in a disposition order placing him on probation for nine months. We affirm.

On 16 October 2013 at approximately 5:00 p.m., Alicia Nguyen ("Ms. Nguyen") was eating dinner at a Wendy's restaurant in Raleigh, North Carolina. While she was eating, three young African-American men

entered the restaurant and sat down at a table behind her. Ms. Nguyen turned around to look at them because they were being rowdy and making rude remarks. Later, two of the young men walked toward the bathroom while the third stood at the food counter facing Ms. Nguyen. The last time Ms. Nguyen looked at her watch, it was 5:30 p.m.

After talking on her iPhone cellular telephone, Ms. Nguyen placed the iPhone on the table. The three young men then surrounded Ms. Nguyen. One of the three young men told his companions to take the iPhone, and the young man standing behind Ms. Nguyen grabbed it off the table. The three then ran from Wendy's with the iPhone, and Ms. Nguyen chased them.

While Ms. Nguyen was chasing the young men, she came into contact with a woman who called 911 at approximately 5:30 p.m. to report the larceny for Ms. Nguyen. Then, Ms. Nguyen came into contact with Patrick Wall ("Mr. Wall"). Ms. Nguyen told Mr. Wall about the theft, and Mr. Wall turned around and drove in the direction Ms. Nguyen had last seen the young men running. Minutes before meeting Ms. Nguyen, Mr. Wall had driven past three young African-American men in that direction. When he saw the three young men again, they ran.

Officer William Edwards ("Officer Edwards") of the Raleigh Police Department ("RPD") investigated the iPhone theft. Ms. Nguyen provided Officer Edwards with a description of the suspects and their clothing. Mr. Wall then informed Officer Edwards where he had last seen the suspects. Officer John Walls ("Officer Walls") detained two individuals that matched the suspects' descriptions.

The juvenile, one of the young men detained, had a Wendy's spoon and two Wendy's receipts in his pockets that were time-stamped 5:29 p.m. and 5:33 p.m. The times on the receipts coincided with the time that the larceny took place at Wendy's. Mr. Wall then observed the individuals at a showup and identified the two individuals as the young men he had previously seen. The juvenile and his companion were taken into custody, and the juvenile was charged with misdemeanor larceny.

On 15 March 2014, a juvenile delinquency hearing was conducted in Wake County District Court. At the hearing, the State presented evidence from Ms. Nguyen, Mr. Wall, Officer Edwards, Officer Walls, RPD Officer D.B. Morland ("Officer Morland"), and RPD Officer Gregory Modetz ("Officer Modetz"). Ms. Nguyen identified the juvenile as one of the young men who stole her iPhone. The juvenile made a motion to dismiss at the close of the State's evidence and at the close of all

the evidence. The trial court denied both motions, adjudicated the juvenile as delinquent for misdemeanor larceny pursuant to N.C. Gen. Stat. § 14–52 (2013), and placed the juvenile on probation for nine months. The juvenile appeals.

[1] The juvenile first argues that the trial court erred by denying his motion to dismiss and adjudicating him as delinquent. Specifically, the juvenile is not challenging the evidence regarding the elements of larceny. Rather, he contends that there was insufficient evidence that he was the perpetrator of the larceny. We disagree.

"We review a trial court's denial of a juvenile's motion to dismiss *de novo*." *In re J.F.*, ____ N.C. App. ____, ____, 766 S.E.2d 341, 347 (2014) (citation omitted). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] juvenile's being the perpetrator of such offense." *Id.* (quoting *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001)) (internal quotation marks omitted). Pursuant to N.C. Gen. Stat. § 14–72(a) (2013), the elements of larceny are: "(1) the wrongful taking and carrying away; (2) of the personal property of another; (3) without his consent; (4) with the intent to deprive permanently the owner thereof." *State v. Edwards*, 310 N.C. 142, 146, 310 S.E.2d 610, 613 (1984).

"The juvenile's motion to dismiss should be denied if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the juvenile committed it." *In re R.N.*, 206 N.C. App. 537, 539, 696 S.E.2d 898, 901 (2010) (citation omitted) (internal quotation marks omitted). "Substantial evidence is that amount of relevant evidence sufficient to persuade a rational juror to accept a particular conclusion." *Id.* "When reviewing a motion to dismiss a juvenile petition, courts must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference of fact that may be drawn from the evidence." *In re S.M.S.*, 196 N.C. App. 170, 172, 675 S.E.2d 44, 45 (2009) (citation omitted).

In the instant case, at the juvenile delinquency hearing, the State presented evidence from Ms. Nguyen, Mr. Wall, Officer Edwards, Officer Walls, Officer Morland, and Officer Modetz. Ms. Nguyen identified the juvenile as one of the three young men who stole her iPhone. Ms. Nguyen recognized his face from when she turned around while he was sitting at the table behind her and also when he was standing near the counter facing her at the Wendy's. While chasing the three young men who stole

her iPhone, Ms. Nguyen was able to further observe their clothing. She reported to Officer Edwards and Officer Modetz that the juvenile was wearing a red jacket and possibly a hat and that one of the other young men was wearing gray shorts.

Mr. Wall first saw the juvenile and two other young men walking down the middle of the street close to his car. Minutes later, when Mr. Wall learned the perpetrators had run toward the street where he had just seen the young men, Mr. Wall turned around to look for them. He recognized the three young men again, and they ran. Mr. Wall identified the juvenile in a showup the day of the larceny. Mr. Wall also stated that the juvenile was wearing a red jacket, another young man was wearing gray, and one of the young men had a hat.

The arresting officers, Officer Walls and Officer Morland, testified that the juvenile had a Wendy's spoon in his back pocket despite the juvenile's denial that he had been at Wendy's. Additionally, Officer Morland found two Wendy's receipts in the juvenile's back pocket. The receipts were time-stamped 5:29 p.m. and 5:33 p.m., which is evidence that places the juvenile in Wendy's at the time of the iPhone theft. Officer Walls also testified that the juvenile was wearing a red hoodie jacket.

The State presented substantial evidence that the juvenile was the perpetrator of the larceny, and the trial court considered the evidence in the light most favorable to the State. Therefore, the trial court did not err by denying the juvenile's motion to dismiss.

[2] The juvenile next argues that the trial court erred by failing to make sufficient findings of fact to support his delinquency adjudication. We disagree.

"[A]lleged statutory errors are questions of law [and we review them] *de novo*. Under the *de novo* standard, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court." *In re A.M.*, 220 N.C. App. 136, 137, 724 S.E.2d 651, 653 (2012) (quoting *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012)).

Pursuant to N.C. Gen. Stat. § 7B–2411 (2013),

> [i]f the court finds that the allegations in the petition have been proved [beyond a reasonable doubt] as provided in G.S. 7B–2409, the court shall so state in a written order of adjudication, which shall include, but not be limited to, the date of the offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

This Court has stated that this statute

> does not require the trial court to delineate each element of an offense and state in writing the evidence which satisfies each element, and we recognize that section 7B–2411 does not specifically require that an adjudication order contain appropriate findings of fact, as does section 7B–807, the statute governing orders of adjudication in the abuse, neglect, or dependency context. N.C. Gen. Stat. §§ 7B–807(b), 2411 (2009). Nevertheless, at a minimum, section 7B–2411 requires a court to state in a written order that 'the allegations in the petition have been proved [beyond a reasonable doubt].' N.C. Gen. Stat. § 7B–2411.

In re J.V.J., 209 N.C. App. 737, 740, 707 S.E.2d 636, 638 (2011) (internal quotation marks omitted). Although *In re Minor*, an unpublished decision, is not binding authority, we find that it is instructive. *See* 160 N.C. App. 708, ____ S.E.2d ____, No. COA03-368, 2003 WL 22388748. This Court, in *Minor*, found that the trial court made sufficient findings of fact when it found, "beyond a reasonable doubt: . . . that the juvenile committed the offense as alleged in the petition filed [3 April 2002] alleging common law robbery and is adjudicated delinquent." 160 N.C. App. at ____, ____ S.E.2d at ____, 2003 WL 22388748, at *2. The petition alleged that the juvenile "unlawfully, willfully, and feloniously did steal, take, and carry [a]way [Juan Gonzales's personal property] . . . by means of an assault upon him consisting of the forcible and violent taking of the property." *Id.*

In re Wade is also consistent with disposition of this issue. The order in *Wade* was reversed because, *inter alia*, the trial court failed to state that its adjudication was based upon facts that were proved beyond a reasonable doubt. 67 N.C. App. 708, 711, 313 S.E.2d 862, 864–65 (1984); *see also In re J.J., Jr.*, 216 N.C. App. 366, 372, 717 S.E.2d 59, 64 (2011) (holding that the trial court did not make sufficient findings of fact when, "[i]nstead of addressing any of the allegations in the petition in the blank space [on the adjudication order], the trial court failed to use the space and made no written findings at all").

In the instant case, as in *Minor*, the trial court found that the allegations had been proved beyond a reasonable doubt and stated so in its written adjudication order. Specifically, the trial court found that it was proved beyond a reasonable doubt "[t]hat on or about the date of 10–16–2013, the juvenile did unlawfully and willfully steal, take, and carry away a White Apple [iP]hone with a pink and gray otter box case,

the personal property of [Ms.] Nguyen having a value of $300.00." N.C. Gen. Stat. § 7B–2411 does not require any additional findings of fact to support the adjudication order. Therefore, the trial court made sufficient findings of fact to support the juvenile's adjudication of delinquency for misdemeanor larceny.

In conclusion, the trial court heard and considered the State's evidence, including testimony from Ms. Nguyen, Mr. Wall, and four police officers; narratives of the events at Wendy's; the location of the young men after the iPhone theft; the description of the young men involved; and the items found on the juvenile when arrested. The trial court made findings of fact that comply with N.C. Gen. Stat. § 7B–2411. This was sufficient evidence of the larceny to support the delinquency adjudication and find that the juvenile was the perpetrator of the larceny. Therefore, the trial court properly denied the juvenile's motion to dismiss. We affirm the trial court's denial of the juvenile's motion to dismiss and the order adjudicating the juvenile as delinquent for misdemeanor larceny.

AFFIRMED.

Chief Judge McGEE and Judge McCULLOUGH concur.

IN THE MATTER OF FRANCES SORRENTINO TAYLOR, DECEASED

No. COA15-159

Filed 7 July 2015

1. Estates—reimbursement claim for funeral expenses—statutory procedure and deadline—clerk of court's jurisdiction

On appeal from the trial court's order vacating an order entered by the clerk of court concerning an estate matter, the Court of Appeals overruled petitioner's argument that the trial court erred by denying her claim for reimbursement of funeral expenses. Petitioner failed to comply with the statutory procedure and deadline for challenging the denial of her claim for funeral expenses, and the clerk of court did not have jurisdiction to her the claim.

2. Estates—attorney fees—determination by clerk of court

The trial court erred in an estate matter by concluding that the clerk of court lacked authority to review an attorney fees petition

for reasonableness. The Court of Appeals agreed, however, with the trial court's determination that the clerk's order lacked sufficient findings to support its decision as to the amount of attorney fees that were reasonable. The matter was remanded to the clerk of court.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

Appeal by respondent from order entered 20 October 2014 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 3 June 2015.

Ward and Smith, P.A., by Alexander C. Dale and Jeremy M. Wilson, for petitioners-appellees.

Sharon A. Keyes for respondent-appellant.

DAVIS, Judge.

Pamela Blackmore ("Blackmore") appeals from the trial court's order vacating a prior order entered by the clerk of court regarding the estate of Frances Sorrentino Taylor ("the Estate"). On appeal, Blackmore argues that the trial court erred in (1) upholding the executor's denial of her request for reimbursement for the expenses from the decedent's funeral; and (2) determining that certain attorneys' fees and expenses incurred by Richard E. Taylor, II ("Taylor") in his capacity as executor were payable by the Estate. After careful review, we affirm in part and vacate and remand in part.

Factual Background

Frances Sorrentino Taylor ("the decedent") died on 5 May 2012 and was survived by her four children: Taylor, Sharon Taylor Dixon ("Dixon"), Frances Lynn Taylor Stoller ("Stoller"), and Blackmore — all beneficiaries of the Estate. The decedent's last will and testament was filed for probate with the Cumberland County Clerk of Court, and Taylor qualified as executor of the Estate on 14 May 2012. Taylor published a notice to creditors on four successive weeks as required by statute on 19 May 2012, 26 May 2012, 2 June 2012, and 9 June 2012, requiring creditors to submit their claims on or before 19 August 2012.

On 7 August 2012, Blackmore submitted a timely claim against the Estate seeking payment of $18,480.00 for caretaking services she provided to the decedent prior to her death. No other claims were submitted

by Blackmore at that time. Following the rejection of her claim by Taylor, Blackmore filed a lawsuit ("the Care Services Action") in Cumberland County Superior Court against the Estate, and Taylor retained Ward and Smith, P.A. ("Ward and Smith"), a law firm, to represent the Estate in that litigation and to provide general assistance regarding the administration of the Estate. The Honorable C. Winston Gilchrist granted summary judgment in the Estate's favor in the Care Services Action by order entered 23 July 2013, and Blackmore's action against the Estate was dismissed with prejudice. Subsequently, on 19 November 2013, the Honorable James G. Bell entered an order in that action (1) determining that "[t]he Estate has incurred reasonable attorneys' fees, costs, and expenses in this matter in the total amount of Thirty-Four Thousand Three Hundred Sixteen and 86/100 Dollars ($34,316.86)"; (2) concluding that Blackmore's complaint against the Estate was frivolous and that Blackmore should have known that the complaint "had no justiciable issues"; and (3) ordering Blackmore, pursuant to N.C. Gen. Stat. § 6-21.5, to "pay to the Estate in reimbursement of its reasonable attorneys' fees, costs, and expenses the total amount of $500.00."

On 17 July 2013, Blackmore filed a "Request for Reimbursement from Decedent's Estate," seeking $15,742.30 in reimbursement for funeral expenses that had been paid from Blackmore's and Dixon's joint bank account. This account was a deposit account with a right of survivorship that named the decedent, Blackmore, and Dixon as joint owners. On 23 September 2013, Taylor filed a petition asking the Clerk of Court to disallow Blackmore's request for reimbursement with regard to the funeral expenses and allow him to "move forward with paying final estate administration expenses, making final distributions to beneficiaries, and closing the Estate." In his petition, Taylor alleged that Blackmore's reimbursement claim against the Estate was time-barred and stated that "to the extent a formal response is required . . . Taylor hereby notifies Blackmore that the Claim is absolutely and unequivocally rejected, disallowed and denied." The Estate further noted its understanding that the joint account consisted solely of funds contributed by the decedent.

A proposed final account for the Estate was filed on 2 January 2014, which included disbursements from the Estate to pay legal fees and expenses for which Ward and Smith had submitted invoices. The proposed final account and the attached disbursements report indicated that the total amount of attorneys' fees and expenses sought was $91,340.77. This sum included $16,927.67 in attorneys' fees and expenses for probate matters, $35,150.85 in attorneys' fees and expenses for litigation matters, and $39,262.22 in attorneys' fees and expenses that were not

specifically designated as being for probate-related or litigation-related matters. Blackmore filed an objection to the final account on 31 January 2014, in which she (1) challenged the Estate's failure to reimburse her for the funeral expenses; and (2) asserted that the amount of attorneys' fees charged by Ward and Smith for probate and litigation matters was "excessive."

A hearing was held before Assistant Clerk of Court Cindy Fullerton ("the Clerk") on 13 May 2014. The Clerk entered an order on 9 June 2014 (1) granting reimbursement to Blackmore for the funeral expenses; (2) approving only $26,211.31 of the requested attorneys' fees as a valid expense of the Estate and denying the remainder; and (3) ordering that a final account be submitted within 30 days of the entry of her order. Taylor, in his capacity as executor, and Stoller, Dixon, and Taylor, as beneficiaries (collectively "Appellees"), appealed the Clerk's order to Cumberland County Superior Court. Simultaneously, the Clerk sealed the records containing detailed invoices from the Estate's counsel based on the fact that confidential attorney-client information was contained therein.

The matter came on for hearing before the Honorable Beecher R. Gray on 22 September 2014. On 20 October 2014, Judge Gray entered an order vacating the Clerk's order, denying Blackmore's claim for reimbursement for the funeral expenses, and ordering that the full amount of the legal fees and expenses for which payment had been sought be paid by the Estate. The trial court further ordered Taylor to submit a final account to the Clerk within 45 days of the entry of its order. Blackmore filed a timely appeal to this Court.

Analysis

Upon appeal to superior court of an order entered by a clerk of court concerning an estate matter, the superior court's review is limited solely to determining the following:

> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of fact.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2013). "The standard of review in this Court is the same as that in the Superior Court." *In re Estate of Monk*, 146 N.C. App. 695, 697, 554 S.E.2d 370, 371 (2001), *disc. review denied*,

355 N.C. 212, 559 S.E.2d 805 (2002). "Errors of law are reviewed *de novo*." *In re Estate of Mullins*, 182 N.C. App. 667, 671, 643 S.E.2d 599, 602 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 693, 652 S.E.2d 262 (2007).

On appeal to this Court, Blackmore argues that the trial court "went beyond its jurisdictional authority" in setting aside the Clerk's order. Specifically, she contends that the trial court erred, and exceeded its limited power of review, in vacating the Clerk's order regarding both her funeral expenses claim and the amount of the legal fees and expenses payable by the Estate. We address each of these issues in turn.

I. Claim for Reimbursement of Funeral Expenses

[1] Blackmore first argues that the trial court erred in denying her claim for reimbursement of the funeral expenses because (1) the court improperly replaced the Clerk's findings and conclusions on this issue with its own; and (2) the claim was supported by evidence of record and authorized by applicable law.

It is well established that a clerk of court has original jurisdiction in probate matters. *See* N.C. Gen. Stat. § 28A-2-1 (2013) ("The clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, estate proceedings as provided in G.S. 28A-2-4."). When a party appeals a judgment or order entered by the clerk of court to the superior court, "the trial court sits as an appellate court." *In re Estate of Mangum*, 212 N.C. App. 211, 212, 713 S.E.2d 18, 19-20 (2011). Where sufficient evidence exists to support the clerk of court's findings, the trial judge cannot substitute his own findings for those of the clerk. *In re Estate of Swinson*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983) (explaining that superior court hearing on appeal from clerk's order in estate matter "is not a *de novo* hearing. . . . since its jurisdiction is derivative").

In the present case, the trial court concluded that the Clerk erred in ordering the Estate to pay $15,742.30 in funeral expenses because the claim was time-barred. Specifically, the trial court ruled that Blackmore's funeral expenses claim did not comply with N.C. Gen. Stat. § 28A-19-3, which governs the presentation of claims against an estate and sets out the applicable deadline for submitting such claims. The trial court also ruled that the funeral expenses claim was likewise time-barred under N.C. Gen. Stat. § 28A-19-16 because Blackmore failed to commence a civil action within three months of receiving notice from Taylor of his rejection of her claim. We agree with the trial court on both counts.

Under N.C. Gen. Stat. § 28A-19-3, claims against a decedent's estate that arise at or after the death of the decedent that are not based on a contract with the personal representative become "forever barred against the estate" if not brought within six months of the date on which the claim arose. N.C. Gen. Stat. § 28A-19-3(b)(2) (2013). Here, the funeral expenses were paid in May of 2012, and Blackmore did not file her claim seeking reimbursement until July of 2013 — 14 months after the claim arose. As such, Blackmore's claim was submitted approximately eight months after the deadline for bringing claims against the Estate had elapsed.

Blackmore attempts to distinguish her "request for reimbursement" from a claim governed by the limitations period set forth in N.C. Gen. Stat. § 28A-19-3 by arguing that funeral expenses are considered an obligation of an estate under N.C. Gen. Stat. § 28A-19-8(a), the statute addressing the funeral expenses of a decedent. Based on this argument, she contends that because (1) she was authorized to bind the Estate for funeral expenses as the decedent's health care power of attorney; and (2) the Estate is "primarily liable" for the funeral expenses of the decedent pursuant to N.C. Gen. Stat. § 28A-19-8(a), the six-month deadline for the presentation of claims set out in N.C. Gen. Stat. § 28A-19-3(b)(2) does not apply. We are not persuaded.

Article 19 of Chapter 28A of our General Statutes, which addresses claims against an estate, does not treat debts for funeral expenses separately from other debts of an estate with regard to the statutory requirements of how and when claims for payment of such debts must be made. The statutory provision addressing funeral expenses as an obligation of the estate is contained within the section of Chapter 28A entitled "Claims Against the Estate," and N.C. Gen. Stat. § 28A-19-6(a), which governs the order in which claims are paid, classifies funeral expenses up to $3,500.00 as a class two *claim*, receiving preferential treatment over most other types of claims, and any additional funeral expenses over $3,500.00 as allowable but without priority over other claims.

Thus, while funeral expenses are clearly considered a valid obligation of an estate, neither Blackmore's brief nor our own research reveals any statutory support for her contention that funeral debts are either (1) deemed automatically presented to the estate (as is the case with actions pending against a decedent at the time of his death where the personal representative is substituted for the decedent as a party under N.C. Gen. Stat. § 28A-19-1(c)); or (2) exempt from the limitations period contained in N.C. Gen. Stat. § 28A-19-3(b) (as are tax claims by the state and federal governments). As such, the trial court did not err in

concluding that Blackmore's claim seeking reimbursement for funeral expenses was time-barred under N.C. Gen. Stat. § 28A-19-3. Moreover, contrary to Blackmore's assertions, this determination was within the trial court's scope of review as it was expressly authorized to determine whether the Clerk's order was legally correct. *See* N.C. Gen. Stat. § 1-301.3(d) ("Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining . . . [w]hether the order or judgment is consistent with the conclusions of law and applicable law.").

In addition, the Clerk lacked jurisdiction to consider Blackmore's claim for reimbursement of funeral expenses in the first place because once the claim was rejected by Taylor, Blackmore's only recourse — pursuant to N.C. Gen. Stat. § 28A-19-16 — was to file a civil action. As this Court explained in *In re Estate of Neisen*, 114 N.C. App. 82, 440 S.E.2d 855, *disc. review denied*, 336 N.C. 606, 447 S.E.2d 397 (1994),

> Section 28A-19-16 provides that a claimant whose claim has been denied by the personal representative, and which claim is not referred to a third party for resolution, "must, within three months, after due notice in writing of such rejection, . . . commence an action for the recovery thereof, or be forever barred from maintaining an action thereon."[1] Rule 3 of the North Carolina Rules of Civil Procedure is entitled "Commencement of action" and provides: "A civil action is commenced by filing a complaint with the court [or by the issuance of a summons under certain circumstances.]" N.C.G.S. § 1A-1, Rule 3 (1990). Section 28A-19-16 clearly provides that the only way to preserve a rejected claim is by commencing an action, i.e., filing a complaint, within three months of the notice of rejection. . . .
>
> Furthermore, the Clerk of Court has no jurisdiction to hear claims which are " 'justiciable matters of a civil nature,' original general jurisdiction over which is vested in the trial division. G.S. 7A-240." *Ingle v. Allen*, 53 N.C. App. 627, 628-29, 281 S.E.2d 406, 407 (1981). The claim in the present case is just such a claim.

Id. at 85-86, 440 S.E.2d at 858.

---

1. N.C. Gen. Stat. § 28A-19-16 was subsequently amended to include language addressing contingent or unliquidated claims, which are not at issue in this case. *See* 2011 N.C. Sess. Laws 1346, 1396, ch. 344, § 4. The above-quoted language, however, remains in the current version of § 28A-19-16.

Like the claimant in *Neisen*, Blackmore failed to file a civil action at all — much less do so within three months of the denial of her claim by Taylor. Consequently, because (1) she did not comply with the statutory procedure and accompanying deadline for challenging the denial of her claim for funeral expenses; and (2) the Clerk did not have jurisdiction to hear Blackmore's claim, Blackmore's argument on this issue is overruled.

II. Attorneys' Fees and Expenses

[2] Blackmore next argues that the trial court erred in vacating the Clerk's findings of fact and conclusions of law concerning the amount of attorneys' fees (and accompanying expenses) that were deemed allowable as an expense of the Estate. In her order, the Clerk noted that Blackmore had objected to both (1) the $34,316.86 in attorneys' fees awarded to Ward and Smith in the litigation of the Care Services Action; and (2) the $44,703.23 in attorneys' fees incurred in various other estate administration matters. The Clerk determined, however, that the attorneys' fees incurred in the litigation of the Care Services Action and awarded in that action were not before her. The Clerk then stated that she had the authority to review attorneys' fees for reasonableness before permitting the payment of any such fees from estate assets and subsequently concluded that only attorneys' fees and expenses in the amount of $26,211.31 were allowable as an expense of the Estate.

In its 20 October 2014 order, the trial court ruled that the Clerk's decision to allow only this portion of the requested attorneys' fees constituted error. Specifically, the trial court determined that the Estate had already incurred $84,492.08 in attorneys' fees and expenses "for legal services in representing the Estate in connection with administration of the Estate and with defense against Blackmore's claims in the Blackmore Litigation," and concluded, in pertinent part, as follows:

> The Clerk lacks statutory authority or jurisdiction to establish a "reasonable and customary" standard for review of legal fees and expenses incurred by the Estate. Even if such a standard existed, which is denied, the June 9 Order is in error because it fails to apply its own "reasonable and customary" standard in any finding of fact or conclusion of law. . . . The ultimate outcome of the June 9 Order reducing the legal fees and expenses to be paid by the Estate is without support in the evidence, the findings of fact, or the conclusions of law, which also renders the June 9 Order in error.

. . . .

> All legal fees and expenses incurred by the Estate with Ward and Smith, P.A. are debts of the Estate, and the Executor should be reimbursed for any legal fees and expenses advanced by him on behalf of the Estate from his own money consistent with [N.C. Gen. Stat. §] 28A-13-3(a)(14).

The trial court therefore ordered that (1) all legal fees and expenses for which reimbursement was sought be paid by the Estate; and (2) the Clerk proceed to close the Estate upon Taylor's submission of a proper and accurate final account.

The primary issue raised by the parties in this appeal is whether a clerk of court has the authority to review for reasonableness the legal fees incurred by an executor on behalf of the estate or, alternatively, whether the clerk's authority is limited to the ministerial task of simply determining whether the entries in a submitted account reflect the actual receipts and disbursements made by the executor (consistent with the clerk's statutory responsibility for auditing the annual and final accounts of the estate under N.C. Gen. Stat. §§ 28A-21-1 and 28A-21-2). In analyzing this issue, we first note the absence of a statutory provision specifically addressing the *payment* of legal fees to an attorney who is hired to assist in the administration of an estate pursuant to N.C. Gen. Stat. § 28A-13-3(19), the statute that authorizes a personal representative to "employ persons, including attorneys . . . to advise or assist the personal representative in the performance of the personal representative's administrative duties."

In contrast, N.C. Gen. Stat. § 28A-23-4 explicitly sets forth the procedure for allowing the payment of attorneys' fees by an estate where the individual serving as the personal representative of the estate is licensed to practice law and provides legal services himself to the estate. N.C. Gen. Stat. § 28A-23-4 states as follows:

> The clerk of superior court, in the discretion of the clerk of superior court, is authorized and empowered to allow counsel fees to an attorney serving as a personal representative, collector or public administrator (in addition to the commissions allowed the attorney as such representative, collector or public administrator) where such attorney in behalf of the estate the attorney represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which

> would reasonably justify the retention of legal counsel by any such representative, collector or public administrator not licensed to practice law.

N.C. Gen. Stat. § 28A-23-4 (2013). Because there is not an analogous provision expressly setting out the clerk of court's authority to award attorneys' fees incurred where, as here, a non-attorney personal representative retains counsel to assist him in estate administration matters, Appellees argue that a clerk is permitted to do nothing more than simply audit the account of the estate to ensure the disbursement of attorneys' fees and related expenses are accurately reflected and has no authority to assess the reasonableness of such fees and expenses.

In making this argument, Appellees rely on *In re Vogler Realty, Inc.*, 365 N.C. 389, 722 S.E.2d 459 (2012). In *Vogler*, our Supreme Court addressed the issue of whether a clerk possesses the authority to determine the reasonableness of attorneys' fees paid to a trustee-attorney in a foreclosure proceeding. *Id.* at 395-96, 722 S.E.2d at 464. The Court emphasized that, in general, clerks of court have "limited jurisdictional authority" and "cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority." *Id.* at 395, 722 S.E.2d at 464. In determining that clerks lacked the authority to examine the reasonableness of attorneys' fees in the context of foreclosure proceedings, the Court contrasted the limited power of clerks in the realm of *foreclosure* with their greater statutory authority in the area of *estates*. Specifically, the Court explained that

> [i]n other contexts, when the legislature has intended for the clerk to possess discretionary authority over commissions and attorney's fees, it specifically has set forth this authority, prefaced with the use of "may" or "in the discretion of." *See* N.C.G.S. § 35A-1116(a) (2009) (guardianship); N.C.G.S. §§ 28A-3-3, 23-4 (2009) (*estates*); *see also Wachovia Bank & Trust Co. v. Waddell*, 237 N.C. 342, 345, 347, 75 S.E.2d 151, 153, 154 (1953) (stating that, under our prior estates statute, the allowance of commissions to an executor required the exercise of judicial discretion by the clerk of court). However, such a grant of authority is completely absent in section 45-21.33. Moreover, the audit itself is ministerial, rather than discretionary in nature, "because the law requires [the clerk] to do [it] without any application or request." *Bryan v. Stewart*, 123 N.C. 92, 97, 31 S.E. 286, 287 (1898); *see also State ex. rel. Owens v. Chaplin*, 228 N.C. 705, 711, 47 S.E.2d 12, 16

> (1948) (describing a ministerial duty as "a simple and definite duty imposed by law regarding which nothing [is] left to [the clerk's] discretion"). . . . Therefore, during the audit the clerk is not authorized to review the trustee-attorney's payment of attorney's fees to himself for reasonableness, as this action would involve an improper exercise of judicial discretion. Instead, the clerk's audit pursuant to section 45-21.33(a) and (b) is a ministerial act that is limited to determining merely whether the entries in the report reflect the actual receipts and disbursements made by the trustee in the absence of a grant of original jurisdiction to determine additional matters.

Id. at 395-96, 722 S.E.2d at 464 (select internal citations and quotation marks omitted and emphasis added).

Appellees contend that the same result should apply here. However, based on our careful examination of the statutory provisions establishing a clerk's authority in estate matters and case law from our Supreme Court interpreting these provisions, we cannot agree.

Pursuant to N.C. Gen. Stat. § 28A-23-3(d)(1), clerks of court have the authority to allow "*reasonable* sums for *necessary* charges and disbursements incurred in the management of the estate." N.C. Gen. Stat. § 28A-23-3(d)(1) (2013) (emphasis added). The Supreme Court has expressly recognized that attorneys' fees incurred in the administration of an estate fall within this statutory provision. *Phillips v. Phillips*, 296 N.C. 590, 602, 252 S.E.2d 761, 769 (1979).[2] In *Phillips*, our Supreme Court stated that the "[c]osts of administration [of an estate] include the executor's commissions and 'reasonable sums for necessary charges and disbursements incurred in the management of the estate.' G.S. 28A-23-3. *Reasonable attorneys' fees come within the latter item.*" *Id.* (emphasis added). The Court further explained that "[a]s a judge of probate, the clerk has supervised the administration of the estate from the beginning and presumably will have some idea of the value of the service which the executor and his attorney have rendered the estate." *Id.* at 602, 252 S.E.2d at 769. Therefore, *Phillips* and *Vogler*, when read in conjunction with N.C. Gen. Stat. § 28A-23-3(d)(1), compel the conclusion that clerks do possess the authority to review attorneys' fees petitions for reasonableness pursuant to their power to allow reasonable sums

---

2. We note that *Phillips* was decided by our Supreme Court after the enactment of Chapter 28A of the North Carolina General Statutes in 1973. *See* 1973 N.C. Sess. Laws 629, 629-674, ch. 1329, § 1-5.

for necessary charges and disbursements incurred in the management of an estate.[3]

Finally, although we conclude that the trial court erred in ruling that the Clerk lacked the authority to review Taylor's attorneys' fees petition for reasonableness, we agree with the trial court's determination that the Clerk's order contained insufficient findings to support its decision as to the amount of attorneys' fees that were reasonable and therefore allowable as an expense of the Estate. We therefore direct the trial court to remand this matter to the Clerk so that she may make the requisite findings of fact and conclusions of law to support her determination concerning the amount of attorneys' fees and expenses allowable as a reasonable charge or disbursement necessary to the management of the Estate.[4]

See N.C. Gen. Stat. § 1-301.3(b) (requiring clerk in estate matters to "determine all issues of fact and law. . . . [and] enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment").

Conclusion

For the reasons stated above, we affirm in part and vacate and remand in part.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STEELMAN and HUNTER, JR. concur.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

---

3. While not the basis for our ruling on this issue, we observe that our holding appears to be consistent with the North Carolina Clerk of Superior Court Procedures Manual issued by the University of North Carolina School of Government. The manual states that while "[t]here is no statutory provision governing the payment of attorney fees for an attorney representing a personal representative or . . . hired by the personal representative in the administration of the estate. . . . [a] clerk may allow these fees as a 'necessary' charge incurred in the management of the estate under G.S. § 28A-23-3(d)(1)." N.C. Clerk of Superior Court Procedures Manual, 75.7 (2012). The manual then directs clerks to utilize a procedure for assessing the reasonableness of such fees similar to that used when reviewing a petition for attorneys' fees pursuant to N.C. Gen. Stat. § 28A-23-4. *See id.*

4. In conducting the reasonableness inquiry, the effect of N.C. Gen. Stat. § 28A-23-3(a) should be considered.

JOHN DOE 200, PLAINTIFF
v.
DIOCESE OF RALEIGH, MICHAEL F. BURBIDGE, BISHOP OF THE DIOCESE OF RALEIGH, AND EDGAR SEPULVEDA, DEFENDANTS

No. COA14-1396

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—First Amendment—religion—immediate appeal

The Court of Appeals had jurisdiction to consider defendants' appeal from an interlocutory order for claims that would require a civil court to delve into issues concerning "the Roman Catholic Church's religious doctrine, practices, and canonical law" in order to resolve the controversy between the parties. When First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate.

2. Jurisdiction—subject matter—negligent supervision of priest—negligent infliction of emotional distress—sexually transmitted disease testing—ecclesiastical matters—motion to dismiss

Plaintiff's claims for negligent supervision and negligent infliction of emotional distress (NIED) based upon the Diocese defendants' allegedly negligent supervision of a priest could be resolved through the application of neutral principles of law and, therefore, were not barred by the First Amendment. Plaintiff's claims for negligence and NIED based on the Diocese defendants' failure to compel the priest to undergo sexually transmitted disease testing, conversely, would entangle the court in ecclesiastical matters and were dismissed under Rule 12(b)(1).

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

Appeal by defendants Diocese of Raleigh and Michael F. Burbidge, Bishop of the Diocese of Raleigh, from order entered 2 June 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 20 May 2015.

Copeley Johnson Groninger PLLC, by Leto Copeley, and Jeff Anderson & Associates, P.A., by Gregg Meyers, pro hac vice, for plaintiff-appellee.

Poyner Spruill LLP, by Andrew H. Erteschik, Charles F. Powers, III, and Thomas K. Lindgren, for defendants-appellants Diocese of Raleigh and Michael F. Burbidge, Bishop of the Diocese of Raleigh.

DAVIS, Judge.

The Diocese of Raleigh ("the Diocese") and Michael F. Burbidge, the Bishop of the Diocese ("Bishop Burbidge") (collectively "the Diocese Defendants") appeal from the trial court's 2 June 2014 order granting in part and denying in part their motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On appeal, the Diocese Defendants argue that the adjudication of the remaining claims asserted against them would require a North Carolina civil court to impermissibly entangle itself in ecclesiastical matters and that these claims must therefore be dismissed for lack of subject matter jurisdiction based on the First Amendment. After careful review, we affirm in part and reverse in part.

Factual Background

On 12 November 2013, John Doe 200[1] ("Plaintiff") filed a complaint in Wake County Superior Court against the Diocese, Bishop Burbidge, and Edgar Sepulveda ("Sepulveda"). In his complaint, Plaintiff alleged that Sepulveda, a priest who was incardinated to the Diocese, sexually assaulted him on multiple occasions beginning in May of 2009 when Plaintiff was sixteen years old.[2] Plaintiff asserted that he was involved in youth activities at Sepulveda's parish and that Sepulveda had begun to "cultivate a special relationship with [him], and began to groom him for sexual assault by exhibiting frequent physical contact with [him] . . . through hugs and embraces." Plaintiff alleged that the first sexual assault occurred when Sepulveda invited Plaintiff to spend the night at his home and that the second incident took place when Sepulveda, "using his stature as a priest," secured an invitation to spend the night at Plaintiff's home.

Plaintiff's complaint stated that he reported the sexual abuse in September of 2009, and, in response, Sepulveda was suspended by the

1. John Doe 200 is a pseudonym used by Plaintiff to protect his privacy.

2. Plaintiff is currently an active member of the military and asserts that the applicable limitations period governing his claims was tolled by the federal Servicemembers' Civil Relief Act, 50 U.S.C.A. App. § 526. The timeliness of Plaintiff's claims is not at issue in this appeal.

Diocese. Plaintiff alleged that when he subsequently requested that the Diocese Defendants compel Sepulveda to undergo testing to determine whether he carried a sexually transmitted disease ("STD") that could have been passed to Plaintiff, this request was refused.

In his complaint, Plaintiff asserted claims for assault and battery against Sepulveda and claims for negligence, negligent infliction of emotional distress ("NIED"), and vicarious liability against the Diocese Defendants. Specifically, Plaintiff alleged that the Diocese Defendants failed to (1) protect Plaintiff from the danger they knew or should have known was posed by Sepulveda by negligently supervising him; (2) educate Plaintiff "about the proper boundaries a priest should observe as to physical touch"; and (3) compel Sepulveda to undergo STD testing and provide the results of such testing to Plaintiff. Plaintiff's NIED claims were likewise based on the Diocese Defendants' failure to protect him from Sepulveda and their refusal to require him to submit to STD testing. The vicarious liability claim against the Diocese Defendants was grounded in theories of respondeat superior, apparent agency, and the non-delegable duty doctrine. Plaintiff sought in his prayer for relief compensatory damages, punitive damages, and injunctive relief in the form of an order compelling Sepulveda to undergo STD testing.

On 24 January 2014, the Diocese Defendants filed a motion to dismiss Plaintiff's claims against them based on lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim upon which relief can be granted under Rule 12(b)(6). In support of their motion, the Diocese Defendants filed an affidavit from Bishop Burbidge setting out basic tenets from the Code of Canon Law, "the universal law of the Roman Catholic Church."[3] In his affidavit, Bishop Burbidge explained that the role of priests, the relationship between a bishop and his priests, and the procedure for removing a priest from his clerical office are all informed by the Code of Canon Law. Bishop Burbidge further discussed policies and procedures that the Roman Catholic Church has enacted to ensure the protection of minors from sexual abuse.

---

3. "In considering a motion to dismiss for lack of subject matter jurisdiction, it is appropriate for the court to consider and weigh matters outside of the pleadings." *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 327, 605 S.E.2d 161, 163 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, 546 U.S. 819, 163 L.Ed.2d 59 (2005); *see Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) ("Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." (citation, quotation marks, and brackets omitted)).

The Diocese Defendants' motion came on for hearing before the Honorable Donald W. Stephens on 27 May 2014. On 2 June 2014, Judge Stephens entered an order dismissing (1) Plaintiff's vicarious liability claim; and (2) the portion of Plaintiff's negligence claim premised on the Diocese Defendants' failure to educate Plaintiff as to the proper boundaries concerning physical contact between priests and parishioners.[4] The trial court's order denied the Diocese Defendants' motion as to the remaining claims asserted against them in the complaint. The Diocese Defendants timely appealed to this Court.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we note that the order from which the Diocese Defendants are appealing is interlocutory as it did not dispose of all of Plaintiff's claims.[5] *See Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 669 (2000) ("An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." (citation and quotation marks omitted)). While a right to immediate appeal does not generally lie from an interlocutory order, appellate review of an interlocutory order is permissible if (1) the order constitutes a final determination as to some, but not all, of the claims between the parties, and the trial court certifies the order for immediate appeal pursuant to Rule 54(b); or (2) "the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment." *Keesee v. Hamilton*, ___ N.C. App. ___, ___, 762 S.E.2d 246, 249 (2014).

As noted above, the Diocese Defendants moved for dismissal of Plaintiff's complaint in the trial court on two grounds: (1) lack of subject matter jurisdiction under Rule 12(b)(1); and (2) failure to state a valid claim for relief under Rule 12(b)(6). The Diocese Defendants concede

---

4. Judge Stephens' order did not explicitly state whether his dismissal of the two above-referenced claims was based on Rule 12(b)(1) or Rule 12(b)(6). However, his order stated that the two claims were "without any legal basis and . . . therefore dismissed with prejudice," suggesting that these two claims failed to state a valid claim for relief under Rule 12(b)(6). Moreover, his comments contained in the hearing transcript likewise lead to the conclusion that his dismissal of these claims was based on Rule 12(b)(6) rather than Rule 12(b)(1).

5. In addition to the remaining claims against the Diocese Defendants, all of Plaintiff's claims against Sepulveda are still pending in the trial court. Those claims are not at issue in this appeal.

that the trial court's partial denial of their motion to dismiss under Rule 12(b)(6) "does not involve immediately appealable issues." *See Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986) ("A ruling denying a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) is ordinarily a nonappealable interlocutory order."). Therefore, the question of whether Plaintiff's complaint was sufficient to state a valid claim for relief against the Diocese Defendants under Rule 12(b)(6) as to those claims left undisturbed by the trial court's order is not before us.

However, the Diocese Defendants do contend that appellate jurisdiction exists as to their appeal of the trial court's ruling on their Rule 12(b)(1) motion. It is this aspect of the trial court's ruling that forms the entire basis for this appeal.

It is well settled that an assertion that a civil court is precluded on First Amendment grounds from adjudicating a claim constitutes a challenge to that court's subject matter jurisdiction. *Tubiolo*, 167 N.C. App. at 326, 605 S.E.2d at 163; *see also Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (explaining that "[s]ubject matter jurisdiction refers to the power of the court to deal with the kind of action in question" and is conferred either statutorily or constitutionally).

In *Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566 (2007), our Supreme Court addressed whether there is appellate jurisdiction over a trial court's interlocutory order denying a church's motion to dismiss for lack of subject matter jurisdiction based on the assertion that "a civil court action cannot proceed [against a church defendant] without impermissibly entangling the court in ecclesiastical matters." *Id.* at 270, 643 S.E.2d at 569. The Supreme Court concluded that the order was immediately appealable because the defendant would be "irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained." *Id.* at 271, 643 S.E.2d at 570. In so holding, the Court noted that "[t]he constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause' " and that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 270, 643 S.E.2d at 569 (citation and quotation marks omitted).

As in *Harris*, the Diocese Defendants in the present case contend that the claims asserted against them in Plaintiff's complaint would require a civil court to delve into issues concerning "the Roman Catholic Church's religious doctrine, practices, and canonical law" in order to

resolve the controversy between the parties — an intrusion that is prohibited by the First Amendment. *See id.* at 275, 643 S.E.2d at 572 ("[W]hen a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden."). Consequently, we conclude that we have jurisdiction over this appeal and proceed to address the merits of the Diocese Defendants' arguments. *See id.* at 270, 643 S.E.2d at 569-70 ("[W]hen First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate.").

II. Subject Matter Jurisdiction

A. First Amendment's Prohibition Against Excessive Entanglement in Ecclesiastical Matters

[2] The Establishment Clause and the Free Exercise Clause of the First Amendment prohibit any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. "As applied to the states through the Fourteenth Amendment, the First Amendment also restricts action by state governments and the servants, agents and agencies, of state governments." *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) (citation and quotation marks omitted). As such, the civil courts of North Carolina are prohibited "from becoming entangled in ecclesiastical matters" and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue. *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 810 (2011); *see W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) ("The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies . . . ." (citation and quotation marks omitted)).

> An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

E. Conference of Original Free Will Baptists of N.C. v. Piner, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966) (citation and quotation marks

omitted), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973). This Court has previously explained that "[t]he prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns" because (1) by hearing religious disputes, a civil court could influence associational conduct, "thereby chilling the free exercise of religious beliefs"; and (2) "by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks 'establishing' a religion." *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 492, 598 S.E.2d 667, 670 (2004) (citation omitted).

In *Harris*, our Supreme Court provided a comprehensive articulation of the considerations a civil court must take into account when determining whether it may adjudicate claims involving religious entities. *Harris*, 361 N.C. at 271-74, 643 S.E.2d at 570-72. The plaintiffs in *Harris*, members of the congregation of Saint Luke Missionary Baptist Church, filed a civil complaint on behalf of the church based on their contention that the church's interim pastor had misappropriated church funds. *Id.* at 268, 643 S.E.2d at 568. In their complaint, the plaintiffs asserted claims for conversion of funds, breach of fiduciary duty, and civil conspiracy against the interim pastor, the church secretary, and the chairman of the board of trustees. *Id.* The pastor moved to dismiss the claims against him for lack of subject matter jurisdiction on First Amendment grounds, and the trial court denied his motion. The Supreme Court held that the First Amendment prohibited the adjudication of the plaintiffs' claims, which were predicated on allegations that the pastor had "usurped the governmental authority of the church's internal governing body." *Id.* at 272, 643 S.E.2d at 571.

> Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church's pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church's

> religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review of the matters presented here is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. None of these issues can be addressed using neutral principles of law.
>
> Here, . . . in order to address plaintiffs' claims, the trial court would be required to interpose its judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the judgment of the church's duly constituted leadership. This is precisely the type of ecclesiastical inquiry courts are forbidden to make.

Id. at 273, 643 S.E.2d at 571.

Thus, although *Harris* — unlike the present case — involved an internal church governance dispute, the principles set out therein concerning the limitations placed by the First Amendment on the subject matter jurisdiction of civil courts to adjudicate claims against religious entities are equally applicable here. "The dispositive question is whether resolution of the legal claim[s] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998).

Therefore, we must examine each of Plaintiff's remaining causes of action against the Diocese Defendants in order to determine whether its adjudication would require "an impermissible analysis by the court based on religious doctrine or practice." *Antioch United Holy Church*, 214 N.C. App. at 511, 714 S.E.2d at 810; *see Harris*, 361 N.C. at 274, 643 S.E.2d at 572 (explaining that once it becomes clear "that no neutral principles of law exist[ ] to resolve plaintiffs' lawsuit, continued involvement by the trial court [is] unnecessary and unconstitutional"). Because we review *de novo* a trial court's ruling on a motion to dismiss for lack of subject matter jurisdiction, we consider the matter anew and freely substitute our own judgment for that of the trial court. *Burgess v. Burgess*, 205 N.C. App. 325, 327, 698 S.E.2d 666, 668 (2010).

B. Negligence Claims

1. Negligent Supervision

Plaintiff's primary claim against the Diocese Defendants seeks to impose liability against them on a theory of negligent supervision. Plaintiff asserts in his complaint that the Diocese Defendants "knew, or should have known, that children needed to be protected from Sepulveda" because of his "sexual interest in children" and "failed to protect [Plaintiff] from the dangers" Sepulveda presented.

North Carolina law recognizes a cause of action for negligent supervision against an employer where the plaintiff establishes the existence of the following elements:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision, . . . ; and (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C 587, 591, 398 S.E.2d 460, 462 (1990) (citation, quotation marks, and emphasis omitted)); *see Wilkerson v. Duke Univ.*, ___ N.C. App. ___, ___, 748 S.E.2d 154, 160 (2013) (explaining that such claims require proof "that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency" (citation omitted)). Our Supreme Court has recognized that with regard to such claims, the employer's liability for the injury caused by his employee is "entirely independent of the employer's liability under the doctrine of *respondeat superior*." *Braswell v. Braswell*, 330 N.C. 363, 373, 410 S.E.2d 897, 903 (1991) (citation omitted).[6]

---

6. At oral argument, counsel for the Diocese Defendants referenced our Supreme Court's decisions in *Bridges v. Parrish*, 366 N.C. 539, 742 S.E.2d 794 (2013), and *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 626 S.E.2d 263 (2006), in contending that the adjudication of this claim would violate the First Amendment. However, neither of those two cases involve a negligent supervision claim against an employer. Nor do they address issues relating to the civil liability of religious entities or otherwise implicate the First Amendment in any respect. Therefore, *Bridges* and *Stein* lack relevance to the limited subject matter jurisdiction issue raised in this appeal.

The Diocese Defendants contend that the trial court should have dismissed Plaintiff's negligent supervision claim under Rule 12(b)(1) because that claim cannot be resolved without excessively entangling a civil court in the examination and interpretation of church doctrine and practice. Specifically, they assert that Plaintiff's negligent supervision claim offends the First Amendment because it "directly asks the trial court — and ultimately a jury — to decide whether the Church's canon law-based doctrines and practices are 'reasonable.' "

At the outset, we observe that no clear consensus exists among courts in other jurisdictions on the issue of whether civil courts may adjudicate tort claims asserting that a religious organization was negligent in its supervision of a cleric who is accused of sexual misconduct or other tortious conduct against a third party. A number of courts have held that exercising jurisdiction over such claims does not offend the First Amendment because a religious organization's liability under such circumstances may be determined through the application of neutral principles of tort law. *See Malicki v. Doe*, 814 So.2d 347, 364 (Fla. 2002) ("The core inquiry in determining whether the Church Defendants are liable will focus on whether they reasonably should have foreseen the risk of harm to third parties. This is a neutral principle of tort law. Therefore, based on the allegations in the complaint, we do not foresee 'excessive' entanglement in internal church matters or in interpretation of religious doctrine or ecclesiastical law."); *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996) (concluding that First Amendment did not bar plaintiff's negligent supervision claim because review of that claim "only requires the court to determine if the Church Defendants knew of [minister's] inappropriate conduct yet failed to protect third parties from him. The court is simply applying secular standards to secular conduct which is permissible under First Amendment standards."); *see also Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1242 (Miss. 2005) (holding that claim against church for its negligent supervision of priest accused of sexually abusing minors was not jurisdictionally barred and "reject[ing] the notion that the First Amendment provides, or was intended to provide, blanket civil immunity to churches for violation of recognized standards of conduct which results in reasonably foreseeable harm").

Other jurisdictions, conversely, have concluded that claims premised on theories of negligent supervision or retention are barred by the First Amendment because such claims "necessarily involve interpretation of religious doctrine, policy, and administration" and could result in an impermissible endorsement of religion by approving one

particular model of supervision. *Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997) (concluding that negligent supervision claim cannot be resolved through neutral principles of law because "[a]djudicating the reasonableness of a church's supervision of a cleric — what the church 'should know' — requires inquiry into religious doctrine"); *see also Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250-51 (D. Colo. 1998) (holding that negligent supervision claim "must be dismissed as violative of the First Amendment" because "the procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate" and such examination "would clearly be inappropriate governmental involvement and a burden on these Defendants' exercise of religion"), *aff'd*, 185 F.2d 873 (10th Cir. 1999) (unpublished); *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997) (concluding that negligent supervision claim must be dismissed because "[t]he imposition of secular duties and liability on the church . . . will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest").

This is not the first occasion on which this Court has confronted this issue. In *Smith v. Privette*, 128 N.C. App. 490, 495 S.E.2d 395 (1998), the plaintiffs, who were members of the administrative staff for White Plains United Methodist Church of Cary ("White Plains"), filed a civil action against White Plains, the Raleigh District of the North Carolina Conference of the United Methodist Church, and the North Carolina Conference of the United Methodist Church (collectively "the church defendants"), alleging that the church defendants negligently supervised Privette, the senior pastor at White Plains who had allegedly committed various "inappropriate, unwelcome, offensive and nonconsensual acts of a sexual nature" against the plaintiffs. *Id.* at 492, 495 S.E.2d at 396. The plaintiffs alleged in their complaint that "the [c]hurch [d]efendants knew or should have known of Privette's propensity for sexual harassment of and assault and battery upon female employees and that they failed to take any action to warn or protect the [p]laintiffs from Privette's tortious activity." *Id.*

The church defendants moved to dismiss the plaintiffs' claims against them for lack of subject matter jurisdiction, and the trial court granted their motion, ruling that a civil court's "second-guess[ing] the discipline of clergy is an intrusion into matters of church governance . . . and would constitute an excessive entanglement between church and state thereby violating . . . the First Amendment." *Id.* at 493, 495 S.E.2d at 396-97 (brackets omitted). On appeal, this Court reversed the trial

court's dismissal of the plaintiffs' negligent supervision claim, rejecting the notion that a negligent supervision claim against a religious organization necessarily requires inquiry into religious doctrine, thereby entangling civil courts in ecclesiastical matters in violation of the First Amendment. *Id.* at 493, 495 S.E.2d at 397. Instead, we recognized the distinction between (1) a claim seeking to impose liability for a church's decisions to hire or discharge a cleric, which we recognized as "inextricable from religious doctrine and protected by the First Amendment"; and (2) an assertion that the church was civilly liable for a minister's wrongful conduct because it knew or had reason to know of his proclivity for sexual misconduct. *Id.* at 495, 495 S.E.2d at 398. We expressly noted that adjudication of the latter claim would not

> require[ ] the trial court to inquire into the [c]hurch [d]efendants' reasons for choosing Privette to serve as a minister. The [p]laintiffs' claim, construed in the light most favorable to them, instead presents the issue of whether the [c]hurch [d]efendants knew or had reason to know of Privette's propensity to engage in sexual misconduct . . . .

Id.

We therefore concluded that such a claim is not barred by the First Amendment because determining whether the church defendants knew or had reason to know of its employee's proclivities for sexual wrongdoing required only the application of neutral principles of tort law, observing that "the application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." *Id.* at 494, 495 S.E.2d at 397 (citation, quotation marks, and brackets omitted).

We believe that the result we reached in *Privette* is equally applicable to Plaintiff's negligent supervision claim here. In the present case, Plaintiff has alleged that Sepulveda — an employee of the Diocese — sexually assaulted Plaintiff and that the Diocese Defendants knew or had reason to know of Sepulveda's sexual attraction to, and propensity to engage in sexual misconduct with, minors. There is no meaningful distinction between these allegations and the allegations asserted by the plaintiffs in *Privette*.

Notably, the Diocese Defendants have made clear in this litigation that they are not contending that the First Amendment serves as an absolute shield barring all claims seeking to hold churches civilly liable based on the sexual assaults of their clerics. Nor do they contend that *Privette* conflicts with our Supreme Court's decision in *Harris* or that *Privette* was wrongly decided.

Instead, the Diocese Defendants attempt to distinguish *Privette* from the present case on two grounds. First, they contend that in *Privette* "the church defendants *conceded* that their conduct was not informed by 'the tenets or practices of the Methodist Church,' and therefore, 'there [was] no necessity for the court to interpret or weigh church doctrine in its adjudication of the plaintiffs' claim for negligent retention and supervision.' " This argument is based on a misreading of *Privette*. Contrary to the Diocese Defendants' assertion, the church defendants in *Privette* specifically argued that the determination of whether they negligently supervised Privette "necessarily requires inquiry into their religious doctrine and that such an inquiry is not permitted under the First Amendment." *Id.* at 493, 495 S.E.2d at 397. Rather than conceding that their supervisory role was not informed by religious doctrine, the church defendants in *Privette* merely acknowledged the commonsense understanding that *sexual misconduct* is not "part of the tenets or practices of the Methodist Church" — a proposition that is obviously equally true of the Catholic faith. *Id.* at 495, 495 S.E.2d at 398.

Second, the Diocese Defendants seek to distinguish *Privette* on the ground that the church defendants there had actual knowledge of the danger Privette posed based on prior complaints of sexual misconduct that had been made against him whereas here the complaint does not specifically allege that Sepulveda had committed sexual assaults on other victims prior to those inflicted upon Plaintiff. However, this distinction was not the basis for our holding in *Privette* that the plaintiffs' negligent supervision claim could be adjudicated without entangling the court in religious doctrine. In our decision, we explained that in order to establish supervisory negligence "against an employer, the plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to that act, the employer *knew or had reason to know of* the employee's incompetency." *Id.* at 494-95, 495 S.E.2d at 398 (citation and quotation marks omitted and emphasis added). We did *not* hold that a plaintiff's complaint must contain allegations of actual knowledge by the church of other sexual wrongdoing by the cleric in order for a religious entity to be held liable under a negligent supervision theory consistent with First Amendment limitations. Were we to adopt the Diocese Defendants' argument on this issue, then the First Amendment would, as a practical matter, serve as a complete shield to tort liability for religious organizations in the sexual abuse context except in those cases in which the plaintiff specifically alleged prior sexual assaults by the cleric at issue. We do not believe the First Amendment requires such a result.

While evidence of actual knowledge on the part of the Diocese Defendants of prior assaults by Sepulveda against other victims might strengthen Plaintiff's case against them in the eyes of a jury, the distinction between allegations of actual notice and allegations of constructive notice does not control the subject matter jurisdiction issue currently before us. Neutral principles of law allow a civil court to adjudicate Plaintiff's claim that the Diocese Defendants knew or should have known of the danger posed by Sepulveda to Plaintiff because of his sexual attraction to minors. Furthermore, a ruling that Plaintiff' was required to specifically allege precisely *how* the Diocese Defendants "knew or should have known" that Sepulveda posed such a danger would constitute a heightened pleading requirement that finds no recognition in the caselaw of our appellate courts.

Adjudication of Plaintiff's negligent supervision claim does not require a civil court to determine issues such as (1) whether Sepulveda should have ever been incardinated; (2) whether he should have been allowed to remain a priest; or (3) whether his relationship with the Diocese should have been severed. All of these questions are inextricably bound up with church doctrine and cannot be decided by a civil court consistent with First Amendment principles. Instead, the issue to be determined in connection with Plaintiff's negligent supervision claim is a purely secular one. Neutral principles of law govern this inquiry and, for this reason, subject matter jurisdiction exists in the trial court over this claim.[7]

---

7. Plaintiff's complaint also includes an allegation that "[w]hen he was incardinated, Sepulveda was inadequately screened for the positions he would later be given by the Bishop." The Diocese Defendants contend that this allegation is indicative of a claim for negligent hiring — a cause of action this Court has previously rejected as constitutionally prohibited. *See Privette*, 128 N.C. App. at 495, 495 S.E.2d at 398 ("[T]he decision to hire . . . a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry."). At oral argument, Plaintiff acknowledged that this allegation was not intended as a negligent hiring claim against the Diocese Defendants. For the sake of clarity, we hold that Plaintiff is not permitted to proceed on any claim that the Diocese Defendants were negligent in hiring Sepulveda as such a claim would clearly be forbidden by the First Amendment. The Diocese Defendants also raise entanglement concerns as to the allegation in the complaint that Bishop Burbidge "was grossly negligent in having insufficient guidelines in effect within the Diocese to define the proper boundaries between priests of the Diocese and its parishioners." We agree that the First Amendment would not permit a civil court to dictate the content of guidelines issued by the Diocese that relate to ecclesiastical matters. But such an intrusion on First Amendment principles does not exist where, as here, a court is simply asked to adjudicate a claim that a church knew or should have been aware that one particular cleric posed a danger to a plaintiff based on his sexual interest in children.

2. Negligent Failure to Require Sepulveda to Undergo STD Testing

Plaintiff also asserts a negligence claim against the Diocese Defendants based on their failure to compel Sepulveda to undergo STD testing. In support of this claim, Plaintiff alleged that when he requested that the Diocese Defendants "require Sepulveda to submit to a test for sexually transmitted diseases and inform the Plaintiff of the results so he could be assured of his health, the Bishop and the Diocese refused to require that Sepulveda do so, even though each has the authority to do so." Plaintiff further asserted in his complaint that the Diocese Defendants had sufficient authority over Sepulveda to compel such testing because Bishop Burbidge "holds all executive, judicial, and legislative authority within the Diocese, and holds specifically from Sepulveda a duty of obedience to the Bishop."

In contrast to Plaintiff's claim for negligent supervision, adjudication of this claim would, by definition, require the examination of church doctrine and thus constitute "precisely the type of ecclesiastical inquiry courts are forbidden to make." *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. As our Supreme Court explained in *Harris*, a civil court is constitutionally prohibited from "interpos[ing] its judgment" on the proper role of church leaders and the scope of their authority "[b]ecause a church's religious doctrine and practice affect its understanding of each of these concepts." *Id.*

Rather than existing as a claim that can be decided based on neutral principles unrelated to religious doctrine, this theory of liability *is premised on* the tenets of the Catholic church — namely, the degree of control existing in the relationship between a bishop and a priest. This claim seeks to impose liability based on the Diocese Defendants' alleged failure to exercise their authority over a priest stemming from an oath of obedience taken by him pursuant to the church's canon law. As such, this claim directly "challenges church actions involving religious doctrine and practice" and cannot be adjudicated without entangling a secular court in ecclesiastical matters. *Id.* at 275, 643 S.E.2d at 572. The trial court therefore erred in denying the Diocese Defendants' motion to dismiss as to this claim. *See id.* ("[W]hen a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden.").

C. NIED Claims

Plaintiff's complaint also contains claims alleging that the Diocese Defendants negligently inflicted emotional distress on Plaintiff by

(1) failing to protect him from Sepulveda; and (2) failing to require Sepulveda to undergo STD testing.

To properly set out a claim for NIED, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Because NIED claims are premised upon negligent conduct by the defendants, a determination that the underlying negligence claim is subject to dismissal will result in the dismissal of the corresponding NIED claim as well. *See Thomas v. Weddle*, 167 N.C. App. 283, 290, 605 S.E.2d 244, 249 (2004) ("A claim for negligent infliction of emotional distress . . . depends upon evidence that the defendants acted negligently. Thus, this claim fails for the same reasons as plaintiffs' other negligence claims." (internal citation omitted)).

1. NIED Based on Negligent Supervision

As explained above, the issue of whether the Diocese Defendants knew or should have known that Sepulveda posed a danger to minors such as Plaintiff because of his sexual attraction to them — the determination central to the adjudication of Plaintiff's negligent supervision claim — can be resolved through the application of neutral principles of law and therefore does not require dismissal under Rule 12(b)(1). Consequently, Plaintiff's NIED claim premised on the assertion that such negligent conduct resulted in him suffering severe emotional distress and that it was reasonably foreseeable that the Diocese Defendants' conduct would result in such distress is likewise permissible under the First Amendment. Because a determination of whether Plaintiff has successfully established the elements of NIED based on the Diocese Defendants' negligent supervision of Sepulveda will not entangle the court in ecclesiastical inquires, subject matter jurisdiction exists in the trial court as to this claim.

2. NIED Based on Failure to Require Sepulveda to Undergo STD Testing

As with Plaintiff's underlying negligence claim based on the Diocese Defendants' failure to require Sepulveda to undergo STD testing, Plaintiff's NIED claim based on those same allegations would necessarily require the court to examine and interpret church doctrine governing the relationship between a priest and a bishop in order to adjudicate the claim. Such an inquiry is, once again, constitutionally prohibited, and

Plaintiff's NIED claim arising out of the Diocese Defendants' failure to compel Sepulveda to undergo STD testing must therefore be dismissed pursuant to Rule 12(b)(1). *See Harris*, 361 N.C. at 273, 643 S.E.2d at 571 (explaining that dismissal is required when "no neutral principles of law exist to resolve . . . claims" so that court can "avoid[ ] becoming impermissibly entangled in the dispute").

Conclusion

For the reasons stated above, we affirm in part and reverse in part the trial court's 2 June 2014 order. Plaintiff's claims for negligent supervision and NIED based upon the Diocese Defendants' allegedly negligent supervision of Sepulveda may be resolved through the application of neutral principles of law and, therefore, are not barred by the First Amendment. Plaintiff's claims for negligence and NIED based on the Diocese Defendants' failure to compel Sepulveda to undergo STD testing, conversely, would entangle the court in ecclesiastical matters and are dismissed under Rule 12(b)(1).

AFFIRMED IN PART; REVERSED IN PART.

Judges STEELMAN and HUNTER, JR. concur.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

YEUN-HEE JUHNN, PLAINTIFF
v.
DO-BUM JUHNN, DEFENDANT

No. COA14-1271

Filed 7 July 2015

1. Appeal and Error—notice of appeal—timeliness—service requirements

Plaintiff wife's motion to dismiss defendant husband's appeal in an alimony and child support case as untimely was denied. Defendant's failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure required application of Rule 3(c)(2) and not Rule 3(c)(1). Thus, defendant's notice of appeal was timely filed within thirty days of defendant receiving the trial court's order.

2. Divorce—alimony—child support—bad faith reporting of income

The trial court did not abuse its discretion by its award of child support and alimony. Its findings of fact were based upon competent evidence and supported its conclusions of law that defendant husband had acted in bad faith regarding the reporting of his income.

3. Divorce—alimony—duration—sufficiency of findings

The trial court did not err by awarding plaintiff wife eighteen years of alimony. The trial court made sufficient findings as to the reasons for the amount, duration, and manner of payment.

4. Divorce—alimony—twenty months' delay entering order—no prejudice

Where defendant husband was not prejudiced by the trial court's delay in entering an order for alimony twenty months after the last hearing, defendant could not show that his constitutional rights were violated.

Appeal by defendant from order entered 10 February 2014 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 19 May 2015.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell and Tobias S. Hampson, for plaintiff-appellee.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for defendant-appellant.

BRYANT, Judge.

Where the trial court's findings of fact are based upon competent evidence and support the trial court's conclusions of law that defendant has acted in bad faith regarding the reporting of his income, we do not find an abuse of discretion by the trial court in its award of child support and alimony. An award of alimony will be upheld where the trial court makes sufficient findings as to the reasons for the amount, duration, and manner of payment of alimony. Where defendant was not prejudiced by the trial court's delay in entering an order for alimony, defendant cannot show that his constitutional rights were violated.

Plaintiff Yeun-Hee Juhnn and defendant Do-Bum Juhnn married on 29 June 1991. Three minor children were born of the marriage.

Plaintiff and defendant separated on 27 August 2007 after sixteen years of marriage.

On 4 September 2007, plaintiff filed a complaint for child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees. Defendant filed an answer and counterclaims for child custody and equitable distribution on 26 September. A consent order for temporary child support and interim post-separation support was agreed to by the parties on 17 October. Plaintiff then filed an amended complaint for child custody, child support, post-separation support, alimony, equitable distribution, and attorneys' fees on 17 December.

On 24 March 2008, defendant agreed to pay $750.00 a month in temporary child support, and to pay for plaintiff's mortgage and car payment. Defendant filed an amended answer and counterclaims for child custody and equitable distribution on 2 September. On 18 December, both parties agreed to dismiss their respective claims for equitable distribution. The parties also agreed to a memorandum of judgment under which defendant would pay plaintiff $1,485.00 a month in post-separation support and $750.00 in temporary child support.

On 1 December 2009, a permanent child custody, child support, and modification of post-separation support order was entered by the trial court. Plaintiff filed a new motion for child support and attorneys' fees on 8 February 2011. After hearings on 9 May 2010, 13 July 2011, 5 February 2012, 21 March 2012, and 1 June 2012, an order for permanent alimony, child support, and attorneys' fees was entered by the trial court on 10 February 2014. Defendant appeals.

---

[1] At the outset, we note that plaintiff filed a motion to dismiss defendant's appeal pursuant to N.C. R. App. P. 3(c)(3). Plaintiff argues that under Rule 3, defendant had thirty days to file a notice of appeal from the date the trial court served its order upon both parties.

Pursuant to N.C. R. App. P. 3, a notice of appeal must be filed within thirty days if the party is served within three days of entry of judgment, or within thirty days after a party is served and service occurs outside a three-day period after entry of judgment. N.C. R. App. P. 3(c)(1), (2) (2014).

Here, the evidence provided by plaintiff shows that a Family Court Administrator sent an email to both parties notifying each that the trial court's order, entered 10 February 2014, had been placed in the mail on 17 February 2014. However, plaintiff has not provided a certificate of

service nor any other evidence, such as a copy of the envelope showing the postmark date/stamp, to show that defendant was served within three days of entry of judgment; as such, Rule 3(c)(2) is applicable.[1] This Court has addressed a similar matter concerning the timely filing of a notice of appeal in *Frank v. Savage*, 205 N.C. App. 183, 695 S.E.2d 509 (2010). In *Frank*, the defendant filed a motion to dismiss the plaintiff's appeal as being untimely filed. This Court denied the defendant's motion, finding that the defendant failed to provide a certificate of service as required by Rule 58: "We believe that Defendant's failure to comply with the service requirements of Rule 58 of the Rules of Civil Procedure in the present case requires us to apply Rule 3(c)(2) and not Rule 3(c)(1). We therefore hold Plaintiff's appeal is timely." *Id.* at 187, 695 S.E.2d at 512.

In the instant case, defendant has provided evidence that he received a copy of the trial court's order on 28 February 2014, and that he filed his notice of appeal on 24 March 2014. Moreover, the email from the Family Court Administrator does not qualify as a certificate of service under *Frank* and, thus, defendant was not "served" on 17 February 2014 under Rule 3(c)(2). Accordingly, based on this Court's reasoning in *Frank*, and on the evidence presented here, defendant's notice of appeal in the instant case was timely filed within thirty days of defendant receiving the trial court's order. Plaintiff's motion to dismiss defendant's appeal as untimely is, therefore, denied.

On appeal, defendant raises three issues as to whether the trial court erred: (I) by finding defendant acted in bad faith regarding his income; (II) in awarding plaintiff eighteen years of alimony; and (III) in not issuing its order until twenty months after the last hearing.

I.

[2] Defendant argues that the trial court erred by finding defendant acted in bad faith regarding his income. We disagree.

> Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was

---

1. "In civil actions and special proceedings, a party must file and serve a notice of appeal: . . . within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C. R. App. P. 3(c)(2) (2014).

> competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation omitted). An abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

Defendant contends the trial court erred in finding that defendant acted in bad faith and then imputing income to him based on his bad faith.

> The trial court may . . . modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business. When the evidence shows that a party has acted in "bad faith," the trial court may refuse to modify the support awards. If a husband has acted in "good faith" that resulted in the reduction of his income, application of the earnings capacity rule is improper.
>
> The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.

Wolf v. Wolf, 151 N.C. App. 523, 526–27, 566 S.E.2d 516, 518–19 (2002) (citations omitted).

In his brief, defendant lists the trial court's findings of fact 40, 42-43, 63, 66-69 as being erroneous. However, defendant fails to set forth any specific challenges to the findings of fact and instead presents a broad

argument which merely contends that "the evidence at trial [did] not support a finding that [defendant] acted in bad faith, warranting the imputation of income to [defendant.]" It is well established by this Court that where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. *In re K.D.L.*, 207 N.C. App. 453, 456, 700 S.E.2d 766, 769 (2010). As defendant has failed to articulate challenges to these specific findings of fact, we find these findings to be not only binding on appeal, but also supported by competent evidence demonstrating that defendant did indeed act in bad faith regarding his income.

Moreover, even assuming *arguendo* that defendant's broad argument is sufficient enough to challenge these specific findings of fact on appeal, defendant's argument still must fail. Defendant challenges the trial court's findings of fact that defendant: had "the capacity and ability to earn [$134,500.00] in 2008"; "engaged in a pattern of concealing income and under reporting his income which was fraudulent, deceitful, and demonstrative of bad faith"; filed falsified and inaccurate tax returns in 2007 and 2008; "has engaged in a course of conduct subsequent to the date of separation designed to deliberately depress his income because of his blatant disregard of his marital obligation to provide support for his dependent spouse and his children"; has "the capacity to earn at least $120,000.00 per year or $10,000.00 per month"; and that defendant "is a supporting spouse and is financially able to pay alimony and child support." Defendant has not, however, challenged the trial court's remaining findings of fact, which include findings that: defendant committed marital misconduct by abandoning plaintiff and their three children; plaintiff was a homemaker during the entire course of her marriage to defendant; "[d]efendant has an earning capacity far greater than that of [plaintiff] and has demonstrated that capacity"; defendant "intentionally shut down his brokerage business" and "intentionally understated [his brokerage business's] corporate income by at least $44,684.00"; defendant's tax returns for 2007 and 2008 were "spurious" and contained falsified and inaccurate information, including defendant forging his wife's signature on the tax returns; defendant has provided for his paramour and her children while refusing to provide support to plaintiff and his children; and that since plaintiff filed her claim for divorce, defendant has "engaged in voluntary unemployment or underemployment," or "is simply hiding income." These unchallenged findings are more than sufficient to support the trial court's conclusion that defendant acted in bad faith, and that the imputation of income to defendant would be appropriate. Moreover, we note that these unchallenged findings of fact clearly support the trial court's conclusion of law that:

> Defendant (1) failed to exercise his reasonable capacity to earn; (2) deliberately avoided family financial responsibilities; (3) acted in deliberate disregard of his support obligations; (4) refused to seek or keep gainful employment; (5) willfully refused to secure or take a job; (6) deliberately did not apply himself to his business; (7) intentionally depressed income; and (8) intentionally left employment to go into another business and that based on this conduct, he intended to avoid his duty of support to Plaintiff and their children and acted in bad faith such that income may be imputed to him.

Defendant's argument is, accordingly, overruled.

II.

[3] Defendant contends the trial court erred in awarding plaintiff eighteen years of alimony. We disagree.

The standard of review is the same as that stated in *Issue I*.

Pursuant to North Carolina General Statutes, section 50-16.3A, "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." N.C. Gen. Stat. § 50-16.3A(b) (2013). "In determining the amount, duration, and manner of payment of alimony," the trial court must consider sixteen relevant factors, including marital misconduct, duration of marriage, and earning capabilities of the parties. *Id.* "[A] trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522–23 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 50-16.3(A)(c) (2013) (holding that where a trial court decides, in its discretion, to award alimony, the trial court must give its reasons for the award's amount, duration, and manner of payment).

In its order awarding plaintiff eighteen years of alimony, the trial court made seventy-six findings of fact, including findings that defendant: engaged in marital misconduct; was "always the sole means of support of the family"; has a greater earning capacity than that of plaintiff; has deliberately underreported his income to the trial court and on his tax returns; has filed falsified and inaccurate tax returns; has provided for his paramour and her children while refusing to support plaintiff and his children; and has either engaged in voluntary unemployment or has been hiding income in an attempt to avoid supporting plaintiff. The trial

court also made findings that plaintiff: "was absent from the marketplace for over 16 years while she raised the children, and lacks English language skills which make her functionally unemployable"; has "neither the education nor training to permit her to find employment to meet her reasonable economic needs in the United States"; "has significantly less earning potential or earning capacity than Defendant"; had to quit a cosmetology program because she could not afford the training; has had to borrow money from her sisters to pay the expenses of herself and the minor children; has been reliant on her sisters for housing, food, and other assistance; "is in debt with no prospect of working her way out of it due to her having no assets and the extent of her personal liabilities"; and that "[at] age 47, [she] is a dependent spouse and is in need of alimony based upon a consideration of the factors enumerated above, as contained in G.S. 50-16.3A(b), for a duration of eighteen years, which the Court finds to be reasonable under the circumstances[.]" The trial court then concluded as a matter of law that:

> 8. Pursuant to N.C.G.S. § 50-16.3A(a) the Court further concludes that an award of alimony to Plaintiff would be equitable considering all of the relevant factors, including those set forth in N.C.G.S. 50-16.3A(b), as outlined above.
>
> 9. Specifically, the Court concludes as a matter of law that Plaintiff is entitled to an award of alimony in the amount, duration and manner specified herein based on the Court's favorable consideration to Plaintiff of the factors contained in N.C.G.S. 50-16.3A(b)(2), (3), (5), (6), (7), (9), (10), (12) and (13), as applied to the facts of this case.
>
> 10. The Court concludes that eighteen years from January 27, 2010 is a reasonable length of time for the Plaintiff to receive[] alimony from the Defendant and concludes the Plaintiff is entitled to retroactive alimony to January 27, 2010.

We find that such numerous and thorough findings of fact and conclusions of law are more than sufficient to support the trial court's decision to award plaintiff alimony for a term of eighteen years.[2]

2. We further note that the trial court made several findings of fact which stated that plaintiff (at the time of the trial court's order) was forty-seven years old. Given that the trial court made numerous findings of fact that plaintiff is "in debt with no prospect of working her way out of it" and is "functionally unemployable," it is certainly conceivable that by awarding eighteen years of alimony, the trial court intended for plaintiff to receive alimony until she reaches the age of sixty-five and becomes eligible for social security and other governmental assistance.

See Ellis v. Ellis, ___ N.C. App. ___, 767 S.E.2d 413 (2014) (upholding the trial court's order awarding alimony for a term of two years to the plaintiff where the trial court properly considered the statutory factors under N.C.G.S. § 50-16.3A(b) and made findings of fact that an alimony award of two years was appropriate given the plaintiff's acts of marital misconduct, bad faith during the divorce process, depletion of the marital estate, and refusal to secure employment). Defendant's argument is, therefore, overruled.

III.

[4] Finally, defendant argues that the trial court erred in not issuing its order until twenty months after the last hearing. Specifically, defendant contends the trial court's delay in entering its order for alimony has violated defendant's constitutional rights. Defendant does not cite any substantive case law in support of his argument, however, in violation of Rule 28 of our Rules of Appellate Procedure. N.C. R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Further, this Court has previously addressed and denied defendant's argument in *Rhew v. Felton*, 178 N.C. App. 475, 631 S.E.2d 859 (2006).

In *Rhew*, the plaintiff contended the trial court, by delaying entry of an alimony order, had violated his constitutional rights. The plaintiff based his argument upon *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000), in which this Court held that a nineteen-month delay by the trial court between an equitable distribution hearing and entry of an equitable distribution order had violated the defendant's rights. *Rhew* distinguished itself from *Wall*, however, by noting that "*Wall* dealt with an equitable distribution award, while the present case involves alimony." *Rhew*, 178 N.C. App. at 482, 631 S.E.2d at 865. "Indeed, since *Wall*, this Court has declined to reverse late-entered . . . orders where the facts have revealed that the complaining party was not prejudiced by the delay." *Britt v. Britt*, 168 N.C. App. 198, 202, 606 S.E.2d 910, 912 (2005) (holding that a delay of sixteen months between hearing and entry of equitable distribution order was not prejudicial) (citing *White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269 (holding that delay of seven months between hearing and entry of equitable distribution order was not prejudicial)).

In the instant matter, defendant argues that the "extreme delay was prejudicial" because, "[s]ince [defendant] had made no payments in twenty months, he is [now] lumped with an extreme arrears amount." However, we note defendant was under an order to pay post-separation

support and child support prior to the trial court's entry of an order for permanent alimony, and defendant has presented no evidence as to why he did not make the required post-separation support and child support payments during this time period (almost four years), nor has defendant shown how the trial court's delayed entry of the alimony and child support order has prejudiced him. In fact, on this record, it appears only plaintiff has suffered substantial prejudice, not defendant.

Defendant further contends he has been delayed by the late entry of the order because hearing transcripts and exhibits have been lost during this twenty-month period. Defendant presents no specific arguments or examples as to exactly how he has been prejudiced by this loss of trial court materials, nor does he cite any case law in support of his argument. Moreover, the record, as presented on appeal, is sufficiently complete to permit a satisfactory review of defendant's arguments. Defendant's contention is, therefore, overruled.

The order of the trial court is affirmed.

AFFIRMED.

Judges STEPHENS and DIETZ concur.

HANNAH MARIE JOHNSON KEARNEY, Plaintiff
v.
BRUCE R. BOLLING, M.D., Defendant

No. COA14-671

Filed 7 July 2015

1. Medical Malpractice—expert witness—American College of Surgeons guidelines

The trial court did not err in a medical malpractice action by allowing defense counsel to cross-examine plaintiff's expert witness on the American College of Surgeons' policy statement on physicians acting as expert witnesses. Permitting such testimony was not an abuse of discretion, and it did not undermine the trial court's ruling that, as a matter of evidentiary law, the witness was qualified to render expert testimony.

2. Appeals and Error—failure to object—issue not preserved

In a medical malpractice action, plaintiff failed to object to a line of cross-examination concerning her expert witness's rejection from medical schools in the United States, thereby failing to preserve the issue for appellate review.

3. Medical Malpractice—American College of Surgeons guidelines—motion to strike

The trial court did not err in a medical malpractice action by allowing one of defendant's expert witnesses to testify regarding the American College of Surgeons' policy statement on physicians acting as expert witnesses. Even though the witness testified as to what the organization "would say" and the trial court could have granted plaintiff's motion to strike, the Court of Appeals held that the trial court did not abuse its discretion.

4. Medical Malpractice—qualification of medical expert witness

The trial court did not err in a medical malpractice action by qualifying one of defendant's witnesses as a medical expert. Because the expert testified that he was familiar with a town similar to Winston-Salem, that current demographic differences were the result of a later recent hurricane, that he associated with doctors in Winston-Salem, and that he felt very comfortable with his familiarity with the standard of care in Winston-Salem at the relevant time, the Court of Appeals could not conclude that the trial court had abused its discretion.

5. Medical Malpractice—motion to amend complaint during trial—lack of informed consent claim

The trial court did not err in a medical malpractice action by granting defendant's motion in limine and denying plaintiff's motion to amend her complaint during trial, effectively prohibiting plaintiff for pursuing a claim based on lack of informed consent. Plaintiff did not comply with Rule 9(j) on the consent issue, and defense counsel's questions at trial did not amount to litigation of a lack of informed consent claim.

Appeal by plaintiff from judgment entered 22 August 2013 by Judge Hugh B. Lewis in Forsyth County Superior Court. Heard in the Court of Appeals 19 March 2015.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellant.

Shumaker, Loop & Kendrick, LLP, by Lisa M. Hoffman and Scott M. Stevenson, for defendant-appellee.

DIETZ, Judge.

Plaintiff Hannah Marie Johnson Kearney appeals from a defense verdict in her medical malpractice action against Dr. Bruce R. Bolling. Kearney's lawsuit stems from serious complications she suffered following gallbladder surgery. She challenges a number of evidentiary rulings by the trial court, including the court's decision to permit testimony that Kearney's expert witness did not satisfy the criteria for expert testimony established by the American College of Surgeons, a voluntary organization to which the expert belonged. Kearney also challenges the trial court's determination that one of Dr. Bolling's expert witnesses was familiar with the standard of care in a community of similar size to Winston-Salem. Finally, Kearney challenges the trial court's grant of a motion *in limine* and denial of a mid-trial motion to amend her complaint to add a new legal theory based on lack of informed consent.

Kearney's arguments present close questions. But this Court's review of evidentiary rulings and other mid-trial discretionary decisions by a trial court is severely limited. These rulings are reviewed for abuse of discretion and this Court can reverse only if the trial court's rulings appear so arbitrary that they could not be the result of a reasoned decision. Although we may not agree with all of the trial court's rulings below, we cannot say that those rulings were so manifestly arbitrary that they constituted an abuse of discretion. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

On 17 March 2009, Plaintiff Hannah Marie Johnson Kearney went to the emergency department of Forsyth Medical Center in Winston-Salem, complaining of severe chest and abdominal pain. The emergency department consulted Defendant Dr. Bruce Bolling, who determined that Kearney had acute cholecystitis and needed to have her gallbladder removed. Dr. Bolling performed a laparoscopic cholecystectomy on Kearney on 17 March 2009. Kearney was discharged from Forsyth Medical Center on 18 March 2009.

Kearney returned to Forsyth Medical Center on 19 March 2009, complaining of severe pain. Dr. Bolling ordered several diagnostic tests, but the results of the tests were normal. Kearney again was discharged on 22 March 2009. On 23 March 2009, Kearney was readmitted to Forsyth

Medical Center. Dr. Bolling ordered a HIDA scan, which showed a bile leak caused by a hole in Kearney's right hepatic duct. As a result of the bile leak, Kearney required additional hospitalization and surgical procedures, including a roux-en-y surgery, to repair the leak. Kearney fired Dr. Bolling on 27 March 2009 and retained new doctors for these additional procedures.

On 30 September 2011, Kearney filed a medical malpractice complaint against Dr. Bolling alleging that Dr. Bolling was "negligent in his care and treatment" of her. On 18 January 2012, Dr. Bolling filed a motion to dismiss, arguing that Kearney failed to effect proper service of the complaint and summons. The trial court denied the motion.

The case went to trial on 15 July 2013. On the first day of trial, Dr. Bolling filed a motion *in limine*, asking the trial court to exclude any evidence "regarding or relating to Defendant's alleged failure to obtain informed consent" on the ground that "such allegations were not contained in the Plaintiff's Complaint and therefore the Defendant did not have proper notice of such allegation." The trial court granted this motion.

Later in the trial, Kearney moved to amend her complaint to add the theory of lack of informed consent after Dr. Bolling's counsel questioned Kearney on cross-examination about whether she had signed a consent form prior to her initial surgery. After hearing arguments from both parties, the trial court denied Kearney's motion, finding that the doctrine of amendment by implication was inapplicable and that the amendment would cause undue prejudice and surprise to Dr. Bolling.

Also during trial, Kearney tendered Dr. Brickman, a medical school professor of surgery, as an expert witness. The court accepted Dr. Brickman as an expert witness in the field of general surgery. Dr. Brickman testified that he was a fellow in the American College of Surgeons, "an honorary society to which you apply for admission after you become board-certified," and that "[i]t's a great honor to be a fellow." On cross-examination, defense counsel questioned Dr. Brickman regarding a document issued by the American College of Surgeons entitled "Statement on the physician acting as an expert witness" which sets forth "[r]ecommended qualifications for the physician who acts as an expert witness."

Over Kearney's objections, defense counsel questioned Dr. Brickman and established that he did not meet the American College of Surgeons' guidelines for providing expert testimony. Defense counsel also asked Dr. Brickman, "did you apply to medical school in the United States?"

Dr. Brickman responded, "I did." Defense counsel then asked him, "Did you get in?" and Dr. Brickman responded, "I did not." Kearney did not object to the admissibility of these two questions.

Dr. Bolling called his own expert witnesses during his case in chief. One of those experts, Dr. Todd Heniford, identified the American College of Surgeons' statement described above and the document was later accepted into evidence—over Kearney's objection—as Defendant's Exhibit No. 4. Dr. Heniford also testified—again over Kearney's objection—that Dr. Brickman was not in compliance with the American College of Surgeons' guidelines for expert testimony and that "[t]he American College of Surgeons would say that he absolutely should not be an expert witness . . . honestly, he should rule himself out."

Dr. Bolling also proffered another expert witness, Dr. William Nealon, a specialist in pancreaticobiliary and hepatic surgery at Vanderbilt University in Nashville, Tennessee. Dr. Nealon testified that he was familiar with the standard of care in communities similar to Winston-Salem, North Carolina—specifically "Beaumont, Texas, where they have a hospital that is almost identical in size to Forsyth Hospital, and the community itself is almost identical in size. . . . And just judging by the demographics for Winston-Salem and Forsyth Hospital, it seems almost identical." Dr. Nealon also testified that he was familiar with Wake Forest University and that he "associate[s] and speak[s] with general surgeons at Wake Forest University."

Plaintiff's counsel then questioned Dr. Nealon, through *voir dire*, about his familiarity with Winston-Salem or similar communities. When asked how he knew the size of Beaumont, Texas, Dr. Nealon responded that he "read it in the newspaper." Plaintiff's counsel then presented demographic information to Dr. Nealon indicating that Beaumont, Texas was significantly smaller than Winston-Salem. The demographic information showed that in 2013 Beaumont had a population of approximately 118,000 compared to Winston-Salem's 234,000; Beaumont's hospital had 456 beds to Forsyth Medical Center's 681; and Beaumont's hospital had 20,658 admissions where Forsyth Medical Center had 40,938. Dr. Nealon testified that he believed the discrepancy was the result of a population decrease caused by a severe hurricane that hit the Beaumont area sometime after 2009.

After plaintiff's counsel completed the *voir dire* of Dr. Nealon, defense counsel asked Dr. Nealon, "do you believe that regardless of what the population is today in those cities, that you are familiar with the

standard of care for Winston-Salem or similar communities as it existed in 2009?" Dr. Nealon replied, "Yes, I feel very comfortable about that."

Defense counsel then tendered Dr. Nealon for acceptance as an expert witness, arguing that Dr. Nealon "has certainly demonstrated for this court that he is familiar with the standard of care in 2009 for the same or similar communities." Plaintiff's counsel objected, arguing that Dr. Nealon was not qualified to testify as an expert because he failed to establish his familiarity with the standard of care in Winston-Salem or a similar community because Beaumont, Texas was not sufficiently similar to Winston-Salem. The trial court found that Dr. Nealon met the statutory requirements for expert testimony. Dr. Nealon then testified that, in his opinion, Dr. Bolling "[met] the standard of care," "used his best judgment," and "used reasonable care" "in all respects, in the care and treatment of [Kearney] from March 17, 2009, through March 27, 2009."

On 2 August 2013, the jury returned a verdict in favor of Dr. Bolling. The trial court entered a corresponding judgment on 22 August 2013. Kearney timely appealed.

Analysis

I. Cross-Examination of Dr. Brickman

[1] Kearney first argues that the trial court erred in allowing defense counsel to cross-examine Kearney's expert witness, Dr. Brickman, about the American College of Surgeons' policy statement on physicians acting as expert witnesses. Kearney contends that questions about the association's guidelines—which recommended that physicians in Dr. Brickman's position not testify as experts—undermined the trial court's ruling that Dr. Brickman was qualified to testify as an expert. We disagree.

The trial court has "broad discretion in controlling the scope of cross-examination and a ruling by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 336, 626 S.E.2d 716, 723 (2006).

A party may question an expert witness to establish inconsistencies and "attack his credibility." *State v. Gregory*, 340 N.C. 365, 410, 459 S.E.2d 638, 663 (1995). "The largest possible scope should be given, and almost any question may be put to test the value of [an expert's] testimony." *Id.* (internal quotation marks omitted). Likewise, "[c]ross examination

is available to establish bias or interest as grounds of impeachment" because "[e]vidence of a witness' bias or interest is a circumstance that the jury may properly consider when determining the weight and credibility to give to a witness' testimony." *Willoughby v. Kenneth W. Wilkins, M.D., P.A.*, 65 N.C. App. 626, 638, 310 S.E.2d 90, 98 (1983).

Here, Dr. Brickman testified that he belonged to the American College of Surgeons and that he considered it an honor to belong to the organization. The organization's guidelines state that doctors like Dr. Brickman, who are not actively practicing medicine in a clinical setting, should not testify as expert witnesses. Dr. Brickman chose to ignore those guidelines and testify in this case. The trial court permitted defense counsel to question Dr. Brickman about his violation of the organization's guidelines in order to challenge his credibility. Under the narrow standard of review applicable to evidentiary issues, we cannot say that the trial court's decision to permit this line of questioning "was so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. Accordingly, we must find no abuse of discretion.

Kearney responds by citing *Goudreault v. Kleeman*, 965 A.2d 1040 (N.H. 2009), a New Hampshire Supreme Court opinion affirming the exclusion of similar testimony regarding the American College of Surgeons' guidelines. But even if *Goudreault* were binding on this Court—and it is not—it does not hold that the American College of Surgeons' guidelines *never* are admissible for impeachment purposes. The *Goudreault* court held, as we do here, that the trial court's evidentiary ruling was not an abuse of discretion under the narrow standard of review for evidentiary rulings. *Id.* at 1052. Nothing in *Goudreault* indicates that it would be an abuse of discretion to permit this line of questioning instead of excluding it; indeed, the nature of discretionary rulings means that two trial judges could reach opposite decisions on the same facts and yet neither ruling is reversible error.

Kearney next argues that questioning Dr. Brickman about his compliance with the American College of Surgeons' guidelines contradicts North Carolina Rule of Evidence 702(b)(2), which expressly permits medical school professors to testify as expert witnesses in medical malpractice actions. Kearney argues that the effect of the trial court's ruling was to permit a private agreement (the American College of Surgeons' guidelines) to supersede a state statute (the Rules of Evidence).

But that is not what occurred at trial. Dr. Brickman described his qualifications and expertise at length during direct examination and the

trial court accepted him as an expert witness in the presence of the jury. Later, during jury instructions, the trial court instructed the jury about what it meant to be an "expert witness" and stated that Dr. Brickman was "a medical expert witness." Thus, although Dr. Brickman's cross-examination concerning the American College of Surgeons' guidelines may have raised questions about credibility and motive to testify, it did not undermine the trial court's ruling that, as a matter of evidentiary law, Dr. Brickman was qualified to render expert testimony.

Finally, it must be noted that, following cross-examination, the trial court provided Kearney with the opportunity to rehabilitate Dr. Brickman through re-direct examination, and Kearney did just that. In sum, we hold that the trial court's decision to permit cross-examination concerning the American College of Surgeons' guidelines was within the trial court's sound discretion.

[2] Kearney also argues that the trial court erred in permitting a line of cross-examination concerning Dr. Brickman's application to—and rejection from—medical schools in the United States. Kearney failed to object to these questions, and therefore this issue was not preserved for appellate review.[1] *See* N.C. R. App. P. 10(a)(1) (2013). In any event, for the same reasons discussed above, these questions could aid the jury in assessing Dr. Brickman's credibility and thus the trial court did not abuse its broad discretion in permitting this line of questioning.

II. Examination of Dr. Heniford

[3] Kearney next argues that the trial court erred in allowing one of Dr. Bolling's experts, Dr. Heniford, to testify about the American College of Surgeons' guidelines. We again hold that the trial court did not abuse its broad discretion in permitting this testimony.

Dr. Heniford testified that he, like Dr. Brickman, was a member of the American College of Surgeons and was familiar with the organization's guidelines concerning testifying as an expert. The following exchange then took place:

> DEFENSE COUNSEL: If the jury should find that Dr. Brickman did not have privileges, did not have an active

1. Defense counsel asked Dr. Brickman questions about his rejection from U.S. medical schools repeatedly during cross-examination. The second time defense counsel asked the question, plaintiff's counsel objected stating "Objection. We've gone over the same thing." But Kearney did not object on the ground that this line of questioning was improper and the responses inadmissible.

> clinical practice, and was not board certified, is he in compliance with the qualifications as specified by the American College of Surgeons?
>
> DR. HENIFORD: The American College of Surgeons would say that he absolutely should not be an expert witness. And honestly, he should rule himself out.
>
> PLAINTIFF'S COUNSEL: Move to strike, Your Honor, what the American College of Surgeons would say.
>
> THE COURT: The request is denied.

We find Dr. Heniford's answer troubling because he did not merely state his understanding of whether Dr. Bolling could testify consistent with the organization's guidelines, but went further and appeared to speak on behalf of the organization. The trial court certainly *could have* granted the motion to strike that testimony and instructed Dr. Heniford to limit his answer to his understanding of the guidelines.

But again, our review is sharply constrained by the narrow standard of review for evidentiary rulings. Although we may have ruled differently, we cannot say that the trial court's denial of that motion to strike "was so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. For example, the court may have believed, in light of the tone and demeanor of the witness unavailable to this Court in reviewing the trial transcript, that Dr. Heniford's answer simply conveyed his understanding of the rules of an honorary organization to which both he and Dr. Brickman belong. Thus, we are constrained to hold that the trial court did not abuse its broad discretion in declining to strike Dr. Heniford's testimony.

Kearney also argues that Dr. Bolling's closing argument improperly referenced the various testimony concerning Dr. Brickman's violation of the American College of Surgeons' guidelines. Because we find no error in the admission of this testimony, both during Dr. Brickman's cross-examination and during Dr. Heniford's direct examination, we likewise find no error in the references to that testimony during closing argument. Accordingly, we reject Kearney's argument.

III. Expert Testimony of Dr. Nealon

[4] Kearney next argues that the trial court erred in qualifying one of Dr. Bolling's witnesses, Dr. Nealon, as a medical expert. Kearney contends that Dr. Nealon was not qualified to testify as a medical expert because he did not show that he is familiar with the standard of care in

Winston-Salem or a similar community, a mandatory criteria for expert witnesses under N.C. R. Evid. 702(b) and N.C. Gen. Stat. § 90-21.12. Again, under the highly deferential standard of review applicable to these evidentiary rulings, we must reject Kearney's argument.

"[T]rial courts are afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal quotation marks omitted). The trial court's "ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion." *Id.* A trial court's evidentiary ruling is not an abuse of discretion unless it "was so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

In a medical malpractice action, the standard of care is defined as "the standards of practice among members of the same health care profession with similar training and experience *situated in the same or similar communities* under the same or similar circumstances at the time of the alleged act giving rise to the cause of action." N.C. Gen. Stat. § 90-21.12(a) (2013) (emphasis added). An expert witness "testifying as to the standard of care" is not required "to have actually practiced in the same community as the defendant," but "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities." *Smith v. Whitmer*, 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003) (citation omitted).

The "critical inquiry" in determining whether a medical expert's testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is "whether the doctor's testimony, taken as a whole" establishes that he "is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community." *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005).

Here, Dr. Nealon testified that he was familiar with "Beaumont, Texas, where they have a hospital almost identical in size to Forsyth Hospital, and the community itself is almost identical in size." He testified that he was familiar with Beaumont and its demographic information both from his own experience there and from information he read in local newspapers. Dr. Nealon also testified that he was familiar with Wake Forest University Baptist Medical Center, also located in Winston-Salem, and that he had spoken with surgeons there.

In response, Kearney presented demographic information on Beaumont, Texas, and Winston-Salem, showing that Beaumont and its hospital actually were markedly smaller than Winston-Salem and Forsyth Medical Center. Dr. Nealon did not dispute that information but testified that the population size of Beaumont declined as the result of a recent hurricane and that, in 2009 when Kearney's claim arose, Beaumont and Winston-Salem were similar communities with similar hospitals. When asked, "do you believe that regardless of what the population is today in [Beaumont and Winston-Salem], that you are familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009," Dr. Nealon answered, "Yes, I feel very comfortable about that."

Kearney contends that the demographic differences between Beaumont and Winston-Salem as of 2013 required the trial court to find that the two cities were not similar communities as a matter of law. Kearney supports this argument with analysis of two cases in which this Court held that the similar community requirement of N.C. Gen. Stat. § 90-21.12 was not satisfied.

First, in *Henry v. Southeastern OB-GYN Assocs., P.A.*, this Court held that the similar community requirement was not met where the proffered expert "failed to testify in any instance that he was familiar with the standard of care in Wilmington or similar communities." 145 N.C. App. 208, 210, 550 S.E.2d 245, 246, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001). The doctor at issue in that case testified that he was familiar with the national standard of care, but was not familiar with Wilmington, North Carolina. *Id.* at 209-10, 550 S.E.2d at 246-47. The doctor practiced in Spartanburg, South Carolina, which the plaintiffs argued was similar to Durham or Chapel Hill, but there was no evidence in the record that Wilmington and Durham or Chapel Hill were the "same or similar." *Id.*

Second, in *Smith v. Whitmer*, this Court held that the similar community requirement was not met where the doctor proffered as an expert "asserted that he was familiar with the applicable standard of care," but "his testimony [was] devoid of support for this assertion." 159 N.C. App. 192, 196, 582 S.E.2d 669, 672 (2003). The doctor in that case "stated that the sole information he received or reviewed concerning the relevant standard of care in Tarboro or Rocky Mount was verbal information from plaintiff's attorney," but he could not "remember what plaintiff's counsel had purportedly told him." *Id.* at 196-97, 582 S.E.2d at 672. He "had never visited Tarboro or Rocky Mount, had never spoken to any health care practitioners in the area, and was not acquainted with

the medical community." *Id.* at 197, 582 S.E.2d at 672 (internal quotation marks omitted).

These cases are distinguishable. Here, Dr. Nealon testified that he was familiar with Beaumont, Texas; that he believed Beaumont was similar to Winston-Salem based on his knowledge of Beaumont and demographic statistics for Winston-Salem; that the demographic differences between Beaumont and Winston-Salem as of 2013 were the result of an intervening hurricane that displaced many Beaumont residents; that he has associated with surgeons from Wake Forest University Baptist Medical Center, another hospital in Winston-Salem; and that he felt "very comfortable" that he was "familiar with the standard of care for Winston-Salem or similar communities as it existed in 2009."

In light of this testimony, we cannot conclude that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723. Thus, under the deferential standard of review applicable to a trial court's admission of expert testimony, we hold that the trial court did not abuse its discretion in concluding that Dr. Nealon was familiar with the standard of care in communities and hospitals similar to Winston-Salem and Forsyth Medical Center.

IV. Grant of Motion *in Limine* and Denial of Motion to Amend

[5] Lastly, Kearney argues that the trial court erred in granting Dr. Bolling's motion *in limine* and denying Kearney's motion to amend her complaint during trial, both of which had the effect of prohibiting Kearney from pursuing a claim based on lack of informed consent. As with Kearney's other arguments, we are constrained by the narrow standard of review applicable to these arguments.

The standard of review for a trial court's ruling on a motion in limine is abuse of discretion. *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001); *Webster v. Powell*, 98 N.C. App. 432, 439, 391 S.E.2d 204, 208 (1990), *aff'd per curiam*, 328 N.C. 88, 399 S.E.2d 113 (1991). Likewise, the decision to permit amendment of a complaint during trial rests in the sound discretion of the trial court and "[i]ts decision will not be disturbed on appeal absent a showing of abuse of discretion." *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996). Thus, as with Kearney's other arguments on appeal, this Court cannot find error and reverse on these issues unless the trial court's ruling "was so arbitrary that it could not have been the

result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.[2]

Kearney first argues that her initial complaint asserted a claim based on lack of informed consent. We disagree. Ordinarily, a complaint need only contain a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1) (2013).

But medical malpractice claims are different. Rule 9(j) contains additional requirements for medical malpractice complaints. Rule 9(j) requires a statement that the plaintiff's medical records have been reviewed "by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. R. Civ. P. 9(j)(1). Claims based on lack of informed consent are medical malpractice claims requiring expert testimony and therefore must comply with the requirements of Rule 9(j). *See Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 145 (2001); *see also Clark v. Perry*, 114 N.C. App. 297, 306, 442 S.E.2d 57, 62 (1994); *Nelson v. Patrick*, 58 N.C. App. 546, 548-49, 293 S.E.2d 829, 831 (1982). When a medical malpractice complaint asserts multiple theories of negligence with different standards of care, the expert or experts satisfying the Rule 9(j) requirement must be willing to testify to each applicable standard of care. N.C. R. Civ. P. 9(j)(1).

That did not happen here. Dr. Brickman, the expert who provided Kearney's Rule 9(j) certification, testified during his deposition that he was not aware Kearney intended to assert an informed consent claim until the issue came up during depositions. He did not review that theory of negligence before the complaint was filed and his opinion forming the basis of Kearney's Rule 9(j) certification did not address that standard of care.

It is "well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery

---

2. Kearney argues that the standard of review on these issues should be *de novo* because they involve the trial court's legal interpretation of Rules 8 and 9 of the North Carolina Rules of Civil Procedure. We agree with Kearney that questions of law, including interpretation of the Rules of Civil Procedure, are reviewed *de novo*. But as explained in our analysis below, the trial court did not err in its understanding of the rules, and its rulings ultimately involved discretionary decisions subject to the abuse of discretion standard.

subsequently establishes that the statement is not supported by the facts then dismissal is likewise appropriate." *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008). Applying this legal principle here, we hold that the trial court did not err in concluding that the complaint "did not include the consent issue." That legal theory could be asserted only if, *before filing the complaint*, Kearney's expert had reviewed the underlying facts and was willing to testify that Dr. Bolling had not complied with the applicable standard of care concerning informed consent. We know for certain that this did not occur because Kearney's expert conceded that he was unaware of the informed consent issue until it first came up during discovery. As a result, the trial court did not abuse its discretion in granting the motion *in limine* excluding Kearney's informed consent evidence from trial.

Kearney also argues that, even if the trial court properly excluded the informed consent evidence initially, the court erred by denying her motion to amend during trial because defense counsel opened the door to this evidence by questioning Kearney about her consent to the medical procedure. As explained below, the trial court did not abuse its broad discretion in denying Kearney's motion.

Kearney contends that the following questioning by defense counsel opened the door on the issue of informed consent:

> DEFENSE COUNSEL: Dr. Bolling came in, talked to you about the operation, and following the recommendation of the emergency department and Dr. Bolling, you consented to have your gallbladder taken out; correct?
>
> KEARNEY: He came in. He did not discuss everything that was to be discussed. When the consent form was handed to me, sir, if you will look back on the first day and how much medication I was given, I was in and out.
>
> DEFENSE COUNSEL: You did sign a consent form; correct?
>
> KEARNEY: I had to be woken up to sign a consent form from all the medicine I was on, sir.

Shortly after this questioning ended, Kearney moved for leave to amend her complaint to add a claim based on lack of informed consent, and the trial court denied the motion. Kearney argues on appeal that her motion should have been granted and that, in any event, the questioning amounted to an amendment by implication under Rule 15(b) of the Rules of Civil Procedure. Rule 15(b) states that "[w]hen issues not raised

by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C. R. Civ. P. 15(b). The denial of a motion to amend under Rule 15(a) and the refusal to recognize a claim of an amendment by implication under Rule 15(b) both are reviewed for abuse of discretion. *Tyson v. Ciba-Geigy Corp.*, 82 N.C. App. 626, 629-30, 347 S.E.2d 473, 476 (1986).

We hold that the trial court did not abuse its discretion by refusing to permit Kearney to pursue her informed consent claim for the first time mid-trial. Our case law governing amendments by implication requires that the parties actually litigate the new claim without objection. For example, in *Taylor v. Gillespie*, on which Kearney relies, this Court held that the pleadings were amended by implication to include a claim for resulting trust because the plaintiff introduced "evidence tending to establish the existence of a resulting trust" and the defendant did not object. 66 N.C. App. 302, 305, 311 S.E.2d 362, 364 (1984).

Here, by contrast, the parties did not litigate a claim for lack of informed consent at trial. All the jury heard were two isolated questions concerning the consent form that Kearney signed. Notably, there was no expert testimony concerning the standard of care and no other testimony establishing the elements of a malpractice claim based on the lack of informed consent. Thus, once again, we must conclude that the trial court's ruling was not an abuse of discretion. The court's decision not to permit this new theory to enter the case mid-trial rested soundly within the court's discretion to control the course of trial proceedings. That decision certainly was not "so arbitrary that it could not have been the result of a reasoned decision." *Williams*, 176 N.C. App. at 336, 626 S.E.2d at 723.

V. Insufficient Service of Process

Finally, Dr. Bolling argues, as an alternative basis to affirm the judgment, that the trial court erred in denying his motion to dismiss for insufficient service of process. Because we affirm the trial court's judgment, we need not reach this issue.

Conclusion

The trial court's evidentiary rulings and its denial of Kearney's mid-trial motion to amend were within the trial court's sound discretion. Accordingly, we find no error in the trial court's judgment.

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

KELLY NICOLE McCAULEY, Plaintiff
v.
STEVEN EUGENE THOMAS, by And through PROGRESSIVE UNIVERSAL INSURANCE COMPANY, Intervenor, Defendant

No. COA14-1366

Filed 7 July 2015

Motor Vehicles—automobile accident—contributory negligence —knowledge of driver's intoxication

In an action for damages allegedly caused by defendant's negligence in an automobile accident, the trial court erred by determining that plaintiff was grossly negligent as a matter of law and entering a directed verdict in favor of defendant. While plaintiff did voluntarily ride in defendant's car after defendant had been drinking, plaintiff testified that she did not believe that defendant was intoxicated. There was sufficient evidence for the issue of plaintiff's contributory negligence to be decided by the jury.

Appeal by plaintiff from order entered 25 July 2014 by Judge Thomas H. Lock in Lee County Superior Court. Heard in the Court of Appeals 6 May 2015.

Brent Adams & Associates, *by Brenton D. Adams*, *for plaintiff-appellant.*

Teague, Rotenstreich, Stanaland, Fox & Holt, P.L.L.C., *by Kenneth B. Rotenstreich, for defendant-appellee.*

McCULLOUGH, Judge.

Kelly Nicole McCauley ("plaintiff") appeals from the trial court's order granting a directed verdict in favor of Steven Eugene Thomas ("defendant") and intervenor Progressive Universal Insurance Company ("Progressive") upon finding that plaintiff was grossly contributorily negligent as a matter of law. We reverse.

I. Background

Plaintiff initiated this action against defendant on 4 October 2013 in Lee County Superior Court to recover for injuries she sustained in a single vehicle automobile accident allegedly caused by defendant's negligence. Specifically, plaintiff alleged the following:

3. That on January 18, 2012 at approximately 11:44 p.m., the plaintiff was a passenger in a 2006 Ford vehicle owned and operated by the defendant.

4. That on the date and at the time referred to above, the defendant was operating his vehicle east on SR 1469, when he encountered a dead end, struck a tree and a fence, before coming to rest off of the roadway.

5. That the impact of the collision referred to above caused the plaintiff personal injuries.

6. That at the time of the collision described above and immediately prior thereto, the defendant was negligent in that he:

(a) Failed to keep a proper lookout;

(b) Failed to reduce speed to the extent necessary to avoid a collision;

(c) Failed to keep his vehicle under proper control;

(d) Drove in a careless and reckless manner.

7. That as a proximate result of defendant's negligence and of the collision referred to above, the plaintiff was injured and underwent medical care and treatment and, upon information and belief, will continue to need medical treatment into the future.

8. That as a proximate result of defendant's negligence and of the personal injuries suffered by the plaintiff, she has incurred medical expenses and, upon information and belief, it is alleged that she will continue to incur medical expenses into the future.

9. That as a proximate result of the collision referred to above, the plaintiff has experienced pain, suffering and discomfort and, upon information and belief, it is alleged she will continue to experience pain, suffering and discomfort into the future as a result of the injuries she sustained in the motor vehicle collision.

In response to plaintiff's complaint, defendant filed an answer on 15 January 2014, in which defendant denied all allegations of negligence and, among other defenses, pleaded contributory negligence and

gross contributory negligence as bars to plaintiff's recovery. Plaintiff responded to defendant's allegations of contributory negligence and gross contributory negligence by asserting defendant had the last clear chance to avoid the accident.

Following the denial of motions to dismiss by defendant, an unsuccessful attempt at mediation, and the intervention of Progressive on behalf of defendant[1], this case came on for jury trial in Lee County Superior Court on 14 July 2014, the Honorable Thomas H. Lock, Judge presiding. Each side called only one witness at trial.

Plaintiff first took the stand and testified that she and defendant were in a relationship at the time of the automobile accident. Plaintiff testified that on the night of the accident, 18 January 2012, she and defendant went on a date to San Felipe, a restaurant in Sanford which was offering a margarita special. Over the course of two hours at the restaurant, plaintiff and defendant ate dinner and drank margaritas. Plaintiff could not recall the exact number of drinks she and defendant consumed, but testified she had no more than three and defendant probably drank one or two more than she did.

Plaintiff testified she and defendant had a good time at dinner and she was feeling the effects of the alcohol by the time they were ready to leave. As a result, plaintiff allowed defendant to drive. When questioned whether she "voluntarily rode with [defendant] after knowing he consumed four or five margaritas in [her] presence," plaintiff responded affirmatively. Yet, plaintiff indicated defendant drank several times a week and was a "far more experienced drinker than [she] was." Plaintiff further testified defendant did not have any problems walking or exiting the restaurant and averred "[defendant] definitely wasn't intoxicated."

From the restaurant, plaintiff and defendant went to defendant's mother's house. Plaintiff indicated she did not complain about defendant's driving between the restaurant and defendant's mother's house. Plaintiff and defendant were at defendant's mother's house for approximately an hour and a half. Plaintiff testified that, to her knowledge, defendant did not consume any alcohol after leaving the restaurant. Yet, plaintiff acknowledged defendant was not in her presence for the entire time they were at defendant's mother's house.

---

1. Progressive, who was defendant's liability insurer at the time of the accident, was allowed to intervene and represent the interests of defendant, who was unable to cooperate in this proceeding due to his incarceration out of state.

From defendant's mother's house, plaintiff and defendant traveled to plaintiff's house on the other side of Sanford, a thirty-five to forty minute drive. Defendant drove as plaintiff was still feeling the effects of the alcohol. Again, plaintiff indicated she voluntarily rode with defendant.

Plaintiff testified that on the way to her house, she and defendant got into an argument. Plaintiff could not remember what the argument was about, but recalled that it was a silly argument. Plaintiff indicated defendant was driving poorly at the time. As a result of defendant's poor driving and because he was yelling at her, plaintiff told defendant to pull over and let her out. Plaintiff testified defendant did pull over, but the downtown area of Sanford where he pulled over was not an area a single female would want to be late at night. Thus when defendant apologized and said he would not say another word and would just take plaintiff home and drop her off, plaintiff agreed.

Plaintiff testified they were silent the rest of the way until they made the turn onto West Forest Oaks near plaintiff's house. After making a normal turn onto West Forest Oaks, plaintiff said defendant "just blew up." Plaintiff testified defendant "gassed it immediately[]" and accelerated the vehicle to 35 to 45 miles per hour. Plaintiff explained,

> it's like a bomb went off inside of him or something. He turns on the road, and he gases [sic] the car. And it's not a very long road. It's a dead end. There's like a little guard rail and little reflector signs at the bottom. He sees, and he's yelling, and he's screaming, and I'm just – I'm apologizing, trying to get him to stop.

Upon further questioning, plaintiff testified "[i]t wasn't like a gradual like, you know, like a normal you gradually get up to 35 miles an hour." When defendant pointed out that plaintiff testified about different speeds, plaintiff admitted she did not know the exact speed, but explained the last time she looked over she saw they were going 35 miles per hour and defendant was still accelerating. Plaintiff recalled "apologizing, begging [defendant] to just please stop, please slow down." Then they crashed.

Although plaintiff's recollection of the actual collision was poor, plaintiff remembered going forward and to the left and hitting her head on the gear shifter and the console that it sits in. The next things plaintiff remembered were police officers and being in the hospital. Plaintiff suffered injuries to her face, jaw, and mouth as a result of the accident.

At the conclusion of the plaintiff's attorney's questioning of her, plaintiff reiterated that she did not observe anything prior to the accident

or argument that would have led her to believe defendant was driving in an impaired condition. Plaintiff did not observe anything about defendant's speech that caused alarm, did not observe defendant's eyes being glassy, and did not think defendant was unsteady on his feet.

Plaintiff rested following plaintiff's testimony, at which time defendant moved for a directed verdict on the ground that plaintiff was grossly contributorily negligent as a matter of law. In support of his motion, defendant reiterated portions of plaintiff's testimony, cited several cases standing for the proposition that a passenger who knows or should know that a driver is intoxicated cannot recover for injuries sustained from riding with the driver, and argued the following:

> [Plaintiff], by her own testimony, has admitted she should have known, and because of that, I ask that the Court grant directed verdict in favor of the [d]efendant finding that, even if the other issues are resolved in favor of the [p]laintiff, that, under the facts of this case, given their presence together from before dinner to the time of the wreck, given the amount of alcohol consumed in each other's presence with no evidence of alcohol being consumed outside of each other's presence, given his erratic driving before he pulled over on McIver Street, and her decision to stay in the car with him, given their argument that occurs when they're intoxicated and her decision to stay in the car with him, that she knew or should have known of his intoxication.

After considering the cases submitted by defendant and the arguments by both sides, the trial court denied defendant's motion for a directed verdict at the conclusion of plaintiff's evidence. The trial court explained that,

> [w]hile the evidence certainly is that the [p]laintiff herself had consumed such a quantity of alcohol that, by her own admission, she should not drive as they left the restaurant, and as they left [d]efendant's mother's home and though the evidence is that [d]efendant Thomas had consumed more alcohol than she, the evidence at this point is that she saw nothing in his conduct or behavior to cause her to conclude that he shouldn't drive.
>
> I note that there's no evidence concerning the relative size of the [d]efendant as compared to the [p]laintiff. There was some evidence that he was a more experienced drinker

> than she. I suppose from that it can be inferred that he had a higher tolerance than she.
>
> I also have carefully reviewed at least my notes concerning testimony regarding his driving, and it does appear that, while there is some conflict, I believe that conflict should be resolved in favor of the [p]laintiff at this point, and she did testify on direct before this Court that there was nothing about his driving, speech, or conduct that caused her any concern before the argument.
>
> And while she did demand to get out of the car on McIver Street, it appears at this point that that was because of the argument and not because of concern over his alcohol consumption. So again, . . . looking at the evidence in the light most favorable to the [p]laintiff, at this point [d]efendant's motion for directed verdict is denied.

The defense then called N.C. State Trooper Brian Crissman as its only witness. After testifying about his training to identify impairment, Crissman testified that he responded to plaintiff and defendant's accident on 18 January 2012. Crissman stated he spoke with defendant at the scene and later at the hospital. Crissman testified that, during his time with defendant at the hospital approximately two hours after the accident, he observed several signs of alcohol use or intoxication including glassy eyes, slurred speech, and combativeness. Crissman further testified that while conversing with defendant, he got pretty close to defendant's face and could smell the odor of alcohol on defendant's breath. Concerning his interactions with defendant at the accident scene, Crissman testified that he administered two breath tests to defendant using an alco-sensor and both tests were positive for alcohol. Based on his observations at the scene and at the hospital, Crissman opined that defendant was sufficiently impaired by alcohol to impair his ability to drive, adding that "[defendant] was obviously impaired, visibly impaired."

Yet on cross-examination, Crissman acknowledged defendant sustained a head injury in the accident and was unconscious when he arrived to the accident scene. Crissman testified medical personnel removed defendant from the vehicle and transported him to the hospital. As a result, Crissman never saw defendant in a standing position and was unable to perform further field sobriety tests. Crissman indicated he was not a medical professional but had some training on head injuries and acknowledged a head injury could affect or aggravate a person's attitude or combativeness. Crissman further acknowledged defendant

had been in treatment for thirty to forty minutes at the hospital before he arrived and he was unsure what medications were administered to defendant. Nevertheless, Crissman testified on re-direct examination that there was no question in his mind that defendant was intoxicated, regardless of any injuries sustained.

At the conclusion of the evidence, the defense renewed its motion for a directed verdict arguing there was now evidence in the record that defendant was impaired. Specifically, the defense argued the evidence of impairment went directly to what plaintiff should have known before she voluntarily rode with defendant and, coupled with the evidence that all alcohol consumed by defendant was consumed in the presence of plaintiff, plaintiff felt the effects of the alcohol she consumed and knew defendant had consumed more alcohol, plaintiff and defendant were arguing over something silly, and defendant was driving erratically which caused plaintiff to make defendant stop the vehicle, left nothing for the jury to decide under the law of contributory negligence and gross contributory negligence in North Carolina.

Upon consideration of the arguments, the trial court allowed defendant's motion for a directed verdict on the basis of gross contributory negligence and ordered defendant to draft the order. The trial court then filed a written order on 25 July 2014. Plaintiff filed notice of appeal on 18 August 2014.

II. Discussion

As a preliminary issue, the defense notes that, contemporaneously with its appellate brief, it filed a motion to dismiss this appeal on the basis that plaintiff's appellate brief was untimely filed. Defendant's motion was denied by order of this Court on 12 March 2015 and we do not address the issue any further.

Now on appeal, plaintiff argues the trial court erred in directing a verdict in favor of defendant. "A motion for a directed verdict by a defendant pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a) 'tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff.' " *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88, 555 S.E.2d 303, 305 (2001) (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). "The standard of review of directed verdict is whether the evidence . . . is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). Specifically to the issue in this case,

> [t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Clark v. Bodycombe, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

Plaintiff contends the trial court erred in entering a directed verdict in favor of defendant on the basis of gross contributory negligence because there was no evidence plaintiff was grossly negligent. In the alternative, plaintiff argues, at the very least, the issue of gross contributory negligence should have been submitted to the jury.

"In this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992). Yet, a plaintiff's contributory negligence does not bar recovery from a defendant who is grossly negligent. *See id; see also Pearce v. Barham*, 271 N.C. 285, 289, 156 S.E.2d 290, 294 (1967). Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent. *See Harrington v. Collins*, 298 N.C. 535, 538, 259 S.E.2d 275, 278 (1979) ("[I]t is the majority rule, and we think the better reasoned rule, that plaintiff's willful or wanton negligence is a defense in an action seeking recovery for injuries caused by defendant's willful or wanton conduct."). Gross negligence is willful and wanton negligence.

> An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference

> to the rights of others. An act is wilful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law.

Boyd v. L. G. DeWitt Trucking Co., Inc., 103 N.C. App. 396, 402, 405 S.E.2d 914, 918 (1991) (internal citations and quotation marks omitted). "The concept of willful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct." *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978)). "The issue of gross negligence should be submitted to the jury if there is substantial evidence of the defendant's wanton and/or wilful conduct." *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 670, 486 S.E.2d 472, 474 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998).

Upon review of the record in this case, we hold the trial court's grant of a directed verdict in favor of defendant on the basis that plaintiff was grossly contributorily negligent was error; at the very least, the issues of defendant's negligence, defendant's gross negligence, and plaintiff's gross contributory negligence should have been decided by the jury.

Defendant cites various cases that stand for the well-established North Carolina rule that,

> a passenger is contributorily negligent as a matter of law so to bar recovery in a negligence suit when (1) the driver of the vehicle was under the influence of an intoxicant; (2) the passenger knew or should have known that the driver was under the influence; and (3) the passenger voluntarily rode with the driver even though she knew or should have known that the driver was under the influence.

Kennedy v. Polumbo, 209 N.C. App. 394, 403, 704 S.E.2d 916, 924 (2011) (citing *Coleman v. Hines*, 133 N.C. App. 147, 149, 515 S.E.2d 57, 59, *disc. review denied*, 350 N.C. 826, 539 S.E.2d 281 (1999)); *see also Lee v. Kellenberger*, 28 N.C. App. 56, 59, 220 S.E.2d 140, 143 (1975). "In determining whether the passenger knew or should have known that the driver was under the influence, our courts apply an 'ordinary prudent man' standard." *Id.* Although the North Carolina rule is clear, the evidence in this case was not conclusive on the issue of defendant's impairment. Consequently, the evidence could not have been conclusive on the issue of plaintiff's contributory negligence based on whether plaintiff knew or should have known defendant was impaired, much less gross contributory negligence.

While it is clear that defendant consumed alcohol in plaintiff's presence, there is conflicting evidence of whether defendant was impaired and whether the accident was the result of defendant's alleged impairment. In fact, in filing this action against defendant, plaintiff did not include any reference to alcohol consumption in the complaint and did not proceed on a theory that defendant was negligent as a result of driving while impaired. Plaintiff alleged defendant was negligent in that defendant "[f]ailed to keep a proper lookout[,]" "[f]ailed to reduce speed to the extent necessary to avoid a collision[,]" "[f]ailed to keep his vehicle under proper control[,]" and "[d]rove in a careless and reckless manner." The issue of impairment was not raised until defendant asserted contributory negligence and gross contributory negligence as bars to plaintiff's recovery.

Although plaintiff, by her own admission, was impaired by alcohol and the evidence was that defendant consumed one or two more drinks than plaintiff, the evidence also indicated defendant drank several times a week, plaintiff did not drink that much, and defendant was a "far more experienced drinker than [plaintiff] was." Moreover, plaintiff testified defendant was not intoxicated. Plaintiff stated she did not notice anything about defendant's speech that caused alarm, she did not observe that defendant's eyes were glassy, and she did not observe that defendant was unsteady on his feet. Plaintiff testified she did not witness anything that led her to believe defendant was driving in an impaired condition. On the other hand, Trooper Crissman testified he was trained to identify impairment and testified defendant was impaired. Crissman based his opinion on the facts that defendant twice tested positive for alcohol on breath tests administered using an alco-sensor at the accident scene and defendant exhibited several signs of alcohol use or intoxication at the hospital hours after the accident. Those signs included glassy eyes, slurred speech, combativeness, and an odor of alcohol on defendant's breath that Crissman noticed when he got close to defendant's face. Crissman acknowledged, however, that defendant had been knocked unconscious during the accident and had suffered a head injury. Although Crissman testified he could distinguish between signs of impairment and the injuries, he acknowledged defendant's head injury could affect or aggravate some symptoms. No evidence of defendant's blood alcohol content was introduced.

Additionally, as noted by the trial court when it denied defendant's motion for a directed verdict at the conclusion of plaintiff's evidence, the evidence suggests plaintiff did not have any concern over defendant's driving prior to the argument and, although plaintiff demanded

defendant pull over and let her out, plaintiff's demand appeared to be a reaction to the argument. Lastly, the evidence also suggests that plaintiff had no issue with defendant's driving between the time he pulled over to let plaintiff out and when he pulled onto West Forest Oaks near plaintiff's house. Plaintiff testified defendant made a normal turn onto West Forest Oaks and then "just blew up" and "gassed it immediately."

Viewing the above evidence and accompanying inferences in the light most favorable to plaintiff, we hold the evidence was sufficient in this case to have gone to the jury. Instead, the trial court invaded the province of the jury and determined the facts and granted defendant's motion for a directed verdict. This was error.

Moreover, even if the evidence was conclusive on the issue of defendant's impairment and plaintiff was contributorily negligent as a matter of law in that she voluntarily chose to ride with defendant when she knew or should have known defendant was impaired, evidence existed in this case to raise the issue of gross negligence by defendant for jury determination. *See Yancey v. Lea*, 354 N.C. 48, 53-54, 550 S.E.2d 155, 158 (2001) ("Our case law as developed to this point reflects that the gross negligence issue has been confined to circumstances where at least one of three rather dynamic factors is present: (1) defendant is intoxicated; (2) defendant is driving at excessive speeds; or (3) defendant is engaged in a racing competition.") (internal citations omitted). Thus, ordinary contributory negligence by plaintiff would not preclude her recovery.

We understand that because the trial court found plaintiff grossly contributorily negligent as a matter of law, it would have been futile to allow the jury to determine whether defendant was negligent or grossly negligent because no matter the level of defendant's negligence, the trial court's determination that plaintiff was grossly contributorily negligent would bar her recovery. However, upon review we do not think the evidence supports a determination that plaintiff was grossly contributorily negligent as a matter of law.

In support of his argument that plaintiff was grossly contributorily negligent, defendant relies on *Coleman v. Hines*, 133 N.C. App. 147, 515 S.E.2d 57 (1999). In *Coleman*, a wrongful death case arising from a car accident in which the passenger was killed after the passenger and driver had consumed alcohol together at a party, this Court first held the trial court did not err in granting summary judgment as to the issue of negligence of both the driver and the passenger based on the following undisputed facts:

> (1) [the driver] was drinking early on the afternoon of the accident when he stopped by to see [the passenger] at her place of employment at Domino's Pizza; (2) according to [the passenger's employer], . . . [the passenger] knew [the driver] was drinking when he stopped by Domino's, and [the passenger] also stated that they planned to drink that evening on their way to an engagement party, during the party, and following the party; (3) [the passenger's employer] begged [the passenger] not to ride with [the driver] that night, and repeatedly offered to pick them up at the party and drive them home, no matter how late they stayed at the party; (4) when [the driver] picked up [the passenger] later that evening, they went to a convenience store and purchased a 12–pack of beer, which they drank in each other's presence over the evening; (5) the only alcohol [the driver] drank that evening was consumed in [the passenger's] presence; (6) at the time of the accident, [the driver] blood-alcohol content was at least .184, more than twice the legal limit, according to the treating physician . . .; and (7) it was obvious to the officer investigating the accident, . . . who arrived about three minutes after the accident, that [the driver] was under the influence of alcohol at the time of the accident.

Id. at 149, 515 S.E.2d at 59. This Court then addressed whether the driver was grossly negligent and held, "to the extent that the evidence establishes willful and wanton negligence on the part of [the driver], it also establishes a similarly high degree of contributory negligence on the part of [the passenger]." *Id.* at 151, 515 S.E.2d at 60 (internal quotation marks omitted). Thus, this Court held the passenger could not prevail.

Defendant contends the evidence in the present case was similar to the evidence in *Coleman* in that plaintiff consumed alcohol with defendant, voluntarily rode in the vehicle defendant was driving, defendant's breath tests following the accident were positive for the presence of alcohol, and Crissman stated he observed signs of intoxication. Thus, defendant argues for the same result – that no matter the level of defendant's negligence, plaintiff's negligence rose to the same level.

In deciding *Coleman*, the court made clear that its decision was based on the "facts of [the] case[.]" *Id.* at 152, 515 S.E.2d at 60. We find this case distinguishable. Specifically, we note that the undisputed facts in *Coleman* revealed that the passenger was aware that the defendant had been drinking all day, the passenger was offered and refused an

alternative ride from her concerned employer who warned her not to ride with the driver, and the driver's blood alcohol content was at least .184, more than twice the legal limit. This evidence from *Coleman* showed the driver was appreciably impaired and there was concern expressed to the passenger about riding with the driver. In the present case, there was no such evidence. Even if defendant was impaired and plaintiff knew or should have known defendant was impaired, the evidence in this case is not sufficient to determine as a matter of law that plaintiff's contributory negligence rose to the level of gross contributory negligence. Moreover, the evidence suggests plaintiff had no concern about defendant's driving until their argument, or following the argument until after defendant turned onto West Forest Oaks when defendant "just blew up" and rapidly accelerated. We think this evidence, separate and apart from any evidence of impairment, was sufficient to raise the issue of defendant's gross negligence in that it manifests a reckless indifference to the rights of plaintiff.

In addition to challenging the trial court's grant of a directed verdict in favor of defendant, plaintiff contends the trial court erred in failing to present the issues of defendant's gross negligence and last clear chance to the jury.[2] Concerning defendant's gross negligence, the basis of the trial court's directed verdict foreclosed the need to consider the issue. Concerning last clear chance, although plaintiff filed a reply asserting defendant had the last clear chance to avoid the accident, plaintiff did not argue the issue below and has waived the issue on appeal.

Having already concluded the trial court erred in granting the directed verdict in favor of defendant, any further analysis on these issues would be merely advisory, and we do not offer advisory opinions. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts . . . to give advisory opinions . . . ."). Thus, we do not address these issues further.

III. Conclusion

As discussed, it appears the trial court invaded the province of the jury and decided the material facts of this case. Accordingly, we hold the

---

2. In response to plaintiff's second and third issues on appeal, defendant argues the issues were not preserved for review citing N.C. R. App. P. 10(a) for the proposition that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" Defendant, however, carelessly cites an old version of Rule 10. Following amendments to the appellate rules in 2009, review on appeal is no longer limited to assignments of error noted in the record.

trial court erred in entering a directed verdict on the basis that plaintiff was grossly contributorily negligent. Plaintiff is entitled to a new trial.

NEW TRIAL.

Judge STEELMAN concurs. Concurred prior to 30 June 2015

Judge STEPHENS concurs.

BARBARA ANN MURPHY, as Personal Representative of the Estate of Donald James Willis, deceased, Plaintiff
v.
KEITH D. HINTON, SR., and HERITAGE PROPANE EXPRESS, LLC, d/b/a HERITAGE PROPANE, Defendants

No. COA14-1230

Filed 7 July 2015

1. Pleadings—notice requirements—not satisfied

Plaintiff failed to comply with the rudimentary notice pleading requirement of N.C.G.S. § 1A-1, Rule 8(a)(1) in a negligence action against a provider of propane arising from a carbon monoxide poisoning death in a barn. The complaint referred to "aforementioned negligence," but there was no mention of any duty owed by defendant, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action.

2. Statutes of Limitation and Repose—voluntary dismissal and refiling—tolling—initial pleading requirements not satisfied

The trial court properly dismissed a refiled complaint where the statute of limitations had expired and the initial complaint did not satisfy N.C.G.S. § 1A-1, Rule 8(a)(1)'s pleading requirements. In order to benefit from the one-year filing extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure (but Rule 12(b)(6) is not a rule setting out a pleading requirement).

Appeal by plaintiff from order entered 24 July 2014 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 17 March 2015.

Robert J. Reeves, PC, by Robert J. Reeves, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLC, by Allen C. Smith and M. Duane Jones, for defendant-appellee Heritage Propane.

DIETZ, Judge.

The issue raised in this appeal is whether a complaint that does not satisfy the notice pleading requirements of Rule 8(a)(1) can benefit from the one-year filing extension of Rule 41(a)(1) following a voluntary dismissal. Our Supreme Court has held that "in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform *in all respects* to the rules of pleading." *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986) (emphasis added).

[1] Here, Plaintiff asserted that Defendant Heritage Propane Express is in the business of selling, installing, and maintaining propane tanks, including the propane tank located in Defendant Keith Hinton's barn. The complaint also alleges that Donald Willis, Plaintiff's son, died of carbon monoxide poisoning while sleeping in that barn. Finally, the complaint alleges that "by reason and consequence of the aforementioned negligence, carelessness, recklessness, and/or willfulness" Plaintiff is entitled to relief.

But there is no "aforementioned" negligence. There is no mention of any duty owed by Heritage Propane, no allegation of unreasonable conduct, and no other reference to the essential elements of a negligence cause of action. Indeed, the complaint does not even allege that Heritage Propane's propane tank was the source of the carbon monoxide that killed Willis. Heritage Propane cannot possibly prepare a defense to a complaint that does not even disclose what claims are being asserted against it. Accordingly, we hold that Plaintiff failed to comply with the rudimentary notice pleading requirement of Rule 8(a)(1).

[2] Under *Estrada*, Plaintiff's failure to conform to this foundational pleading requirement prevents application of Rule 41(a)(1)'s one-year filing extension. Accordingly, for the reasons discussed below, we affirm the trial court's order granting Heritage Propane's motion to dismiss Plaintiff's second complaint based on the statute of limitations.

Facts and Procedural History

On 21 June 2012, Plaintiff Barbara Ann Murphy filed a wrongful death complaint against Defendant Heritage Propane Express.

The complaint began by describing Heritage Propane as "in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of propane tanks, propane heaters and various equipment, including the propane tank that was installed in the home and barn of Defendant Hinton."

The complaint then alleged the following sequence of events: That on 15 November 2010, Decedent Donald James Willis arrived at Keith Hinton's home at approximately 3:30 a.m. and spent the night in the upstairs area of Hinton's barn. Around 7:35 a.m., Hinton's girlfriend, Stacy Brown, went to check on Willis. Brown smelled fumes, turned off the propane heater in the barn, and then discovered Willis unresponsive. Brown called 911. The responding firemen found high levels of carbon monoxide in the barn. Willis was transported to the hospital where he was pronounced dead. These factual allegations in the complaint do not mention Heritage Propane or any actions or omissions by Heritage Propane.

After these allegations, under headings labeled "For a First Cause of Action (Survivorship Action, N.C.G.S. § 28A-18-2)" and "For a Second Cause of Action (Wrongful Death Cause of Action, N.C.G.S. § 28A-18-1)," the complaint alleges

> That by reason and consequence *of the aforementioned negligence*, *carelessness*, *recklessness*, *and/or willfulness* and as a direct and proximate result thereof, Decedent was injured, suffered severe physical harm from which he subsequently died . . .
>
> . . .
>
> That by reason and consequence of *the aforementioned negligence*, *carelessness*, *recklessness*, *and/or willfulness* and as a direct and proximate result thereof, Decedent's heirs were harmed or damaged . . .

Despite the reference to the "aforementioned negligence, carelessness, recklessness, and/or willfulness," no portion of the complaint describes any act or omission by Heritage Propane that could constitute negligence or similar tort liability. The only reference to Heritage Propane is the allegation that it is "in the business of inspecting, maintaining, installing, and selling . . . propane tanks . . . including the propane tank

that was installed in the home and barn of Defendant Hinton." There is no allegation, for example, that Heritage Propane negligently designed, manufactured, or installed the propane tank at the Hinton barn; no allegation the Heritage Propane breached some duty to maintain or repair the tank to keep it in a safe condition; and no allegation that Heritage Propane failed to warn the deceased about some unreasonably dangerous condition of the propane tank of which it was aware.

Murphy voluntarily dismissed the complaint on 4 October 2012 and refiled the same complaint on 30 August 2013. The allegations in the refiled complaint were identical to those in the original complaint.

On 31 December 2013, Murphy amended her complaint. The amended complaint was far more detailed, listing for the first time allegations that "employees of Heritage Propane Express, LLC, either individually or in combination, were negligent in the following respects, with regard to the installation, maintenance, repair, or updating of the propane heating system, which heated the building in which Donald Willis suffered the fatal exposure to carbon monoxide gas." The complaint then includes a list of allegations for "substandard and not properly sealed" drilling holes, "haphazardly" installed equipment, improper ventilation, improper permitting, improper maintenance of ventilation pipes, and improper inspection.

On 27 May 2013, Heritage Propane filed a motion to dismiss Murphy's complaint based on the statute of limitations. The company argued that Murphy's August 2013 complaint and December 2013 amended complaint were filed outside the two-year statute of limitations period for wrongful death actions, which began to run on 15 November 2010. Heritage Propane also argued that Murphy's voluntary dismissal of her initial complaint did not provide a one-year period in which to refile under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. The company contended that a complaint that fails to state a claim on which relief can be granted cannot benefit from the one-year tolling period in Rule 41(a). The trial court agreed with Heritage Propane's arguments and granted the motion to dismiss. Murphy timely appealed.

Analysis

Ordinarily, when a plaintiff voluntarily dismisses her complaint under Rule 41(a)(1), "a new action based on the same claim may be commenced within one year after such dismissal." N.C. R. Civ. P. 41(a)(1) (2013). As a result, "[i]f the action was originally commenced within the period of the applicable statute of limitations, it may be recommenced within one year after the dismissal, even though the base period may

have expired in the interim." *Brisson v. Santoriello*, 351 N.C. 589, 594, 528 S.E.2d 568, 571 (2000).

But this one-year extension of the time for filing only applies if the complaint properly states a claim for relief. Our Supreme Court has held that "Rule 41(a)(1) must be applied in conjunction with the rules for drafting and certification of pleadings." *Estrada v. Burnham*, 316 N.C. 318, 322, 341 S.E.2d 538, 541 (1986). Thus, "in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform *in all respects* to the rules of pleading." *Id.* at 323, 341 S.E.2d at 542 (emphasis added).

In *Estrada*, the plaintiff filed a "bare bones" complaint and then immediately filed a voluntary dismissal of the complaint. *Id.* at 319, 341 S.E.2d at 540. The file stamps on the two documents showed they were filed only two minutes apart. *Id.* Although the complaint stated a claim for relief (and thus complied with the pleading requirements of Rule 8 of the Rules of Civil Procedure), the Supreme Court held that the plaintiff's complaint violated the good-faith filing requirements of Rule 11 because the plaintiff never intended to pursue the original complaint and filed it solely to dismiss it and gain the additional one year "extension" on the statute of limitations. *Id.* at 322-23, 341 S.E.2d at 541-42.

The Court concluded that "in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year 'extension' by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a)." *Id.* at 323, 341 S.E.2d at 542. Because plaintiff's complaint did not conform to Rule 11(a), the Supreme Court held that the trial court properly dismissed the complaint based on expiration of the statute of limitations. *Id.* at 325-26, 341 S.E.2d at 543.

Importantly, although *Estrada* involved a violation of Rule 11(a), the Supreme Court stated that "Rule 41(a)(1) must be applied in conjunction with *the rules for drafting and certification of pleadings*" generally and that to benefit from the one-year extension "the complaint must conform *in all respects to the rules of pleading*, including Rule 11(a)." *Id.* at 322-23, 341 S.E.2d at 541-42. Thus, *Estrada* established that failure to comply with other "rules of pleading," beyond Rule 11(a), likewise prevents the one-year savings provision from taking effect.

This Court confirmed that portion of the *Estrada* holding in *Robinson v. Entwistle*, 132 N.C. App. 519, 523, 512 S.E.2d 438, 441 (1999). In *Robinson*, the plaintiff failed to comply with the expert certification

requirement of Rule 9(j). *Id.* This Court held that, under *Estrada*, "Rule 41(a)(1) is only available in an action where the complaint complied with *the rules which govern its form and content* prior to the expiration of the statute of limitations." *Id.* (emphasis added). As a result, this Court affirmed summary judgment based on the statute of limitations because "a voluntary dismissal without prejudice which ordinarily would allow for another year for re-filing was unavailable to plaintiff in this case." *Id.*

Taken together, *Estrada* and *Robinson* establish that to benefit from the one-year filing extension provided in Rule 41(a), the initial complaint must conform in all respects to the rules of pleading contained in Rules 8, 9, 10 and 11 of the North Carolina Rules of Civil Procedure.[1] These four rules govern the "form and content" of pleadings and are appropriately entitled "General rules of pleadings," "Pleading special matters," "Form of pleadings," and "Signing and verification of pleadings," respectively.

Applying *Estrada* and *Robinson* here, the one-year extension provided by Rule 41(a) is unavailable to Murphy. There is no more fundamental "rule of pleading" than the foundational requirement of Rule 8(a)(1). Rule 8(a)(1) requires a complaint to contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1). To satisfy Rule 8(a)(1), a complaint must provide "sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought." *Wake Cnty. v. Hotels.com, L.P.*, ___ N.C. App. ___, ___, 762 S.E.2d 477, 486 (2014).

Here, Murphy's initial complaint failed to show that she is entitled to relief as required by Rule 8(a)(1). The complaint alleged that Heritage Propane is "in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of propane tanks, propane heaters and various equipment, including the propane tank that was installed in the home and barn of Defendant Hinton." The complaint also alleged that Willis died of carbon monoxide poisoning inside Defendant Hinton's barn. And the complaint alleged that Willis died "by reason and consequence of the aforementioned negligence, carelessness, recklessness, and/or willfulness."

---

1. Heritage Propane asks this Court to extend *Estrada* to the pleading requirement of Rule 12(b)(6) as well. But Rule 12(b)(6) is not a rule setting out a pleading requirement. It is a rule providing the procedure for seeking dismissal for failure to comply with the pleading requirements of Rules 8 and 9.

But the complaint does not include any "aforementioned" negligence. There is no allegation that Heritage Propane owed any duty to Willis nor any claim that the propane tank installed in Hinton's barn was defective, unreasonably dangerous, improperly installed, or negligently maintained. Indeed, the complaint does not even allege that Heritage Propane's propane tank was the source of the carbon monoxide that allegedly killed Willis.

As a result, the complaint does not satisfy Rule 8(a)(1)'s pleading rules. Heritage Propane cannot "answer and prepare for trial" against a claim for "aforementioned" negligence without knowing what that alleged "aforementioned" negligence is. *See Hotels.com*, ___ N.C. App. at ___, 762 S.E.2d at 486. Likewise, the complaint does not "allow for the application of the doctrine of *res judicata*" because it does not identify the claim being brought: is it negligent design and manufacture of the propane tank? Failure to warn? Negligent installation? Negligent maintenance and repair? The complaint does not say and thus fails to comply with Rule 8(a)(1). *See id.*

Because Murphy's complaint failed to satisfy Rule 8(a)(1) and thus did not "conform in all respects to the rules of pleading," the one-year tolling provision in Rule 41(a)(1) is unavailable to her. *Estrada*, 316 N.C. at 323, 341 S.E.2d at 542. As a result, the trial court properly dismissed her refiled complaint—filed roughly a year after the voluntary dismissal—because that complaint was well outside the applicable two-year statute of limitations.

Because we affirm the trial court's order, we need not address Heritage Propane's alternative ground to affirm based on Murphy's second amended complaint and the inapplicability of the "relation back" doctrine in Rule 15(c) of the Rules of Civil Procedure.

Conclusion

We affirm the trial court's order granting Heritage Propane's motion to dismiss based on the statute of limitations.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

NEUSOFT MED. SYS., USA INC. v. NEUISYS, LLC

[242 N.C. App. 102 (2015)]

NEUSOFT MEDICAL SYSTEMS, USA, INC., PLAINTIFF
v.
NEUISYS, LLC, DEFENDANT

NEUISYS, LLC, COUNTERCLAIM-PLAINTIFF
v.
NEUSOFT MEDICAL SYSTEMS, USA, INC., TOM BUSE, AND KEITH MILDENBURGER,
COUNTERCLAIM-DEFENDANTS

NEUISYS, LLC, THIRD-PARTY PLAINTIFF
v.
NEUSOFT MEDICAL SYSTEM COMPANY, LTD., THIRD-PARTY DEFENDANT

No. COA14-779

Filed 7 July 2015

1. Appeal and Error—interlocutory orders and appeals—arbitration—substantial right

The merits of an appeal were considered in a case involving commercial confidential information where an order did not resolve all of the issues but the effect of the order was to require Neusoft China to defend two of six claims in court rather than in arbitration. The right to arbitrate was substantial.

2. Appeal and Error—interlocutory orders and appeals—arbitration—non-signatories to original arbitration agreement

The Court of Appeals had jurisdiction to review the merits of appeals from interlocutory orders from Neusoft USA and two former employees of Neusoft China where they were not parties to the original arbitration agreement. By operation of common law agency and contract principles, a contractual right to arbitrate may become enforceable by or against a non-signatory to the agreement.

3. Judges—reconsideration of interlocutory order—purported change in theory of case

The trial court did not err in denying Neusoft China's renewed motion to stay litigation in a case involving confidential commercial information. One trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge only in the limited situation where there was a showing of a substantial change in circumstances. In this case, Neusoft China pointed to a change in the theory of the claims; however the purported change in theory

was merely a statement of one way that the confidential information was used.

4. Estoppel—applicability of arbitration agreement—other claims

The trial court did not err by not concluding that the N.C. distributor of medical imaging equipment was equitably estopped from denying applicability of an arbitration clause in a distribution agreement to claims for breach of a non-disclosure agreement and for unfair and deceptive practices. The N.C. distributor was not simultaneously denying the enforceability of the arbitration clause in the distribution agreement while also claiming a right under the distribution agreement.

5. Arbitration and Mediation—arbitration—claim not made in pleading

The trial court did not err by denying motions to stay claims not subject to arbitration pending arbitration of other claims. Although Neusoft USA and Buse and Mildenberger claimed that a portion of the damages sought by the N.C. distributor was dependent on an issue to be arbitrated, they made no such claim in their pleadings for damages.

Appeal by Neusoft Medical Systems Co., Ltd. ("Neusoft China"); Neusoft Medical Systems, U.S.A., Inc. ("Neusoft USA"); and Tom Buse and Keith Mildenberger from orders entered 10 January 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 5 February 2015.

Van Laningham Duncan PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., for the Third-Party Defendant-Appellant.

Kilpatrick Townsend & Stockton LLP, by Daniel R. Taylor, Jr., and Susan H. Boyles, for the Plaintiff/Counterclaim Defendant-Appellant.

Wall Esleeck Babcock LLP, by J. Dennis Bailey and Joseph T. Carruthers, for the Counterclaim Defendant-Appellants.

Womble Carlyle Sandridge & Rice, LLP, by Brent F. Powell and Philip J. Mohr, for the Defendant/Counterclaim Plaintiff/Third-Party Plaintiff-Appellee.

Ellis & Winters LLP, by Jonathan A. Berkelhammer, Matthew W. Sawchak, and Kelly Margolis Dagger, for Amicus Curiae, the North Carolina Association of Defense Attorneys.

DILLON, Judge.

This dispute involves a business relationship between China-based Neusoft China, a manufacturer of medical imaging equipment (e.g., CT scanners) and North Carolina-based Neuisys, LLC ("NC Distributor"), a distributor of Neusoft China equipment in the United States.

In this action, NC Distributor has asserted six claims against Neusoft China. NC Distributor has also asserted claims against Neusoft USA (a wholly-owned subsidiary of Neusoft China) and against two Neusoft USA employees (Tom Buse and Keith Mildenberger) who formerly worked for NC Distributor.

I. Summary of Opinion

A. Appeal by Neusoft China

In 2012, the trial court entered an order (the "2012 order") staying four of NC Distributor's six claims against Neusoft China, concluding that the four claims were subject to arbitration based on the arbitration clause in their distribution agreement. The trial court, however, denied Neusoft China's motion to stay the two other claims, concluding that those two claims were not subject to arbitration.

In 2014, the trial court entered another order (the "2014 order") denying a renewed motion by Neusoft China to refer to arbitration or, in the alternative, stay the two claims that the court had concluded were nonarbitrable in its 2012 order.

Neusoft China has appealed the 2014 order. We hold that we have jurisdiction over this appeal. On the merits, we hold that the trial court did not err in denying Neusoft China's renewed motion. Accordingly, we affirm that order.

B. Appeals by Neusoft USA and Messrs. Buse and Mildenberger

In 2013, Neusoft USA and Messrs. Buse and Mildenberger moved the trial court to stay NC Distributor's claims against *them* pending arbitration of NC Distributor's four arbitrable claims against Neusoft China. In 2014, the trial court denied these motions. Neusoft USA and Messrs. Buse and Mildenberger appeal from these interlocutory orders. We hold that we have jurisdiction over these appeals; however, on the merits,

we hold that the trial court did not err in denying the motions to stay. Accordingly, we affirm those orders.

II. Background

A. Facts

In 2003, Neusoft China entered into an agreement (the "2003 Distribution Agreement") with NC Distributor authorizing NC Distributor to become the exclusive distributor of its equipment in various markets in the United States. The 2003 Distribution Agreement contained a clause whereby the parties agreed to settle disputes arising thereunder through arbitration in China.

In the years that followed, in addition to selling Neusoft China's equipment in the United States, NC Distributor also developed a profitable business – outside the 2003 Distribution Agreement – contracting with the end users of the equipment to provide warranty repair and service work.

In 2009, Neusoft China entered into negotiations to acquire NC Distributor. During these negotiations, the parties entered into a second agreement (the "2009 Non-disclosure Agreement") whereby NC Distributor agreed to disclose its confidential information – including information about its warranty business – and whereby Neusoft China agreed to use the confidential information only for the purpose of "evaluating, negotiating and implementing" the potential acquisition. Unlike the 2003 Distribution Agreement, however, this 2009 Non-disclosure Agreement did *not* contain an arbitration clause. Ultimately, the negotiations did not lead to a deal.

In 2010, Neusoft China and NC Distributor amended the 2003 Distribution Agreement to extend its term. However, under the terms of the amendment, NC Distributor was no longer Neusoft China's *exclusive* distributor in any region.

Shortly thereafter, Neusoft China – through its subsidiary Neusoft USA – began competing directly with NC Distributor in the distribution *and* servicing of the equipment. During this time, Neusoft USA hired away employees of NC Distributor, including Messrs. Buse and Mildenberger.

In September of 2011, representatives of Neusoft USA, including Mr. Buse, met with representatives of NC Distributor. During a break in the meeting, a representative of NC Distributor accessed Mr. Buse's computer without his authorization and transferred certain information

from the computer onto a thumb drive, ostensibly to determine whether Neusoft USA was using any of NC Distributor's confidential information.

B. Statement of Proceedings

In November of 2011, Neusoft USA commenced this action against NC Distributor, asserting claims in connection with the access of Mr. Buse's computer.

In December of 2011, NC Distributor answered, asserting counterclaims against Neusoft USA. NC Distributor also brought in Neusoft China, asserting six claims.

In October of 2012, after a hearing, the trial court determined that four of NC Distributor's six claims against Neusoft China arose under the 2003 Distribution Agreement and were, therefore, subject to arbitration. However, the court ruled that two of the claims – NC Distributor's claims for breach of the 2009 Non-disclosure Agreement (which did not have an arbitration clause) and for unfair and deceptive practices in connection with this breach – *did not* "arise in connection with the interpretation or implementation" of the 2003 Distribution Agreement, denying Neusoft China's motion to stay proceedings on those two claims pending arbitration of the other four claims. This 2012 order was not appealed.

In March of 2013, with leave of court, NC Distributor filed an amended pleading, bringing in Mr. Buse and Mr. Mildenberger, and alleging claims against them.

In December of 2013, after engaging in additional discovery, Neusoft China once again moved the trial court to refer NC Distributor's claims for breach of the 2009 Non-disclosure Agreement and for unfair and deceptive practices to arbitration or, in the alternative, stay those claims pending arbitration of the four arbitrable claims. Neusoft USA and Messrs. Buse and Mildenberger also filed motions to stay NC Distributor's claims against *them* pending arbitration of NC Distributor's arbitrable claims against Neusoft China.

In January of 2014, after a hearing on the matter, the trial court entered orders denying all three motions, allowing both the claims for breach of the 2009 Non-disclosure Agreement and for unfair and deceptive practices to proceed. Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger entered timely notices of appeal.

III. Analysis

A. Right to Immediate Appeal

Each of the orders being appealed is interlocutory because none are dispositive as to all claims and all parties. *Bullard v. Tall House Bldg. Co., Inc.*, 196 N.C. App. 627, 637, 676 S.E.2d 96, 103 (2009) ("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."). Generally, there is no right to immediate appeal from an interlocutory order. *Travco Hotels, Inc. v. Piedmont Natural Gas Co., Inc.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992). However, N.C. Gen. Stat. §§ 1-277 and 7A-27 set forth exceptions to this general rule. *Id.* Applying these statutes, our Supreme Court has held that a right to an immediate appeal from an interlocutory order exists where the order "deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Id.* at 292, 420 S.E.2d at 428 (internal marks omitted).

Our Supreme Court has developed a "two-part test," *see id.*, to determine whether an interlocutory order is immediately appealable where an appellant claims to have been deprived of a substantial right: (1) "the right itself must be substantial"; and, (2) "the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment." *Frost v. Mazda Motors of America, Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) (internal marks omitted). However, as the Supreme Court has recognized, "the 'substantial right' test is more easily stated than applied[,]" and appellate courts "must consider the particular facts of each case and the procedural history of the order from which an appeal is sought." *Travco Hotels*, 332 N.C. at 292, 420 S.E.2d at 428. Therefore, to determine whether we have jurisdiction over an appeal, we must discern the precise nature of the right the appellant claims as substantial.[1] To that end, each appellant bears the burden of

1. However, we do not reach the *merits* of an appellant's claim to that substantial right in answering this threshold jurisdictional question. To do so would, in the words of the United States Supreme Court, "conflat[e] the jurisdictional question with the merits of the appeal." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 628, 129 S. Ct. 1896, 1900 (2009). For example, if a defendant claims sovereign immunity as a defense to an action, a denial of its motion to dismiss based on this defense would generally be immediately appealable. *See, e.g., Dep't of Transp. v. Blue*, 147 N.C. App. 596, 600, 556 S.E.2d 609, 615 (2001). This is true even where there is no *merit* to the defense because, e.g., the defendant belongs to an unrecognized Indian tribe. *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385-86, 677 S.E.2d 203, 207-08 (2009). Nevertheless, an appellant who makes a *frivolous* assertion of a substantial right for an improper purpose (e.g., delay) does so at the risk of being sanctioned by this Court. *See* N.C. R. App. P. 34.

demonstrating that the interlocutory order appealed from "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

We address the propriety of Neusoft China's appeal separately from the appeals taken by Neusoft USA and by Mr. Muse and Mr. Mildenberger.

1. Neusoft China

[1] In its brief, Neusoft China states that it is appealing the 2014 order denying its right to arbitrate. We have held that the right to arbitrate is substantial. *See*, *e.g.*, *Prime South Homes*, *Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). We agree that the 2014 order affects this substantial right. Specifically, the effect of the 2014 order is to require Neusoft China to proceed in defending two of NC Distributor's claims against it in court rather than in arbitration. As we have often noted regarding the need for immediate review in such cases, the right to arbitrate "may be lost if review is delayed[.]" *See*, *e.g.*, *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007). Therefore, we hold that Neusoft China has met its burden to demonstrate that we have jurisdiction over its appeal of the 2014 order.[2] Accordingly, we consider the merits of its appeal in Section III. B.

2. Neusoft USA and Messrs. Buse and Mildenberger

[2] Neusoft USA and Messrs. Buse and Mildenberger appeal from interlocutory orders denying their motions to stay NC Distributor's claims against them pending arbitration of the claims asserted against Neusoft China. They argue, inter alia, that they have the right to have the issue of whether NC Distributor can recover damages for the loss of its exclusivity under the 2010 amendment to the Distribution Agreement decided by arbitration. These appellants essentially argue that they have the right to have this issue decided by arbitration even though they are not parties to the 2003 Distribution Agreement.

Generally, we do not recognize a right to immediate appeal from an interlocutory order denying a stay of litigation. *Howerton v. Grace Hosp.*, *Inc.*, 124 N.C. App. 199, 201-02, 476 S.E.2d 440, 442-43 (1996).

---

2. NC Distributor contends that we lack jurisdiction over Neusoft China's appeal because it is from a denial of a motion for reconsideration, citing this Court's decision in *Slaughter v. Swicegood*, 162 N.C. App. 457, 591 S.E.2d 577 (2004). However, assuming *arguendo* that the 2014 order is one denying a motion to reconsider, the effect of the 2014 order nonetheless requires Neusoft China to defend the claims in court.

Moreover, the right to immediate appeal from an interlocutory order denying arbitration or denying a stay pending arbitration is predicated on the deprivation of the right to arbitrate, which inheres in the contract providing for arbitration. *See Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 381-82, 614 S.E.2d 418, 422 (2005). Nevertheless, we recognize that by operation of common law agency and contract principles, a contractual right to arbitrate may become enforceable by or against a non-signatory to the agreement. *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 229, 721 S.E.2d 256, 261-62 (2012). Since the right to arbitrate a claim *or issue* is a substantial right if it is enforceable by or against an appellant who is a non-signatory to the agreement creating it, we hold that we have jurisdiction to review the merits of Neusoft USA and Messrs. Buse and Mildenberger's appeals.[3]

B. Merits of the Appeals

1. Neusoft China

[3] Having determined that the 2014 order denying Neusoft China's renewed motion is immediately appealable, we now consider the merits of the appeal. For the reasons stated below, we hold that the trial court did not err in denying Neusoft China's renewed motion; and, therefore, we affirm the trial court's 2014 order.

Our Supreme Court has held that one trial court judge has the authority to reconsider an interlocutory order entered by another trial court judge "*only in the limited situation* where the party seeking to alter that prior ruling makes a sufficient showing of a *substantial change in circumstances during the interim* which presently warrants a different or new disposition of the matter." *State v. Duvall*, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981) (emphasis added). As our Supreme Court observed, "if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge." *Id.* at 562, 284 S.E.2d at 498.

In the present case, the trial court concluded in its 2014 order that there had "been no substantial change in circumstances [] which would

3. We note that Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger all cite § 16 of the Federal Arbitration Act ("FAA"), *see* 9 U.S.C. 16(a)(1)(A) (2013), as an additional basis for our jurisdiction. However, § 16 of the FAA applies *in federal court*. *See Volt Info. Sci., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n. 6, 109 S. Ct. 1248, 1254 n. 6 (1989). State law governs the appealability of interlocutory orders in State court. *Elliott v. KB Home North Carolina, Inc.*, ___ N.C. App. ___, ___, 752 S.E.2d 694, 697 (2013).

warrant a different or new disposition[.]" Neusoft China argues, however, that a substantial change warranting the modification of the trial court's 2012 order did occur. Specifically, Neusoft China contends as follows: Initially, NC Distributor merely asserted that the two claims were based on a theory that Neusoft China had shared NC Distributor's confidential information with its subsidiary, Neusoft USA. Accordingly, the trial court determined that they were not arbitrable since they did not relate to the 2003 Distribution Agreement. However, after the 2012 order was entered and the time to appeal that order had passed, a representative of NC Distributor stated in a deposition that these claims were based on Neusoft China's improper use of the confidential information as leverage *during the 2010 renegotiation of the Distribution Agreement*. According to Neusoft China, this purported change in theory is a "substantial change" because it amounts to an admission by NC Distributor that the two claims based on the Non-disclosure Agreement and found by the trial court to be nonarbitrable in its 2012 order do, in fact, relate to the Distribution Agreement and are, therefore, subject to the arbitration clause contained in that agreement.

Generally, we review a trial court's decision to grant or deny a stay of nonarbitrable claims in a dispute pending arbitration of the arbitrable claims for an abuse of discretion. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 485, 583 S.E.2d 325, 334 (2003). However, the determination of whether a claim or issue in a dispute *is* arbitrable is a question of law we review *de novo*. *See, e.g.*, *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001). Therefore, we review *de novo* whether the trial court correctly concluded that Neusoft China had failed to show that a substantial change in circumstances had occurred.

NC Distributor's complaint against Neusoft China alleges that Neusoft China used confidential information, including but not limited to "customer data, financial data, and projected revenue data" that were shared for the sole purpose of "evaluating, negotiating, and implementing" the acquisition, "to formulate a plan to drive [NC Distributor] out of business for [Neusoft China's] own benefit," and by disclosing said information to Neusoft USA. NC Distributor's complaint also alleges that Neusoft China used the confidential information acquired in connection with the potential acquisition "to establish [Neusoft USA]" and "to formulate a plan of forcing [NC Distributor] out of business and to otherwise steal [NC Distributor's] employees and customers," further alleging that it used said information to outbid NC Distributor, offering the same products to NC Distributor's customers below cost, and that this "conduct constitute[d] unfair methods of competition and unfair or

deceptive acts or practices[.]" Thus, the allegations in NC Distributor's complaint put Neusoft China on notice that it was seeking damages for use of confidential information obtained pursuant to the Non-disclosure Agreement to compete unfairly with it rather than for the sole purpose of evaluating and negotiating a potential acquisition, and that this use of the information not only constituted breach of the agreement, but also independently qualified as an unfair and deceptive practice under North Carolina law.

Neusoft China traces the origins of the alleged change in NC Distributor's theory of the case to the deposition testimony of NC Distributor's CEO, Kim Russell. Specifically, Mr. Russell testified that Neusoft China used NC Distributor's confidential information provided pursuant to the Non-disclosure Agreement *as leverage* in negotiations over amending the Distribution Agreement, specifically using the word "threat" during his testimony. However, the "threat" to which the deponent referred did not introduce some new theory of liability. Rather, the context plainly demonstrates that the deponent's testimony was that Neusoft China used the confidential information to compete with NC Distributor rather than for purposes of evaluating and negotiating the potential acquisition. The deponent was merely stating one way Neusoft China used the information competitively, namely as leverage in negotiations over the 2010 amendment to the Distribution Agreement. Therefore, we hold that the trial court did not err in denying Neusoft China's renewed motion to refer the claims continuing in litigation to arbitration or, in the alternative, to stay those claims pending arbitration.

[4] Neusoft China also argues that the trial court erred in failing to conclude that NC Distributor was *equitably estopped* from denying the applicability of the arbitration clause in the Distribution Agreement to the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices. Specifically, Neusoft China contends that NC Distributor is using the Distribution Agreement as a reference point in calculating its damages. We do not believe the trial court committed reversible error in this regard.

> Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment. There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply.

Gore v. Myrtle/Mueller, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal marks and citation omitted). In the context of arbitration, "the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Ellen v. A.C. Schultes of Maryland, Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (internal marks omitted). However, in *Ellen* we refused to extend the application of the doctrine where the plaintiffs were not "seeking any direct benefits from the contracts containing the relevant arbitration clause," or "asserting any rights arising under [those] . . . contracts." *Id.* at 322, 615 S.E.2d at 733.

In the present case, NC Distributor is not simultaneously denying the enforceability of the arbitration clause in the Distribution Agreement with Neusoft China while also claiming a right under the Distribution Agreement. That is, just as in *Ellen*, the claims for breach of the Nondisclosure Agreement and for unfair and deceptive practices do not necessarily "depend upon the [Distribution Agreement] containing the arbitration clause." *Id.* at 322, 615 S.E.2d at 733. Rather, these claims depend on legal duties imposed by an agreement which does *not* contain an arbitration clause and by North Carolina law prohibiting unfair and deceptive practices. As in *Ellen*, in prosecuting these claims NC Distributor is not "seeking any direct benefits from the contract[] containing the relevant arbitration clause," or "asserting any rights arising under [that] . . . contract[]." *Id.* at 322, 615 S.E.2d at 733. Accordingly, we hold that the trial court did not err in failing to conclude that equitable estoppel applies to NC Distributor's claims.[4]

2. Merits of Neusoft USA's Appeal and Messrs. Buse and Mildenberger's Appeal

[5] We have reviewed the arguments of Neusoft USA and Messrs. Buse and Mildenberger, and we conclude that the trial court did not err in denying their motions to stay NC Distributor's claims against them pending arbitration of the four arbitrable claims asserted against Neusoft China.

On appeal, Neusoft USA and Messrs. Buse and Mildenberger claim that NC Distributor is seeking damages from them, in part, because of lost profits *due to* the loss of its exclusivity under the 2003 Distribution

4. Neusoft China also argues that the trial court erred in finding that it had waived the right to arbitrate the two remaining claims. We need not reach this argument, as we have concluded that the trial court did not err in concluding that Neusoft China otherwise has no right to compel arbitration of these claims.

Agreement; and, therefore, they argue that they are entitled to a stay until this issue is resolved by arbitration.[5] Specifically, they contend that a portion of the damages that NC Distributor seeks is dependent upon the invalidity of the 2010 amendment to the 2003 Distribution Agreement, which stripped NC Distributor of its status as Neusoft China's exclusive distributor. However, NC Distributor has made no such claim against these Defendants in its pleadings for damages. Rather, NC Distributor only seeks lost profits *due* to the appropriation by Neusoft USA and Messrs. Buse and Mildenberger of NC Distributor's confidential information, irrespective of any loss of any status under the 2003 Distribution Agreement.[6]

These Defendants contend that the validity of the 2010 amendment predominates the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices, that the validity of the 2010 amendment can only be determined in arbitration, and that a determination of the validity of the amendment would preclude NC Distributor's success on those claims. However, the claims for breach of the Non-disclosure Agreement and for unfair and deceptive practices present distinct legal issues from those presented by the arbitrable claims, namely whether Defendants or any of them impermissibly used NC Distributor's confidential information to compete with NC Distributor rather than for the permissible purposes of evaluating and negotiating a potential acquisition and whether such use constituted an unfair and deceptive practice under North Carolina law.

IV. Conclusion

We hold that the trial court did not err in denying the motion to refer the claims against Neusoft China for breach of the Non-disclosure

---

5. Messrs. Buse and Mildenberger also contend that the trial court's order denying their motion to stay the proceedings pending arbitration was erroneous in its omission of an express ruling on the applicability of the FAA. However, while a panel of this Court has held that a trial court's denial of a motion to compel arbitration must contain a finding as to the applicability of the FAA, *see Sillins v. Ness*, 164 N.C. App. 755, 759, 596 S.E.2d 874, 877 (2004), no such requirement exists for an order granting or denying a motion for a stay, and we decline to impose one.

6. Neusoft China, Neusoft USA, and Messrs. Buse and Mildenberger also argue at length regarding the eventual calculation of damages. However, "[t]he assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury, subject, of course, to the discretionary power of the judge to set its verdict aside, when in his opinion equity and justice so require." *Matthews v. Lineberry*, 35 N.C. App. 527, 528, 241 S.E.2d 735, 737 (1978). Moreover, we do not issue advisory opinions. *See, e.g.*, *Lemon v. Combs*, 164 N.C. App. 615, 625-26, 596 S.E.2d 344, 350 (2004).

Agreement and for unfair and deceptive practices to arbitration or, in the alternative, to stay those claims. Further, we hold that the trial court did not err in denying the other Defendants' motions to stay the claims against them pending the arbitration of four arbitrable claims against Neusoft China. Accordingly, we affirm the orders of the trial court.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

CATHY SUGGS PATTERSON, PLAINTIFF
v.
TIMOTHY CRAIG PATTERSON, DEFENDANT

No. COA14-830

Filed 7 July 2015

Divorce—alimony—purely contractual agreement—cohabitation—enforcement

In an action for specific performance of defendant's alimony obligations, the trial court did not err by denying defendant's motion for summary judgment. Plaintiff's cohabitation was not a bar to enforcement of the alimony agreement because N.C.G.S. § 50-16.9, which names cohabitation and death as events that terminate court-ordered alimony, does not apply to alimony agreements that are purely contractual.

Appeal by defendant from order entered 15 July 2014 by Judge Jacquelyn L. Lee in Harnett County District Court. Heard in the Court of Appeals 5 January 2015.

Ryan McKaig for plaintiff-appellee.

Doster, Post, Silverman, Foushee, Post & Patton, P.A., by Jonathan Silverman, for defendant-appellant.

McCULLOUGH, Judge.

Timothy Craig Patterson ("defendant") appeals the denial of his motion for summary judgment. For the following reasons, we affirm.

I. Background

Cathy Suggs Patterson ("plaintiff") and defendant married on 25 April 1974, separated in December 2001, and later divorced. Coinciding with their separation, plaintiff and defendant made and entered into a separation and property settlement agreement (the "agreement") on 7 December 2001. The agreement provided as follows concerning alimony:

> [Defendant] shall pay to [plaintiff] a monthly sum of alimony in the amount of $2,000.00. This payment shall begin on the 1st day of January 2002 and continue on the same day of each month thereafter until the occurrence of one of the following events:
>
> 1. [Defendant's] death[;]
> 2. [Plaintiff's] remarriage [; or]
> 3. [Plaintiff's] death[.]
>
> This obligation shall terminate in the event one or more of the above referenced events occurs.

Pursuant to its terms, the agreement was never incorporated into a court order or judgment during plaintiff's and defendant's divorce.

On 16 July 2013, plaintiff commenced this action by filing a verified complaint seeking specific performance of defendant's alimony obligations pursuant to the terms of the agreement. Plaintiff alleged defendant "paid all alimony payments until May 2013[,]" but has since "refused to make further payments as provided in the [agreement] . . . without justification or excuse." Defendant responded to the complaint by filing an answer and a separate motion for summary judgment on 2 October 2013. In both his answer and motion for summary judgment, defendant pled plaintiff's cohabitation as a bar to the enforcement of the alimony provision of the agreement and argued the agreement was void as against public policy. Plaintiff filed replies to defendant's motion for summary judgment and defendant's answer on 20 November 2013.

Based on the various pleadings, affidavits submitted in support of the pleadings, and plaintiff's deposition taken 26 September 2013, it is undisputed that prior to plaintiff filing this action, plaintiff was cohabitating and defendant ceased making alimony payments in accordance with the agreement.

Following a hearing on defendant's motion for summary judgment in Harnett County District Court, the trial judge entered an order on

22 April 2014 in which she denied defendant's motion and attempted to certify the matter for appeal. Defendant filed notice of appeal from the order on 21 May 2014.

On 15 July 2014, the trial judge entered an amended summary judgment order by consent of the parties in which she clarified the certification of the matter for appeal; the amended order, however, was identical to the first in that it denied defendant's motion for summary judgment based in large part on the following determinations:

> 11. The [agreement] entered into by and between the parties to this action is not, by its own terms, violating public policy, promoting any action to violate public policy, or otherwise void.
>
> 12. When the totality of the terms of the parties' [agreement] are read, as a whole, the [a]greement fails to violate public policy and pursuant to North Carolina Case Law, continues to remain valid and in full force and effect.

Defendant filed notice of appeal from the amended order on 15 July 2014.

II. Discussion

The sole issue on appeal is whether the trial court erred in denying defendant's motion for summary judgment. Defendant contends the trial court did err because the alimony provision in the agreement, which does not provide for termination of alimony payments upon plaintiff's cohabitation, is void as against public policy. Therefore, defendant asks this Court to declare the alimony provision void, reverse the trial court's decision, and direct entry of summary judgment in his favor.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). In this case, the material facts are undisputed and this Court's review is limited to whether the trial court erred as a matter of law.

On appeal, defendant recognizes that the freedom of contract is a fundamental constitutional right, but contends the right is limited by public policy considerations. Illustrative of defendant's contention and pertinent to this case, N.C. Gen. Stat. § 52-10.1 provides that "[a]ny married couple is . . . authorized to execute a separation agreement

not inconsistent with public policy . . . .” N.C. Gen. Stat. § 52-10.1 (2013). Defendant then asserts the public policy of North Carolina regarding alimony and cohabitation is reflected in N.C. Gen. Stat. § 50-16.9, which governs modification of contested and uncontested court orders for alimony or postseparation support. As defendant points out, prior to 1995, N.C. Gen. Stat. § 50-16.9 provided, “[i]f a dependent spouse who is receiving alimony under a judgment or order of a court of this State shall remarry, said alimony shall terminate.” N.C. Gen. Stat. § 50-16.9 (1993). However, N.C. Gen. Stat. § 50-16.9 was amended in 1995 to refer to postseparation support in addition to alimony and to include cohabitation and death as events terminating court ordered alimony or postseparation support. *See* 1995 N.C. Sess. Laws ch. 319, § 7. Thus, N.C. Gen. Stat. § 50-16.9 now provides as follows:

> If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse.

N.C. Gen. Stat. § 50-16.9(b) (2013).

Defendant claims the legislature’s amendment to N.C. Gen. Stat. § 50-16.9 in 1995 reflects this Court’s opinion in *Sethness v. Sethness*, 62 N.C. App. 676, 303 S.E.2d 424 (1983), in which this Court looked unfavorably upon cohabitation but upheld the trial court’s dismissal of a suit seeking to terminate contractual postseparation support, noting that just “[b]ecause a separation agreement does not specifically prohibit . . . cohabitation and may, by implication condone [it], it does not therefore follow that the agreement promotes [it].” 62 N.C. App. at 681, 202 S.E.2d at 428. This Court then stated, “[w]hether the silence of a separation agreement on [cohabitation] renders it void as against public policy is a matter for legislative, not judicial determination.” 62 N.C. App. at 681, 202 S.E.2d at 428.

Defendant contends the policy behind the amendment to include cohabitation as a terminating event for court ordered alimony or postseparation support in N.C. Gen. Stat. § 50-16.9 applies equally to contractual alimony or postseparation support.

Upon review of the N.C. Gen. Stat. § 50-16.9, *Sethness*, and the other cases cited by defendant, we disagree with defendant’s view that N.C. Gen. Stat. § 50-16.9 reflects a broad public policy in North Carolina that

all alimony or postseparation support, whether court ordered or contractual, shall terminate upon cohabitation of the dependent spouse. In line with many cases decided by this Court, we find the distinction between court ordered and contractual support obligations significant and hold N.C. Gen. Stat. § 50-16.9 only reflects the public policy regarding court ordered alimony or postseparation support. *See Acosta v. Clark*, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984) (citing *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (discussing the difference between a separation agreement treated as a contract and a separation agreement that has been approved by the court as part of a court ordered judgment)); *see also Williamson v. Williamson*, 142 N.C. App. 702, 704, 543 S.E.2d 897, 898 (2001) (emphasizing N.C. Gen. Stat. § 50-16.9 refers to spousal support payments pursuant to a judgment or order). "[I]f the parties wish to preserve their agreement as a contract they need only avoid submitting their agreement to the court." *Acosta*, 70 N.C. App. at 115, 318 S.E.3d at 554 (citing *Walters*, 307 N.C. at 386, 298 S.E.2d at 342). N.C. Gen. Stat. § 50-16.9 does not, and was not intended to, interfere with the freedom of the parties to agree to terms for alimony that is purely contractual. If the legislature intended to address this court's decision in *Sethness* and espouse a broad public policy covering contractual alimony or postseparation support, it would not have used language limiting N.C. Gen. Stat. § 50-16.9 to situations where "a dependent spouse . . . is receiving postseparation support or alimony from a supporting spouse *under a judgment or order of a court of this State*[.]" N.C. Gen. Stat. § 50-16.9(b).

Moreover, as this Court pointed out in *Sethness*, "the clear implication of [cases where separation agreements were found to be void as against public policy] and [N.C. Gen. Stat. § 52-10.1] . . . is that such agreements may not by their own terms promote objectives (i.e.: divorce, termination of parental rights) which ore offensive to public policy." 62 N.C. App. at 680, 303 S.E.2d at 427; *see also Williams v. Williams*, 120 N.C. App. 707, 463 S.E.2d 815 (1995) (noting a provision in an agreement that comprises a promise looking towards future separation is void as against public policy because it would discourage the plaintiff from putting forth a concerted effort to maintain the marriage). In *Sethness*, this Court relied on *Riddle v. Riddle*, 32 N.C. App. 83, 230 S.E.2d 809 (1977), which is very similar to the present case. As we explained in *Sethness*,

> *Riddle* holds, in accordance with general principles of contract law, that a separation agreement must be enforced according to its own terms. The applicable provision of this separation agreement, quoted at the outset, provides that [the] plaintiff is to pay [the] defendant certain sums

> of money. This obligation is to continue until the happening of certain events stated in the agreement (i.e.: emancipation of the child, remarriage of [the] defendant). The agreement also confirms the right of the parties to "live separate and apart" and provides that "neither party shall interfere with the rights, privileges, doings or actions of the other." Under the agreement, cohabitation by [the] defendant with another man does not constitute a breach of the agreement or grounds for termination of [the] plaintiff's support obligation.

62 N.C. App. at 681, 303 S.E.2d at 427-28. Thus, "cohabitation by one party to a separation agreement does not necessarily invalidate the agreement or relieve a party of his support obligations thereunder." *Id.* at 681, 303 S.E.2d at 427.

Defendant's only argument against reliance on *Sethness* and *Riddle* is that those cases were decided prior to the amendments to N.C. Gen. Stat. § 50-16.9. Yet, in *Jones v. Jones*, 144 N.C. App. 595, 548 S.E.2d 565 (2001), decided after the amendment to N.C. Gen. Stat. § 50-16.9, the Court continued to emphasize that contractual alimony in a separation agreement was not affected by the plaintiff's cohabitation. 144 N.C. App. at 601, 548 S.E.2d at 568. "[T]he separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles." *Id.* at 601, 548 S.E.2d at 569. Whether or not the discussion of contractual alimony in *Jones* is dicta, we find that the distinction between contractual and court ordered support is still significant and, as discussed, hold N.C. Gen. Stat. § 50-16.9 reflects only the policy with regard to court ordered support. Thus, the result in this case is no different than in *Sethness* and *Riddle*.

In this case, where the parties included specific events in the agreement to terminate alimony, agreed that the parties were to live separate and apart as if they were single and unmarried, and agreed the agreement would not become part of a divorce judgment, we hold defendant is bound by the terms of the agreement.

III. Conclusion

For the reasons discussed, we hold trial court did not err in denying defendant's motion for summary judgment and affirm the order of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

CHARLENE SALZER, MARY ELDER, AND MARTHA BUFFINGTON, PLAINTIFFS
v.
KING KONG ZOO, AND JOHN CURTIS, DEFENDANTS

No. COA14-1211

Filed: 7 July 2015

1. Constitutional Law—federal preemption—animal welfare—complementary state legislation

The federal Animal Welfare Act (AWA) did not expressly preempt plaintiff's claim from being brought in a North Carolina District Court because the language of the AWA permits the enactment of complementary legislation by the states.

2. Constitutional Law—federal preemption—animal welfare—no implicit intent to occupy entire field

Congress could not have implicitly intended to occupy an entire field of regulation when it explicitly afforded states the right to enact cooperative legislation in the same field.

3. Constitutional Law—federal preemption—animal welfare—state and federal legislation—not in conflict

The federal Animal Welfare Act (AWA) did not preempt plaintiffs' claim under N.C.G.S. § 19A where the two statutes applied equally and did not conflict so much as operate cooperatively.

Appeal by Plaintiffs from an order entered 29 August 2014 by Judge Donna Forga in Cherokee County District Court. Heard in the Court of Appeals 20 April 2015.

Winston & Strawn LLP, by Amanda L. Groves and Elizabeth J. Ireland, for Plaintiff-Appellants.

No brief submitted by Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Charlene Salzer, Mary Elder, and Martha Buffington ("Plaintiffs") appeal from an order granting dismissal of their complaint for lack of subject matter jurisdiction. For the following reasons, we reverse and remand the decision of the district court.

I. Factual & Procedural History

In 1991, the current and former owners of King Kong Zoo incorporated the King Kong Zoological Park, Inc. in North Carolina, with Defendant John Curtis as its registered agent. King Kong Zoological Park, Inc. privately owns and operates King Kong Zoo. King Kong Zoo is an Animal Welfare Act ("AWA") licensed exhibitor of wild and domestic animals in Murphy, North Carolina.

On 30 April 2014, Plaintiffs Charlene Salzer, Mary Elder, and Martha Buffington initiated a civil action against King Kong Zoo and John Curtis ("Defendants") in Cherokee County District Court, alleging facts amounting to animal cruelty in violation of N.C. Gen. Stat. § 19A-1. According to Plaintiffs, the conditions in which King Kong Zoo kept the animals were grossly substandard. Plaintiffs moved the Cherokee County District Court for a permanent injunction against King Kong Zoo's exhibition of domestic and exotic wildlife, as well as an order terminating John Curtis's ownership and possessory rights in the animals exhibited. Defendants subsequently moved for dismissal of Plaintiffs' complaint for lack of personal jurisdiction over King Kong Zoological Park, Inc. pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure, and for lack of jurisdiction over the subject matter of the complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

The case came on for hearing on 18 August 2014. Defendants first argued insufficient service of process because Plaintiffs named an improper party—"King Kong Zoo"—instead of "King Kong Zoological Park, Inc." in their service of summons. Defendants next argued that, because the federal AWA governs exhibitors and the welfare of animals in licensed zoos, the United States District Court is vested jurisdiction in the subject matter, and such federal law preempts Plaintiffs from seeking relief under N.C. Gen. Stat. § 19A-1. In response, Plaintiffs contended N.C. Gen. Stat. § 19A-1 is not preempted, but rather works in conjunction with the federal AWA.

On 29 August 2014, the district court issued a written order denying Defendants' motion for dismissal on the grounds of personal jurisdiction. However, the court granted Defendants' motion to dismiss for lack of subject matter jurisdiction. The court stated the applicable law in this case is the federal AWA, contained in Chapter 54 of Title 7 of the United States Code because "N.C. Gen. Stat. § 19A-1 . . . has no application to licensed zoo operations." Therefore, the court found, jurisdiction lies not in the State court but in the United States District Court. Plaintiffs filed timely written notice of appeal to this Court on 17 September 2014.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2), which provides for an appeal of right to the Court of Appeals from any final judgment of a district court in a civil action. *See* N.C. Gen. Stat. § 7A-27(b)(2) (2014).

III. Standard of Review

The standard of review "of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*." *M Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Id.*

IV. Analysis

This is a case of first impression in North Carolina—addressing whether the federal AWA preempts Plaintiffs from bringing their claim in Cherokee County District Court under N.C. Gen. Stat. § 19A. Pursuant to the Tenth Amendment of the United States Constitution, "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Federal law, therefore, preempts state law only when: "(1) Congress explicitly provides for the preemption of state law; (2) Congress implicitly indicates the intent to occupy an entire field of regulation to the exclusion of state law; or (3) the relevant state law principle actually conflicts with federal law." *Eastern Carolina Reg'l Hous. Auth. v. Lofton*, __ N.C. App. __, __, 767 S.E.2d 63, 69 (2014) (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992)). Courts typically begin their analysis of federal preemption "with a presumption against federal preemption." *Davidson Cnty. Broad., Inc. v. Rowan Cnty. Bd. of Comm'rs*, 186 N.C. App. 81, 89, 649 S.E.2d 904, 910 (2007) (quotation marks and citation omitted). Moreover, "[w]here . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.*

Therefore, here, the issue is whether the federal AWA (A) expressly preempts any State regulation of animal welfare; (B) implies an intent to regulate the welfare of all animals in the United States; or (C) conflicts with N.C. Gen. Stat. § 19A so that "compliance with both state and federal requirements is impossible, or where state law stands as an obstacle

to the . . . objectives of Congress." *Lofton*, __ N.C. App. at __, 767 S.E.2d at 69. For the following reasons, we hold the federal AWA does not preempt State regulation of animal welfare under N.C. Gen. Stat. § 19A.

A. Express Preemption of State Regulations Regarding Animal Welfare

[1] Under the "Express Preemption" theory, federal law preempts state law if the federal law contains "explicit pre-emptive language." *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 44, 681 S.E.2d 465, 476 (2009) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115, 112 S. Ct. 2374, 2392 (1992)). In *Guyton*, this Court considered whether the federal National Flood Insurance Act ("NFIA") preempted the plaintiffs from seeking redress in State court. We held "[a]s a result of the absence of expressly preemptive language in the NFIA . . . the NFIA [did] not expressly preempt . . . civil actions against lenders[.]" *Id.* at 45, 681 S.E.2d at 477. Here, Paragraph 1 of the federal AWA provides, "The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1) (2006). Additionally, instead of providing definite language preempting state regulation of animal welfare, the AWA explicitly states, "Paragraph (1) shall not prohibit any State . . . from promulgating standards in addition to those standards promulgated by the Secretary under paragraph (1)." 7 U.S.C. § 2143(a)(8) (2006). This precise language permitting states to enact complementary legislation to the AWA indicates the federal law does not expressly preempt claims under N.C. Gen. Stat. § 19A. Thus, under the "Express Preemption" theory, Plaintiffs are not limited to relief in federal courts. Moreover, other jurisdictions have held animal welfare to be "recognized as part of the historic police power of the States." *DeHart v. Town of Austin, Ind.*, 39 F.3d 718, 722 (7th Cir. 1994) (citing *Nicchia v. New York*, 254 U.S. 228, 230-31, 41 S. Ct. 103, 103-04 (1920)).

Therefore, the federal AWA does not preempt N.C. Gen. Stat. § 19A, but empowers Section 19A to work in conjunction with the AWA. Accordingly, due to explicit language empowering states to enact animal welfare laws complementary to the AWA, Plaintiffs' claim is not expressly preempted from being brought in Cherokee County District Court.

B. Implied Intent to Regulate All Animal Welfare in the United States

[2] As noted above, Congress empowered the individual states to enact harmonious legislation to work in conjunction with the AWA. Congress, therefore, could not have implicitly intended to occupy an entire field

of regulation if it explicitly affords states the right to enact cooperative legislation dealing with the same field.

C. Conflict Between N.C. Gen. Stat. § 19A and the Federal Animal Welfare Act

[3] Under the "Conflict Preemption" theory, federal law preempts state regulation when "compliance with both state and federal requirements is impossible, or 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Guyton*, 199 N.C. App. at 44-45, 681 S.E.2d at 476 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990)). The issue of "Conflict Preemption" arises "when 'compliance with both federal and state regulations is a physical impossibility[.]' " *State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 525, 614 S.E.2d 281, 287 (2005) (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722 (1983)).

There is no conflict of law here preempting Plaintiffs from bringing their action in Cherokee County. Both N.C. Gen. Stat. § 19A and the AWA apply to King Kong Zoo and both protect against the inhumane treatment of animals such as those exhibited in King Kong Zoo. N.C. Gen. Stat. § 19A is applicable to privately owned zoos such as King Kong Zoo because King Kong Zoo is not a "bona fide zoo[] . . . operated by federal, State, or local government agencies." N.C. Gen. Stat. § 19A-11 (listing exceptions to the statute). Similarly, the federal AWA applies to King Kong Zoo because it is a licensed private exhibitor under the AWA. N.C. Gen. Stat. § 19A prohibits the same inhumane treatment of animals as the federal AWA. Thus, they apply equally and do not conflict so much as they operate cooperatively.

Because no explicit preemptive language exists, no implicit intent by Congress to occupy the entire field of animal welfare regulation exists, and the federal and State statutes do not conflict, we hold the federal AWA does not preempt Plaintiffs' claim under N.C. Gen. Stat. § 19A. Therefore, the trial court erred in finding it lacked subject matter jurisdiction over Plaintiffs' complaint.

For the reasons above, we reverse and remand to the Cherokee County District Court for determination consistent with this opinion.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DIETZ concur.

STATE v. CALDERON

[242 N.C. App. 125 (2015)]

STATE OF NORTH CAROLINA
v.
JESUS CALDERON, DEFENDANT

STATE OF NORTH CAROLINA
v.
CHRISTOPHER LASHON MILLER, JR., DEFENDANT

No. COA14-1131

Filed 7 July 2015

1. Robbery—jury instructions—not-guilty mandate

In defendants' trial for offenses stemming from an armed robbery, it was not plain error when the trial court failed to deliver the "not guilty" mandate during its jury instructions on robbery with a firearm and common law robbery. This error did not amount to plain error because the trial court did not impermissibly suggest that defendants must be guilty, and the verdict sheets clearly informed the jury of its option of returning a "not guilty" verdict.

2. Robbery—attempt—sleeping victim—acting in concert

In defendants' trial for offenses stemming from an armed robbery, the trial court did not err by denying defendants' motion to dismiss the charges of attempted robbery with a firearm as to one of the victims. The evidence showed that defendants brandished their weapons in the apartment and their co-perpetrator, with a shotgun in hand, approached the sleeping victim to take money from his pockets.

3. Robbery—attempt—jury instruction—acting in concert —omitted

In defendants' trial for offenses stemming from an armed robbery, it was not prejudicial error for the trial court to omit instructions on acting in concert from the attempted robbery jury instructions. Considering the evidence presented at trial and the jury instructions in their entirety, the Court of Appeals was not convinced that the instructions were likely to mislead the jury.

4. Robbery—armed—jury instructions—lesser-included offenses

In defendants' trial for offenses stemming from an armed robbery, it was not error for the trial court not to instruct the jury on lesser-included offenses for one of the charges of armed robbery.

An instruction on lesser-included offenses is required only when the evidence would allow the jury to find the defendant guilty of the lesser offense and acquit him of the greater.

Appeal by Defendants from judgments entered 21 April 2014 by Judge Jeffrey P. Hunt in Superior Court, Cleveland County. Heard in the Court of Appeals 6 April 2015.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant and Assistant Attorney General Rebecca E. Lem, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant–Appellant Calderon.

Leslie C. Rawls for Defendant–Appellant Miller.

McGEE, Chief Judge.

Jesus Calderon ("Defendant Calderon") and Christopher Lashon Miller, Jr. ("Defendant Miller") (collectively "Defendants") appeal from judgments entered upon jury verdicts finding Defendants each guilty of four counts of robbery with a firearm and two counts of attempted robbery with a firearm, and finding Defendant Calderon guilty of one count of possession of a firearm by a felon. We find no prejudicial error.

I. Facts and Procedural History

The evidence at trial tended to show that Christopher Moore ("Mr. Moore") and Defendants were "chilling, smoking [marijuana], and drinking" at an apartment complex in Shelby, North Carolina, on 5 June 2013. They ran out of marijuana and decided to walk to the neighboring Ramblewood Apartments complex ("Ramblewood") "to go rob somebody for some weed." Defendant Calderon, armed with a twenty-two-caliber pistol, and Defendant Miller, armed with a nine-millimeter pistol, walked with Mr. Moore to Bobbie Yates's apartment ("the apartment") in Ramblewood to steal marijuana, since Mr. Moore said he had previously purchased marijuana from Bobbie Yates and believed there would be marijuana in the apartment. When Defendants and Mr. Moore approached Ramblewood, they encountered Bobby Hamrick ("Mr. Hamrick"), who was standing outside the apartment and who told them: "They're having a card game. There ain't no weed up there." When Defendants and Mr. Moore learned from Mr. Hamrick that there was an ongoing card game with "such a [sic] amount of money" on the table, they left Ramblewood

and returned to the apartment complex, where they retrieved a shotgun for Mr. Moore. Defendants and Mr. Moore, all now armed, returned to the apartment in Ramblewood.

There were a number of people in the apartment, including Bobbie Yates, Cordell Yates, Mr. Hamrick, Terrance Norris ("Mr. Norris"), Anthony Charles ("Mr. Charles"), Troy Vinson ("Mr. Vinson"), Terris Parker ("Mr. Parker"), and Jackie Allen ("Mr. Allen"), as well as the ten-year-old son of Mr. Charles. Bobbie Yates, Cordell Yates, Mr. Charles, Mr. Hamrick, and Mr. Vinson were seated around the kitchen table playing poker, and each of the men had money on the table. Others, including Mr. Charles's ten-year-old son, were seated on one part of a sectional couch in the adjoining living room, and Mr. Allen, who had been drinking alcohol earlier in the evening, was either "passed out" or asleep on another part of the couch. The apartment had an open floor plan, so there was no wall or barrier separating the kitchen from the living room.

As the card game continued, there was a knock on the front door and when the door was opened, Defendants and Mr. Moore "rushed in," all with weapons in hand. As they pointed their weapons at the people in the apartment, one of them announced: "Where it at? You know what time it is." Several of the people in the apartment testified that they knew or recognized Defendants and Mr. Moore.

Once Defendants and Mr. Moore entered the apartment, Defendants stood with their weapons raised and pointed at the people in the apartment while Mr. Moore grabbed the $200.00 to $300.00 off the kitchen table and searched through some of the people's pockets, and Mr. Hamrick's socks, for more money. Mr. Moore held his shotgun in his left hand as he proceeded to take the money off the table and from the people in the apartment and put it in his pocket.

One of the people in the living room testified that, when Mr. Moore approached Mr. Parker, Mr. Parker refused to give Mr. Moore his money, stating: "If you all motherf---ers want my money, you got to go in my pocket and get it yourself because I ain't going to give you my money out of my pocket. You got to go in there and get it yourself." Mr. Moore then pressed the barrel of his shotgun to Mr. Parker's forehead, said, "Motherf---er, I kill you," and reached inside Mr. Parker's pockets and took his money. Mr. Charles, whose attention was on the living room where his son was located throughout the robbery, saw Mr. Moore search through Mr. Allen's pockets as he lay on the couch, either "passed out" or asleep, although no witness saw Mr. Moore take any money from Mr. Allen. The entire robbery lasted between two and four minutes, and

after the money was collected, Defendants and Mr. Moore told the people not to leave the apartment for ten minutes "or they was [sic] going to kill whoever came the f--- out." As soon as Defendants and Mr. Moore left the apartment, one of the people in the apartment called the police.

Mr. Moore pleaded guilty to nine counts of armed robbery and agreed to testify at Defendants' trial. Defendants were each indicted on multiple counts of robbery with a dangerous weapon. Defendant Calderon was also indicted on one count of possession of a firearm by a felon. Defendants were tried jointly. At trial, Defendants moved to dismiss the charges at the close of the State's evidence and at the close of all of the evidence. Two counts of robbery with a dangerous weapon were dismissed against each Defendant, and two counts were reduced to attempted robbery with a firearm.

Defendant Calderon was found guilty by a jury of four counts of robbery with a firearm, two counts of attempted robbery with a firearm, and one count of possession of a firearm by a felon, and was sentenced to two consecutive terms of 73 months to 100 months' imprisonment for the robbery and attempted robbery convictions, and to one term of fourteen to twenty-six months' imprisonment for the possession of a firearm by a felon conviction, to begin upon the expiration of the other sentences.

Defendant Miller was found guilty by a jury of four counts of robbery with a firearm and two counts of attempted robbery with a firearm, and was sentenced to two consecutive terms of sixty-four to eighty-nine months' imprisonment. Both Defendant Calderon and Defendant Miller appeal.

II. Not Guilty Mandate in Jury Instructions

[1] Defendant Calderon first contends the trial court erred by failing to provide a "not guilty" mandate to the jury when the court gave its instruction on the offense of robbery with a firearm and on the lesser-included offense of common law robbery. Defendant Calderon asserts that, because the trial court's charge to the jury diverged from the pattern jury instructions and did not expressly instruct the jury on its duty to return a verdict of not guilty if certain conditions were met, he was deprived of his fundamental right to have all permissible verdicts submitted to the jury and thus requires a new trial. We disagree.

"Because [Defendant Calderon] did not object at trial to the omission of the not guilty option from the trial court's final mandate to the jury, we review the trial court's actions for plain error." *See State v. McHone*, 174 N.C. App. 289, 294, 620 S.E.2d 903, 907 (2005), *supersedeas*

and disc. review denied, 362 N.C. 368, 628 S.E.2d 9 (2006). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (internal quotation marks omitted).

"Every criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty." *State v. Chapman*, 359 N.C. 328, 380, 611 S.E.2d 794, 831 (2005) (internal quotation marks omitted). "Such instruction is generally given during the final mandate after the trial court has instructed the jury as to elements it must find to reach a guilty verdict." *Id.* "Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *McHone*, 174 N.C. App. at 295, 620 S.E.2d at 907. Nonetheless, it has long been recognized that "the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct." *Id.* at 294, 620 S.E.2d at 907 (internal quotation marks omitted).

In the present case, the parties agreed that the trial court would charge the jury in accordance with the North Carolina Pattern Jury Instructions. For the offense of robbery with a firearm, Pattern Jury Instruction 217.20 provides as follows:

> The defendant has been charged with robbery with a firearm, which is taking and carrying away the personal property of another from his person or in his presence without his consent by endangering or threatening a person's life with a firearm, the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently.
>
> For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt:
>
> First, that the defendant took property from the person of another or in his presence.
>
> Second, that the defendant carried away the property.
>
> Third, that the person did not voluntarily consent to the taking and carrying away of the property.

> Fourth, that the defendant knew he was not entitled to take the property.
>
> Fifth, that at the time of taking the defendant intended to deprive that person of its use permanently.
>
> Sixth, that the defendant had a firearm in his possession at the time he obtained the property (or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be).
>
> And Seventh, that the defendant obtained the property by endangering or threatening the life of [that person] [another person] with the firearm.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in his possession a firearm and took and carried away property from the person or presence of a person without his voluntary consent by endangering or threatening [his] [another person's] life with the use or threatened use of a firearm, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

N.C.P.I. — Crim. 217.20 (2003) (emphasis added). For the offense of common law robbery, Pattern Jury Instruction 217.10 provides as follows:

> The defendant has been charged with common law robbery, which is taking and carrying away personal property of another from his person or in his presence without his consent by violence or by putting him in fear, and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it.
>
> For you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt:
>
> First, that the defendant took property from the person of another or in his presence.
>
> Second, that the defendant carried away the property.

> Third, that the other person did not voluntarily consent to the taking and carrying away of the property.
>
> Fourth, that at that time, the defendant intended to deprive him of its use permanently.
>
> Fifth, that the defendant knew he was not entitled to take the property.
>
> And Sixth, that the taking was by violence or by putting the person in fear.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant took and carried away property from the person or the presence of a person without his voluntary consent, by violence or by putting that person in fear, the defendant knowing that he was not entitled to take it and intending at that time to deprive the person of its use permanently, it would be your duty to return a verdict of guilty. *If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.*

N.C.P.I. — Crim. 217.10 (2002) (emphasis added).

In the trial on these matters, the trial court's charge to the jury on the offenses of robbery with a firearm and common law robbery conformed to the pattern jury instructions entirely, with the following exception: the court did not expressly instruct the jury that it was its "duty to return a verdict of not guilty" if it had a reasonable doubt as to one or more of the enumerated elements of robbery with a firearm or common law robbery, respectively. Instead, for the offense of robbery with a firearm, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, *then you will not return a verdict of guilty of robbery with a firearm* as to that defendant." (Emphasis added.) For the offense of common law robbery, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, *then you would not find the defendant guilty of common law robbery*." (Emphasis added.)

In *State v. McHone*, this Court considered whether the trial court committed plain error by "(1) failing to include the option of not guilty of first-degree murder in its final mandate to the jury; and (2) omitting the not guilty option from the verdict sheet for that offense despite

including a not guilty option on the verdict sheet for the robbery with a dangerous weapon charge." *State v. Jenrette*, __ N.C. App. ___, ___, 763 S.E.2d 404, 412 (2014) (citing *McHone*, 174 N.C. App. at 291, 620 S.E.2d at 906), *appeal dismissed and disc. review denied*, __ N.C. __, __ S.E.2d __ (filed Apr. 9, 2015) (No. 416P14). In McHone, this Court concluded that "the trial court failed to instruct the jury on the option of finding [the] defendant not guilty during its final mandate" when it instructed the jury to "*not return a verdict of guilty of first-degree murder on the basis of malice, premeditation, and deliberation*" and to "*not return a verdict of guilty of first-degree murder under the felony murder rule*," rather than instructing the jury that "it would be your duty to return a verdict of not guilty" if the State failed to meet one or more of the elements of first-degree murder under either theory. *McHone*, 174 N.C. App. at 292-93, 296, 620 S.E.2d at 906, 908. We determined this instruction constituted a failure to give "an appropriate not guilty mandate," *see Jenrette*, __ N.C. App. at ___, 763 S.E.2d at 412, because the trial court "neither stated that the jury *could* find defendant not guilty of first degree murder, nor that it was their *duty* to do so should they conclude the State failed in its burden of proof," *McHone*, 174 N.C. App. at 296, 620 S.E.2d at 908, and further did not, "as an alternative to a 'not guilty' mandate, instruct the jury to answer 'no' to [that] issue on the verdict sheet should it not find any one or more of the elements of murder missing." *Id.* at 296, 620 S.E.2d at 908–09. Thus, we concluded that "the trial court's failure to provide a not guilty final mandate constituted error." *Id.* at 297, 620 S.E.2d at 909.

In order to consider whether such error constituted plain error and required a new trial, this Court identified "three factors that must be weighed in determining whether the failure to give an appropriate not guilty mandate [rose] to the level of plain error." *Jenrette*, __ N.C. App. at ___, 763 S.E.2d at 412. First, we must consider the challenged jury instructions "in their entirety." *McHone*, 174 N.C. App. at 297, 620 S.E.2d at 909. Second, we need to "consider the content and form of the . . . verdict sheet [for the offense that is the subject of the challenged instruction] in determining whether the failure to provide a not guilty mandate constitutes plain error." *Id.* Third, we need to consider the instructions and verdict sheet for the other offenses in the case. *See id.* at 298, 620 S.E.2d at 909.

With respect to the first factor, this Court in *McHone* determined that, "in the absence of a final not guilty mandate," the challenged instructions "essentially pitted one theory of first degree murder against the other, and *impermissibly suggested* that the jury should find that the killing was perpetrated by [the] defendant on the basis of at least one

of the theories." *Id.* at 297, 620 S.E.2d at 909. Thus, we concluded that instructing the jury " 'not [to] return a verdict of guilty' as to each theory of first degree murder [did] not comport with the necessity of instructing the jury that it *must or would* return a verdict of not guilty should they completely reject the conclusion that defendant committed first degree murder." *Id.* (first alteration in original).

With respect to the second factor, this Court in *McHone* recognized that the verdict sheet "only provided a space for an answer to 'Guilty of first-degree murder,' " *State v. Wright*, 210 N.C. App. 697, 705, 709 S.E.2d 471, 476 (citing *McHone*, 174 N.C. App. at 297, 620 S.E.2d at 909), *disc. review denied*, 365 N.C. 332, 717 S.E.2d 394 (2011), but "the verdict sheet itself did not provide a space or option of 'not guilty.' " *McHone*, 174 N.C. App. at 298, 620 S.E.2d at 909. Consequently, "while the content and form of the verdict sheet did not compel the jury to return a verdict of guilty insofar as it stated 'if' it found defendant guilty of first degree murder," *id.*, "we repeat[ed] our observation that it failed to afford exactly that which the court initially informed the jury it would be authorized to return — a not guilty verdict." *Id.*

Finally, with respect to the third factor, this Court in *McHone* considered the instructions and verdict sheets given to the jury for the other charge in that case, which was armed robbery and its lesser-included offense of larceny. *See id.* For these offenses, the trial court *did* provide a not guilty mandate in conformity with the pattern jury instructions, and the verdict sheet *did* include a space for a not guilty verdict. *Id.* Thus, we determined that, "[r]ather than help correct the failure to provide a similar not guilty mandate with respect to the first degree murder charge," *id.*, the presence of a not guilty final mandate as to the taking offenses, as well as the content and form of the verdict sheet on the taking offenses, "likely *reinforced* the suggestion that the jury should return a verdict of first degree murder based upon premeditation and deliberation and/or felony murder." *Id.* Thus, "based *not only* on the importance of the jury receiving a not guilty mandate from the presiding judge, but also on the form and content of the particular verdict sheets utilized in this case," *id.* at 299, 620 S.E.2d at 910 (emphasis added), this Court concluded that "the trial court's inadvertent omission tipped the scales of justice in favor of conviction and *impermissibly suggested* that the defendant must have been guilty of first degree murder on some basis." *Id.*

Unlike the alternative theories of first-degree murder that were the subject of the challenged instruction in *McHone*, which "essentially

pitted one theory of first degree murder against the other," *id.* at 297, 620 S.E.2d at 909, in the present case, "there was nothing that would support the proposition that the trial court impermissibly suggested that [Defendants] must be guilty" of robbery with a firearm or common law robbery. *See Wright*, 210 N.C. App. at 706, 709 S.E.2d at 477. While the better practice would have been for the trial court to have expressly instructed the jury on the not guilty mandate, each verdict sheet for the four counts of robbery with a firearm for Defendant Calderon and Defendant Miller provided the following options: "Guilty of Robbery With a Firearm . . . OR Guilty of Common Law Robbery . . . OR Not Guilty." Thus, the verdict sheets for each of the charges, including those for the unchallenged offenses of attempted robbery with a firearm and possession of a firearm by a felon, "clearly informed the jury of its option of returning a not guilty verdict." *See Jenrette*, __ N.C. App. at ___, 763 S.E.2d at 414. "[W]e are satisfied that any confusion that may have arisen stemming from the trial court's instructions was remedied by the verdict sheet[s], which — as discussed above — clearly provided an option of not guilty" for each charge against Defendants. *See id.* at ___, 763 S.E.2d at 417. Additionally, since we have determined that the trial court's instruction did not impermissibly suggest that Defendants must be guilty, we also conclude that the other charges, which included not guilty mandates that adhered to the pattern jury instructions, did not reinforce that the jury should return a guilty verdict. Therefore, while it was error for the trial court to fail to deliver the not guilty mandate during its instruction on the offenses of robbery with a firearm and common law robbery, we hold this error does not rise to the level of plain error.

III. Sufficiency of Evidence of Attempted Robbery With A Firearm

[2] Defendants next contend the trial court erred by denying their respective motions to dismiss the charges of attempted robbery with a firearm of Mr. Allen because the evidence was insufficient to support such convictions. Again, we disagree.

"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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). "The evidence is to be considered in the light most favorable to the State; the State

is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Id.*

The elements of robbery with a dangerous weapon are: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another[;] (2) by use or threatened use of a firearm or other dangerous weapon[;] (3) whereby the life of a person is endangered or threatened." *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011), *disc. review dismissed*, 366 N.C. 583, 739 S.E.2d 842 (2013); *see also* N.C. Gen. Stat. § 14 87(a) (2013). In other words, "[a]rmed robbery requires both an act of possession of a weapon and an act whereby the weapon is used to endanger the life of the victim" and "the use of force must be such as to induce the victim to part with the property." *Cf. State v. Dalton*, 122 N.C. App. 666, 671, 471 S.E.2d 657, 660–61 (1996) (holding that the trial court erred by denying the defendant's motion to dismiss the charge of robbery with a dangerous weapon where the victim had been asleep on the sofa in her house when the defendant had seen the victim's purse on the floor and removed it from her house because "[t]he taking of the purse occurred while [the victim] was asleep . . . [and,] therefore, she could not have known of the presence of the knife and could not have been induced by it to part with her purse"). "[T]he question in an armed robbery case is whether a person's life was in fact endangered or threatened by [the robber's] possession, use[,] or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life." *Hill*, 365 N.C. at 279, 715 S.E.2d at 845 (second alteration in original) (emphasis in original omitted).

"Acting in concert means that the defendant is 'present at the scene of the crime' and acts 'together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.' " *State v. Graham*, 186 N.C. App. 182, 197, 650 S.E.2d 639, 649 (2007) (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)), *disc. review denied and appeal dismissed*, 362 N.C. 477, 666 S.E.2d 765 (2008). "Under the theory of acting in concert, if two or more persons join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime's common purpose." *State v. Hill*, 182 N.C. App. 88, 92–93, 641 S.E.2d 380, 385 (2007) (citing *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

Therefore, in order to consider whether there was sufficient evidence to convict a defendant of committing robbery with a dangerous weapon under a theory of acting in concert, "the State need not present evidence that [the] defendant actually possessed the dangerous weapon." *Id.* at 93, 641 S.E.2d at 385. "The State must only show that defendant acted in concert to commit robbery and that his co defendant used the dangerous weapon in pursuance of that common purpose to commit robbery." *Id.* (internal quotation marks omitted).

"The elements of attempt are an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense." *State v. Key*, 180 N.C. App. 286, 292, 636 S.E.2d 816, 821 (2006) (internal quotation marks omitted), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 399 (2007). "In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof." *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (internal quotation marks omitted). "[T]he act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." *Id.* (internal quotation marks omitted). "[A] defendant can stop his criminal plan short of an overt act on his own initiative or because of some outside intervention. However, once a defendant engages in an overt act, the offense [of attempt] is complete[.]" *Key*, 180 N.C. App. at 292, 636 S.E.2d at 821–22 (first and third alterations in original) (internal quotation marks omitted). While it "need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." *Price*, 280 N.C. at 158, 184 S.E.2d at 869 (internal quotation marks omitted). "[A]n attempt to rob another person of personal property . . . occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person." *Id.* at 157–58, 184 S.E.2d at 869 (citation omitted).

In *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996), the defendant confessed to killing a man who was sleeping in the driver's seat of a van. *See Miller*, 344 N.C. at 665, 477 S.E.2d at 920. The defendant also stated that, after he shot the man, he did not take any money from him because the defendant "was scared." *Id.* On appeal, the defendant argued there was insufficient evidence to uphold his conviction of attempted armed robbery because "the evidence was insufficient to show that his actions

advanced beyond a mere preparation to commit robbery." *Id.* at 667, 477 S.E.2d. at 921. However, the Court had previously determined that "evidence was sufficient to support a conviction for attempted armed robbery where the defendant placed his hand on a pistol and began to withdraw it from a purse with the intent of completing the substantive offense of armed robbery through its use." *Id.* at 669, 477 S.E.2d. at 922 (citing *State v. Powell*, 277 N.C. 672, 678–79, 178 S.E.2d 417, 421 (1971)). Thus, in *Miller*, although the victim was asleep in the van, the Court concluded that "[t]he evidence clearly show[ed the defendant] had already committed an overt act in furtherance of the crime well before he left the scene . . . [o]nce defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing [the victim]." *Id.* at 670, 477 S.E.2d at 922. Moreover, "[t]he fact that [the defendant] did not take the money [from the victim was] irrelevant." *Id.*

Here, Defendants argue there was insufficient evidence to prove that either of them unlawfully attempted to deprive Mr. Allen of personal property or that Mr. Allen's life was threatened or endangered. However, the evidence tended to show that Defendants and Mr. Moore planned to rob Bobbie Yates of marijuana, but that once they were informed there was a poker game going on in the apartment, they retrieved a third weapon and returned to Ramblewood for the purpose of robbing the people present in the apartment. Once Defendants and Mr. Moore entered the apartment, Mr. Moore took the money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes and, during the course of the robbery, Defendants continuously pointed their weapons at the people in the apartment, which had an open floor plan; Defendant Miller had a nine-millimeter pistol, and Defendant Calderon brandished a twenty-two-caliber pistol. After Mr. Moore had taken money from the people seated around the kitchen table, Mr. Moore, with his shotgun in hand, approached Mr. Allen, who was "passed out" or asleep in the living room, as Defendants continued to point their weapons at the people in the apartment. When Defendants and Mr. Moore prepared to leave the apartment, they told the people to remain in the apartment for ten minutes, or else they would kill them.

When viewed in the light most favorable to the State, we conclude that this evidence is sufficient to show that Defendants, acting in concert with Mr. Moore, had the specific intent to deprive Mr. Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. Although Mr. Moore may not have reached the "last proximate act to the

consummation of the offense" — because Mr. Allen was "passed out" or asleep and therefore could not be induced to give up his money due to the threat that Defendants' weapons presented, and because no one saw Mr. Moore take any money from Mr. Allen's pockets — Defendants and Mr. Moore did an "overt act calculated and designed" to rob Mr. Allen when Defendants brandished their weapons in the open apartment as Mr. Moore moved toward Mr. Allen with the intent to take money from his pockets. *See Price*, 280 N.C. at 157–58, 184 S.E.2d at 869. Therefore, we hold the trial court did not err by denying Defendants' motions to dismiss the charges of attempted armed robbery of Mr. Allen against both Defendants.

IV. Challenge to Jury Instructions on Acting in Concert

[3] Defendant Calderon next contends that he could not have been convicted of the attempted robbery of Mr. Allen under the theory of acting in concert because the trial judge did not specifically instruct the jury on acting in concert in its charge on that offense and, thus, Mr. Moore's actions could not have been imputed to Defendant Calderon.

"This Court reviews jury instructions contextually and in its entirety." *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (internal quotation marks omitted). "The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Id.* at 296-97, 610 S.E.2d at 253 (internal quotation marks omitted). "The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction." *Id.* at 297, 610 S.E.2d at 253 (alteration in original) (internal quotation marks omitted). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.* (internal quotation marks omitted).

In the present case, the parties conducted a charge conference in chambers. When the court announced that it was "time for our on-the-record charge conference," the court read out the extensive list of the pattern jury instructions it intended to give, which included the following:

> 104.35, flight in general; 104.90, identification of a defendant as a perpetrator; 105.20, impeachment or corroboration by prior statements of a witness; 101.42, when you have multiple defendants charged with the same crimes; *202.10, acting in concert; 201.10, the attempt*

instructions in general; 217.20 is robbery with a firearm; 217.10, common law robbery.

(Emphasis added.) After reading the list of proposed pattern jury instructions, the court invited the parties to request additional instructions or to indicate whether any of the proposed instructions should be stricken. At this time, Defendant Calderon's counsel stated: "Your Honor, we have no objections. We spent I think a fair amount of time going over that in chambers, as you said, and I think those are the appropriate instructions to be given to the jury."

In its instruction to the jury, the trial court repeated the acting in concert instruction after it gave the instruction for robbery with a firearm and after it gave the instruction for common law robbery. However, the court did not repeat the acting in concert instruction after it gave the instruction for attempted robbery with a firearm. Neither Defendant Calderon nor the State objected to the trial court's seemingly inadvertent omission of the repetition of the acting in concert instruction immediately following the attempted robbery instruction, which was given after the court's instructions for robbery with a firearm and before the court's instructions for common law robbery. Additionally, the record shows that neither Defendant Calderon nor the State requested that the trial court give the acting in concert instruction to the exclusion of the attempted robbery instruction. Nevertheless, looking at the charges to the jury in their entirety, and when considering the evidence presented — that Mr. Moore approached Mr. Allen with the intent of committing robbery while Defendants continuously pointed their weapons at the people from whom Mr. Moore was taking money in the apartment — we are not persuaded that the trial court's failure to repeat the acting in concert instruction after the attempted robbery instruction was likely to have misled the jury. Accordingly, we overrule this issue on appeal.

V. Instruction on Lesser-Included Offenses

[4] Defendant Calderon and Defendant Miller finally contend the trial court committed plain error by failing to instruct the jury on attempted larceny and attempted common law robbery, respectively, as the lesser-included offenses for the charge of attempted armed robbery of Mr. Allen. Defendants assert that, because Mr. Allen was "passed out" or asleep at the time that Mr. Moore attempted to take property from Mr. Allen's pockets, Mr. Allen's life was not endangered or threatened by Defendants' weapons, and the State's evidence was insufficient to support Defendants' respective convictions of the attempted armed robbery of Mr. Allen. Again, we disagree.

As we discussed above, an *attempt* to rob another person of personal property "occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person," *see Price*, 280 N.C. at 157–58, 184 S.E.2d at 869, and "once a defendant engages in an overt act, the offense [of attempt] is complete[.]" *Key*, 180 N.C. App. at 292, 636 S.E.2d at 821–22 (second alteration in original) (internal quotation marks omitted). Because Defendants were convicted of the *attempted* armed robbery of Mr. Allen and not of robbery with a firearm with respect to Mr. Allen, we conclude that Defendant Calderon's reliance on *Dalton*, 122 N.C. App. at 671, 471 S.E.2d at 660–61 (arresting judgment on the charge of robbery with a dangerous weapon after concluding that the defendant took the victim's purse from her home while she was asleep because the victim "could not have known of the presence of the knife [during the time that her purse was taken] and could not have been induced by [the knife] to part with her purse"), is misplaced.

In their arguments in support of this issue on appeal, Defendants do not dispute that the State presented evidence showing that Defendants and Mr. Moore armed themselves and went to the apartment for the purpose of robbing the people therein. Defendants then pointed their weapons at the people in the apartment as Mr. Moore rifled through several people's pockets, including Mr. Allen's, for the purpose of taking their money. Since "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense *and to acquit him of the greater*," *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (emphasis added), we conclude that the trial court was not required to give an instruction on a lesser-included offense for the charge of attempted armed robbery of Mr. Allen. Because we hold the trial court did not err by failing to instruct the jury on the lesser-included offenses of attempted larceny or attempted common law robbery, we decline to address Defendants' remaining assertions with respect to this issue on appeal.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR. and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DANIEL JOSEPH CLARK, DEFENDANT

No. COA14-1277

Filed 7 July 2015

Constitutional Law—Confrontation Clause—DMV records—not created solely as evidence against defendant

Defendant's right to confrontation was not violated in a prosecution for driving with a revoked license where the trial court admitted defendant's driving record, a document authenticating orders suspending his license and stating that they were mailed to his house, and two orders indefinitely suspending his driving license. None of the records were created for the sole purpose of providing evidence against defendant.

Appeal by Defendant from judgment entered 24 June 2014 by Judge C. Thomas Edwards in Caldwell County Superior Court. Heard in the Court of Appeals 7 April 2015.

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

Winifred H. Dillon, for the Defendant.

DILLON, Judge.

Daniel Joseph Clark ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of driving while his license was revoked and driving while displaying an expired license plate registration. The question raised in this appeal is whether the trial court violated Defendant's rights under the Confrontation Clause of the federal Constitution by allowing the State to introduce certified copies of his driving record and revocation orders from the Division of Motor Vehicles ("DMV"). We find no error.

I. Background

Defendant was found guilty of driving while his license was revoked and driving while displaying an expired registration. The court sentenced Defendant to a suspended sentence and placed him on supervised probation. Defendant entered notice of appeal in open court.

II. Analysis

In his brief, Defendant only argues error in his conviction for driving while his license was revoked. Therefore, any challenge to his conviction for driving while displaying an expired registration plate is waived. *See* N.C. R. App. P. 28.

In his sole argument on appeal, Defendant contends that the trial court erred in allowing the introduction of certain documentary evidence over his objection. The documents in question are (1) a copy of his driving record certified by the Commissioner of Motor Vehicles ("DMV Commissioner"); (2) two orders indefinitely suspending Defendant's drivers' license; and (3) a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to Defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV.

Defendant contends that the introduction of these documents violated his constitutional right to confront and cross-examine his supposed accusers, the DMV Commissioner and the DMV employee. We disagree.

Our review is *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Our resolution of the constitutional issue in the present appeal requires a brief review of several landmark United States Supreme Court decisions and the impact of those decisions on the admissibility of certain documentary evidence under our law.

The United States Supreme Court held in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004), that the constitutional guarantee to confrontation prohibits the introduction of testimonial hearsay unless the declarant is unavailable to testify at trial and the defendant has had a previous opportunity to cross-examine him or her. *Id.* at 68, 124 S. Ct. at 1374. Justice Scalia, writing for the majority, offered three, alternate formulations of the definition of "testimonial" within the meaning of the Clause: (1) "'*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably

expect to be used prosecutorially"; (2) "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and (3) "statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *Id.* at 51-52, 124 S. Ct. at 1364.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed.2d 314 (2009), the Supreme Court clarified that documents – however labeled – which contain declarations of fact made for the purpose of establishing that fact in a criminal trial qualify as testimonial, and a defendant has the right to confront and cross-examine a hearsay declarant who creates such a document just as he would any of his other accusers. *Id.* at 310-11, 129 S. Ct. at 2532. The Court noted that while "[a] clerk c[an] by affidavit *authenticate* or provide a copy of an otherwise admissible record," he or she cannot "*create* a record for the sole purpose of providing evidence against a defendant." *Id.* at 322-23, 129 S. Ct. at 2539 (emphasis in original).

Finally, in *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed.2d 610 (2011), the Court confirmed that a fact attested to in a hearsay document created for the purpose of proving that fact at trial is only admissible where the defendant is afforded the opportunity to confront and cross-examine the original hearsay declarant, and this constitutional demand is not met by the affirmation in court of the original declarant's prior statement by somebody else similarly qualified. *Id.* at ___, 131 S. Ct. at 2713. "A document created solely for an evidentiary purpose," the Court reiterated, "made in aid of a police investigation, ranks as testimonial." *Id.* at ___, 131 S. Ct. at 2717 (internal marks omitted).

Our appellate courts have recognized that certain records kept by State agencies are admissible in criminal prosecutions where the record was not created in contemplation of being used in a criminal trial. *See, e.g.*, *State v. Raines*, 362 N.C. 1, 17, 653 S.E.2d 126, 137 (2007) (detention center incident reports); *State v. Gardner*, ___ N.C. App. ___, ___, 769 S.E.2d 196, 199 (2014) (GPS tracking reports). However, no reported North Carolina case has yet to address the admissibility of records created and maintained by DMV under *Crawford*, *Melendez-Diaz*, and *Bullcoming*. Courts in other jurisdictions, though, have held that records created and maintained by state driving license agencies *as part of their regular administration and in compliance with governing law* are not testimonial. *See Boone v. Com.*, 758 S.E.2d 72, 76 (2014) (Virginia Court of Appeals); *State v. Kennedy*, 846 N.W.2d

517, 524-25 (2014) (Iowa Supreme Court); *State v. Leibel*, 838 N.W.2d 286, 295-97 (2013) (Nebraska Supreme Court); *People v. Nunley*, 821 N.W.2d 642, 652-53 (2012) (Michigan Supreme Court); *State v. Murphy*, 991 A.2d 35, 43 (2010) (Maine Supreme Court). However, where the record is created by the agency *for the purpose of proving a fact in a criminal trial*, courts have held that the record *is* testimonial. *See Kennedy*, 846 N.W.2d at 526-27 (Iowa Supreme Court); *State v. Jasper*, 271 P.3d 876, 887 (2012) (Washington Supreme Court); *Com. v. Parenteau*, 948 N.E.2d 883, 890 (2011) (Massachusetts Supreme Court); *People v. Pacer*, 847 N.E.2d 1149, 1153-54 (2006) (New York Court of Appeals).

In the present case, to convict Defendant of driving while his license was revoked, the State was required to prove that he "had actual or constructive knowledge of the revocation[.]" *State v. Richardson*, 96 N.C. App. 270, 271, 385 S.E.2d 194, 195 (1989) (internal marks omitted). Proof of actual or constructive knowledge can be established by demonstrating compliance with N.C. Gen. Stat. § 20-48. *State v. Curtis*, 73 N.C. App. 248, 251, 326 S.E.2d 90, 92 (1985). N.C. Gen. Stat. § 20-48 provides, in relevant part:

> Whenever the Division is authorized or required to give any notice under this Chapter or other law regulating the operation of vehicles, . . . such notice shall be . . . by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the Division. . . . Proof of the giving of notice in either such manner may be made by a notation in the records of the Division that the notice was sent to a particular address and the purpose of the notice.

N.C. Gen. Stat. § 20-48 (2012).

To prove that Defendant's license was revoked and that he knew it was revoked, the State moved to admit Defendant's driving record, the document attached to the orders indefinitely suspending his license, and the orders themselves. The bottom of each page of the driving record bears the following certification:

> I certify that the foregoing is a true copy of the driving record of the within named person on the file in the Driver License Section of the N.C. Division of Motor Vehicles.
>
> Signed /s/ Kelly J. Thomas /s/
> Commissioner of Motor Vehicles

The document attached to the suspension order contained a similar certification by the DMV Commissioner. The DMV employee's attestation to mailing the suspension order stated as follows:

> I certify that I am an employee of the North Carolina Division of Motor Vehicles, and that the original of attached document was deposited by me in the United States mail on the mail date of the attached order in an envelope, postage paid, addressed as appears thereon, which address is shown by the records of the Division as the address of the person named on the document.
>
> Signed /s/ Luann Garrett /s/
> EMPLOYEE N.C. DIVISION OF MOTOR VEHICLES

Thus, while hearsay, the portions of the documents certifying their accuracy and attesting that the suspension orders were sent to Defendant prior to the offense date of his charge constitute substantive evidence of his commission of the offense. However, none of these records were "create[d] . . . for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 557 U.S. at 323, 129 S. Ct. at 2539. Instead, the records were created by DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked. *See* N.C. Gen. Stat. §§ 20-26(a), -48 (2012). As the Supreme Court explained in *Melendez-Diaz*, "records . . . created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial . . . are not testimonial." 557 U.S. at 324, 129 S. Ct. at 2539-40. Therefore, we hold that the records in the present case are non-testimonial. Accordingly, this argument is overruled.

III. Conclusion

We hold that the copy of the driving record, the document authenticating the suspension orders and stating that it was mailed to the person named in the orders, and the two orders indefinitely suspending Defendant's license, are non-testimonial. Therefore, the admission of this evidence without accompanying testimony did not violate Defendant's right to confrontation.

NO ERROR.

Judges ELMORE and GEER concur.

STATE v. HARDY

[242 N.C. App. 146 (2015)]

STATE OF NORTH CAROLINA
v.
LEONARD HARDY

No. COA14-1320

Filed 7 July 2015

1. Evidence—testimony—other witnesses—response to cross-examination

The trial court did not err in a breaking and entering, larceny after breaking and entering, possession of stolen property, and willful and wanton injury to real property case by failing to strike the victim's testimony. Where a witness who has not offered testimony identifying defendant as the perpetrator refers in response to cross-examination to hearsay evidence that "other witnesses" had identified defendant and where a separate witness positively identified defendant during the trial, any error by the trial court in failing to strike the hearsay testimony was not prejudicial.

2. Real Property—injury to real property—motion to dismiss—sufficiency of evidence—air conditioner

The trial court did not err by denying defendant's motion to dismiss the injury to real property charge based on alleged insufficient evidence that an air conditioner was real property. Given the manner in which the air-conditioner was attached to a mobile home, the fact that it was "gutted" instead of removed entirely, and the fact that it was attached by the property owner to the rental property for the use and enjoyment of the renters, there was substantial evidence in this case that the air conditioner was real property and not personal property.

3. Real Property—jury instruction—classification—air conditioner

The trial court did not err by instructing the jury that an air conditioner constituted real property. The air-conditioner was properly classified as real property given the nature and circumstances surrounding its annexation to a mobile home.

4. Damages and Remedies—restitution—amount—injury to property—sufficiency of evidence

The trial court did not err in its restitution order by requiring defendant to pay $7,408.91. There was sufficient evidence to support the trial court's order awarding restitution based on a handyman's invoice. Further, N.C.G.S. § 15A-1340.34 allows a defendant who

damages property to be held responsible for all damage directly and proximately caused by the injury to property, including reasonable costs of repair and replacement, especially in a case like this where an air-conditioner was completely inoperable due to defendant's actions.

5. Sentencing—felony larceny—felony possession of stolen goods

The trial court erred by sentencing defendant for both felony larceny and felony possession of stolen goods, and the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. The case was remanded for resentencing.

Appeal by defendant from judgment entered 14 February 2012 by Judge W. Allen Cobb, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 7 April 2015.

Attorney General Roy Cooper, *by Assistant Attorney General Elizabeth A. Fisher*, *for the State.*

Appellate Defender Staples Hughes, *by Assistant Appellate Defender Hannah H. Love*, *for defendant.*

INMAN, Judge.

This case presents, among other issues, the question of whether an air-conditioning unit attached to the exterior of a mobile home, which unit is dismantled and destroyed causing extensive water damage to the home, is correctly classified as real property or personal property for the purpose of a criminal charge and conviction. Based on the record below, the answer in this case is real property.

Defendant appeals the judgment entered after a jury found him guilty of breaking and entering, larceny after breaking and entering, possession of stolen property, and willful and wanton injury to real property. On appeal, defendant contends that: (1) the trial court erred in failing to strike the victim's testimony that "other witnesses" saw defendant outside her home on the day the air-conditioner was damaged; (2) the trial court erred in denying defendant's motion to dismiss the injury to real property charge because there was insufficient evidence that the air-conditioner was real property; (3) the trial court erred by instructing the jury that the air-conditioner constituted real property; (4) the restitution order requiring defendant to pay $7,408.91 was not supported by evidence; and (5) defendant is entitled to a new sentencing hearing because

it is unclear whether the trial court based his sentence on defendant's conviction for felony possession of stolen goods.

After careful review, we conclude that defendant received a trial free of error but remand for resentencing.

Background and Procedural History

On 25 July 2011, Zulema Bass ("Ms. Bass") arrived home and noticed that her mobile home was hot inside even though the air-conditioner was on. After hearing a loud noise outside, she asked her fifteen-year-old son Brendell Bass ("Brendell") to investigate. Brendell went to the back door and began screaming that a man was out there. Ms. Bass ran to the door and saw a man riding away on a bicycle; she only saw half of the man's face and was unable to identify him. Ms. Bass went outside and saw that the air-conditioning unit was "demolished" and noticed a twisted pipe on the ground beside the unit. She also noticed that there was extensive water damage under her home from "pipes leaking everywhere." Ms. Bass called 911. The State did not elicit any identification testimony from Ms. Bass regarding whether the man she saw that day was defendant.

On cross-examination, defense counsel asked Ms. Bass about her inability to identify defendant to police officers. Ms. Bass responded that she could not identify him because she "did not see his whole face . . . when [defendant] was riding off." Defense counsel then asked: "So you can't tell this jury that it was [defendant] that was outside your home that day; is that correct?" Ms. Bass replied: "That was him, because I had other witnesses that saw him go on the bicycle in the woods, and my—also my son was there." Defense counsel immediately objected that the answer was nonresponsive and requested that her answer be stricken from the record. The trial court overruled the objection. Ms. Bass did not offer any further testimony clarifying her statement about "other witnesses."

Brendell also testified at trial that, after hearing "loud" noises, he saw a man coming out of the crawlspace beneath their home holding copper wire and went out to confront him. At trial, he identified defendant as the man he had seen and confronted. Brendell testified that once defendant heard him yell, defendant threw the copper wire on the ground beside a tree. Before Brendell was able to answer the State's question as to whether he had ever seen defendant before, defense counsel objected, and the trial court excused the jury to determine whether Brendell's testimony was "objectionable."

During *voir dire*, Brendell testified that he had seen defendant around the neighborhood about four or five times, including one particular incident where he saw defendant take a refrigerator out of another house in the neighborhood. The trial court allowed Brendell to testify to the jury that he had seen defendant around the neighborhood, but did not allow any testimony concerning the refrigerator incident.

Detective Parchman, the officer who responded to the 911 call from the mobile home, corroborated Brendell's testimony, claiming that Brendell identified the man he saw as defendant.

Jack Gregory ("Mr. Gregory"), a handyman with 40 years of experience, testified that he went to Ms. Bass's mobile home to inspect and attempt to repair the air-conditioner. Mr. Gregory explained that Ms. Bass's air-conditioner was a two-piece unit. The outside unit was a condensing unit, which sat on the ground outside the mobile home and is connected to a second unit. The second unit, known as the A-coil, was located on the inside of the home and sat on the top of the home's heater. A high pressure copper pipe beneath the mobile home connected the outside unit to the indoor A-coil. Mr. Gregory testified that Ms. Bass's outside condensing unit had been completely "gutted." The compressor had been completely removed, and the wiring in the control box had been pulled out. Almost the entire high pressure copper piping that ran beneath the home had been removed. Mr. Gregory also noted some water line damage in the crawlspace of the mobile home; the water lines were broken so extensively that the entire back side of the brick wall on the underpinning was "soaked through." The air-conditioner was inoperable and beyond repair.

Dale Davis ("Mr. Davis") testified that he owned the mobile home but used it as a rental property. He testified that he had received an estimate of over $6,000 to repair "just the AC" from Jackson & Sons.

At the end of the State's evidence, defense counsel made a motion to dismiss the injury to real property charge because the air-conditioning unit "would be more better described as personal property" since part of it was outside of the mobile home's crawlspace. The trial court denied the motion.

During jury instructions, the trial court instructed the jury on the charge of injury to real property as follows:

> The [d]efendant has also been charged with willful and wanton injury to real property. For you to find the

> [d]efendant guilty of this offense the State must prove two things beyond a reasonable doubt:
>
> First, that the [d]efendant injured the air conditioner of Dale Davis. An air conditioner affixed to a house is real property.
>
> And second, that the [d]efendant did this willfully and wantonly[.]

The jury found defendant guilty of all charges. Before judgment was entered, defendant pled guilty to attaining habitual felon status in exchange for the State's recommendation of a mitigated sentence.

On 14 February 2012, the trial court sentenced defendant to 77 months to 102 months imprisonment and ordered defendant to pay $7,408.91 in restitution. The restitution amount was based on the amount Mr. Davis paid to Mr. Gregory to inspect the air-conditioner and fix the water pipes, $918.91, and an estimate from Jackson & Sons to replace the "heat pump" for $6,490.00.

On the same day as judgment was entered but after sentencing defendant, the trial court arrested judgment on defendant's conviction for possession of stolen goods. The trial court did not modify defendant's sentence. Defendant appeals.[1]

Analysis

I. Victim's Testimony Regarding "Other" Witnesses

[1] Defendant first argues that the trial court erred by overruling defense counsel's objection and motion to strike Ms. Bass's testimony concerning her knowledge that defendant committed the crimes because "other witnesses" identified him as the perpetrator. Specifically, defendant contends that Ms. Bass's testimony was nonresponsive and beyond the scope of defense counsel's question, was hearsay, and was not based on personal knowledge. We conclude that defendant was not prejudiced by the testimony.

"The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Taylor*, 154 N.C. App. 366, 372, 572 S.E.2d 237, 242 (2002). The burden is on the defendant to show that he was prejudiced by the admitted

1. On 27 December 2012, this Court entered an order allowing defendant's petition for writ of certiorari to review the judgment entered.

evidence. *State v. Durham*, 175 N.C. App. 202, 207, 623 S.E.2d 63, 67 (2005); *see also* N.C. Gen. Stat. § 15A-1443(a) (2013). "If there is overwhelming evidence of defendant's guilt or an abundance of other evidence to support the State's contention, the erroneous admission of evidence is harmless." *State v. Williams*, 164 N.C. App. 638, 644, 596 S.E.2d 313, 317 (2004).

Even if we were to assume, without deciding, that the trial court erred in allowing the testimony and that Ms. Bass's testimony did not constitute invited error because it was nonresponsive, *see State v. Wilkerson*, 363 N.C. 382, 412, 683 S.E.2d 174, 192 (2009) (noting that because the witness's testimony constituted a "nonresponsive outburst," defense counsel did not "invite" the error), defendant is unable to show that he was prejudiced by this testimony. Defendant argues that Ms. Bass's testimony "impermissibly bolstered the identification of [defendant] as the perpetrator." However, any value in Ms. Bass's nonspecific testimony was negligible given the strength of other undisputed identification evidence. Brendell testified that, on the day in question, he saw defendant coming out of the crawlspace of the mobile home carrying copper wire, and that he had seen defendant in the neighborhood several times over the years. While Brendell admitted that he could not specifically recall defendant's name on the day of the incident, he was able to provide it to Detective Parchman two days later. Detective Parchman corroborated this evidence, testifying that Brendell positively identified defendant as the man he saw coming out of the crawlspace.

In light of Brendell's testimony, which was corroborated by Detective Parchman and not refuted by other evidence, we believe that Ms. Bass's allegedly unresponsive and hearsay testimony had little or no effect on the jury's verdict of guilt. *See State v. Anderson*, 177 N.C. App. 54, 62, 627 S.E.2d 501, 505 (2006) (holding that our standard of review to determine whether a trial court committed prejudicial error in admitting evidence is "whether a reasonable possibility exists that the evidence, if excluded, would have altered the result of the trial"). Furthermore, we note that the only other reference to Ms. Bass's allegations that "other witnesses" saw defendant ride off on a bicycle that day occurred during cross-examination of Brendell when defense counsel asked if he had "asked other folks in the neighborhood if they had seen anybody on a bike." Brendell replied that he had, but he never testified about what others had told him. Defense counsel then asked Brendell whether he had seen anybody else in the neighborhood besides defendant ride a bike. Brendell replied that he had.

Although it seems likely that Ms. Bass's testimony that "other witnesses" had identified defendant as the perpetrator was based on double hearsay—conversations Brendell had with "other folks"—the probative effect of her testimony was negligible, given that Brendell, in his testimony, never identified the person "others" saw riding a bike, and given that Brendell identified defendant on an entirely independent basis. Therefore, in sum, any error in the admission of Ms. Bass's testimony was harmless.

Defendant's reliance on *State v. Mitchell*, 270 N.C. 753, 155 S.E.2d 96 (1967), is misplaced. In *Mitchell*, 270 N.C. at 756, 155 S.E.2d at 99, the defendant was charged with armed robbery and felonious assault for opening the victim's car door, taking the victim's wallet, and shooting the victim. The victim testified that "somebody had told him [that] defendant had admitted [to] taking" the wallet. *Id.* During cross-examination, the victim's identification of defendant as the perpetrator was "considerably shaken." *Id.* at 757, 155 S.E.2d at 96. Thus, the inadmissible hearsay was prejudicial because: (1) the evidence constituted an admission of guilt by the defendant, and (2) it was the only significant evidence offered to identify the defendant as the perpetrator. Here, Ms. Bass's testimony that "other witnesses" saw defendant riding his bike that day did not suggest an admission of guilt by defendant. Further, a separate witness, Brendell, in his testimony before the jury identified defendant as the perpetrator. Therefore, *Miller* is distinguishable and is not controlling.

In sum, where a witness who has not offered testimony identifying defendant as the perpetrator refers in response to cross examination to hearsay evidence that "other witnesses" had identified defendant and where a separate witness positively identified defendant during the trial, any error by the trial court in failing to strike the hearsay testimony was not prejudicial.

II. Denial of Motion to Dismiss

[2] Defendant argues that the trial court erred in denying his motion to dismiss the injury to real property charge because there was insufficient evidence that the mobile home's air-conditioner was real property.[2] Defendant cites *State v. Primus*, __ N.C. App. __, 742 S.E.2d 310 (2013), to support his contention that a mobile home's air-conditioner is personal property.For the reasons explained below, we disagree.

---

2. Neither party raises any question that the mobile home in this case constitutes real property so, for purposes of this opinion, we will treat the mobile home as real property. *See* N.C. R. App. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

This Court reviews a trial court's order denying a defendant's motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Defendant was charged with violating N.C. Gen. Stat. § 14-127, which makes it a crime to willfully and wantonly damage, injure, or destroy real property. Specifically, the indictment charges that defendant injured the air-conditioner in the crawlspace under Ms. Bass's mobile home. On appeal, defendant contends that the *Primus* decision holds as a matter of law that a mobile home air-conditioner is personal property, so that the trial court should have granted his motion to dismiss the charge of injury to real property.

First, we must determine whether *Primus* requires us to classify the mobile home's air-conditioner as personal property. The defendant in *Primus* was convicted of attempted felony larceny and injury to personal property for taking an air-conditioner which had been attached to the victim's mobile home. *Id.* at __, 742 S.E.2d at 311-12. The defendant had cut the "wires and piping" that secured the air-conditioner to the outside of the mobile home. *Id.* at __, 742 S.E.2d at 314. At trial, when instructing the jury on the charge of injury to personal property, the trial court stated that "[w]ires and piping connected to an air-conditioning unit are personal property." *Id.*

On appeal, the defendant argued that the trial judge's instruction was "an improper expression of the trial judge's opinion as to a factual issue within the province of the jury." *Id.* at __, 742 S.E.2d at 313. However, because the trial judge "simply filled in the blanks in the pattern jury instruction for injury to personal property," this Court held that "if the statement amounts to error, it was an instructional error that was not preserved for appeal." *Id.* at __, 742 S.E.2d at 314. The Court went on to say that, "assuming *arguendo* that the trial judge's instruction to the jury was an opinion as to a factual issue, we think the error is harmless" because the "instruction classifying the wires and piping as personal property was supported by the evidence." *Id.*

Defendant contends that because the *Primus* Court "classified the injury to the air-conditioning unit . . . as injury to personal property, the damage to the air-conditioning unit in this case must also be classified as injury to personal property" based on *In re Civil Penalty*,

324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). However, we are only bound by previous cases that decided the same issue as the one raised in the present appeal. *See id.* ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). The only issue addressed in *Primus* was whether the judge's statement that "[w]ires and piping connected to an air-conditioning unit are personal property" constituted an improper statement of opinion. *Id.* at __, 742 S.E.2d at 314. This Court did not resolve this issue because, as noted in the opinion, this argument amounted to a challenge to the jury instructions, which was not preserved for appeal. *Id.* Thus, we did not decide whether the classification of the wires and piping as personal property was an instructional error because it constituted an improper statement of the law, the issue raised in this appeal.

Furthermore, while the *Primus* Court did state that the trial court's classification of "the wires and piping as personal property was supported by evidence," *see id.*, that conclusion followed the phrase "assuming *arguendo*" and was not relied upon by the Court for its ultimate holding that the trial judge's instruction did not amount to an improper opinion of the court. *See generally Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 359, 416 S.E.2d 166, 173 (1992) (noting that statements not relied upon for the Court's ultimate holding are *dicta*). Accordingly, contrary to defendant's assertions, *Primus* is not binding and does not require a conclusion by this Court that Ms. Bass's air-conditioner must be classified as personal property.

Given the absence of controlling authority on the matter of whether an air-conditioner attached to a mobile home constitutes real or personal property as a matter of law, we must look at how air-conditioners or other similar types of property are classified not only in the criminal law context but also in property law. Chapter 14, the section of our General Statutes containing our state's statutory criminal law, does not provide a definition of "real property," and the only discussion concerning the difference between real property, fixtures, and personal property is in N.C. Gen. Stat. § 14-83.1 titled "Fixtures subject to Larceny," which abolished the common law distinctions between personal property and personal property affixed to real property, which would include fixtures, for purposes of a larceny charge. Thus, under section 14-83.1, which became effective 1 December 2008, the carrying and taking away of fixtures supports a conviction of larceny whereas, under the common law, it would not. *See also* P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 2.01 (6th ed. 2011) (noting that "[f]ixtures were

originally personal property but have been attached to land in a more or less permanent manner under such circumstances to be considered in law to have become a part of the real property").

In contrast to the statute defining larceny to include both personal property and fixtures which are "considered" real property as a matter of law, our General Statutes define as separate offenses injury to real property, a Class 1 misdemeanor under N.C. Gen. Stat. § 14-127, and injury to personal property, a Class 1 or 2 misdemeanor, depending upon the amount of damage caused, under N.C. Gen. Stat. § 14-160. Thus, the classification of the type of property a defendant is charged with injuring is a necessary determination.

"A fixture has been defined as that which, though originally a movable chattel, is, by reason of its annexation to land, or association in the use of land, regarded as a part of the land, partaking of its character." *Little v. Nat'l Serv. Indus., Inc.*, 79 N.C. App. 688, 692, 340 S.E.2d 510, 513 (1986) (quoting 1 Thompson on Real Property). While fixture law is usually applicable in controversies involving possession of or interests in the fixture, it is relevant in this case to determine whether the air-conditioner here was a fixture which would properly be classified "in law" to be part of the real property.

> [S]everal tests for resolving the question of whether a chattel attached to real property becomes real property or remains personalty have been referred to in the cases. They include (1) the manner in which the article is attached to the realty; (2) the nature of the article and the purpose for which it is attached to the realty; and (3) the intention with which the annexation of the article to the realty is made. Under the modern view, the controlling test is the intention with which the annexation is made.

Little, 79 N.C. App. at 692, 340 S.E.2d at 513 (internal citations omitted); *see also Moore's Ferry Dev. Corp. v. City of Hickory*, 166 N.C. App. 441, 445-46, 601 S.E.2d 900, 903 (2004).

These concepts of how and when personal property becomes so attached to real property that it becomes part of the real property have been applied in the criminal context for charges other than injury to real property. For example, in *State v. Schultz*, 294 N.C. 281, 282, 240 S.E.2d 451, 453 (1978), the defendant was charged with larceny for taking bronze urns and vases that had been attached to grave markers from a cemetery. *Schultz*, 294 N.C. at 282, 240 S.E.2d at 453. At the time, the

common law definition of larceny was in effect and a person could not be convicted of larceny for taking and carrying away property affixed to the ground, *i.e.*, fixtures. *Id.* at 286, 240 S.E.2d at 455. Although, clearly, the grave markers to which the urns and vases were attached would not be subject to common law larceny because they were "affixed to the soil," the Court concluded that the urns and vases constituted personal property. *Id.* at 286, 240 S.E.2d at 456. Specifically, the Court noted that although the urns and vases were "fastened to the [bronze grave] markers," they were attached by "a slight twist so as to make grooves and projections upon the urn or vase fit into prepared slots in the receptacle." *Id.* However, the urns and vases were "not a part of [the] marker[s]." *Id.* Furthermore, "[t]he [bronze grave] marker serves its contemplated purpose whether or not the urn or vase is so affixed." *Id.* In contrast, the only purpose for attaching the urns and vases was to prevent them from overturning, and they also could be used for their contemplated purposes regardless of whether they were attached to the grave markers. *Id.* at 287-88, 240 S.E.2d at 456. Finally, the Court noted that, given that the defendant removed a great number of them in a very short period of time, the vases and urns were "easily separated" from the bronze grave markers even though the person who placed them "contemplated their remaining so in place." *Id.* Accordingly, the Court held that the urns and vases were personal property and could be the subject of the larceny charges. *Id.*

Similarly, in *State v. Patterson*, 2011 WL 2848770, *2 (COA10-1240) (July 19, 2011) (unpublished), the defendant was charged with larceny based on "taking and carrying away the personal property of CSX," a railroad company. The "personal property" at issue was 4,800 feet of copper signal wire that had been affixed to signal poles. *Id.* at *2. Because the offenses occurred prior to 1 December 2008, N.C. Gen. Stat. § 14-83.1, which, as discussed above, abolished the common law distinction between personal property and personal property affixed to real property for purposes of larceny, did not apply. Therefore, if the copper wire was so affixed to the poles that it became real property, the defendant could not have been guilty of larceny. The *Patterson* Court applied the logic enunciated in *Schultz* to conclude that the copper wire was affixed to real property because: (1) the signal poles themselves were buried up to eight feet into the ground, making them fixtures appurtenant to the land; (2) the copper wires were attached to the signal poles in such a way that removing them would require cutting the wires and they were not, as were the urns at issue in *Schultz*, attached with a "slight twist"; and (3) the attachment of the copper wire to the poles was a "crucial

part of the contemplated purpose" of both the signal poles and the wire since their purpose was to carry electronic signals along the tracks. *Id.* at *3. Accordingly, "the copper wire was attached to the signal poles, as to make it an integral part of such signal poles and [was], therefore, real property or chattels real." *Id.* Accordingly, this Court reversed the trial court's order denying the defendant's motion to dismiss the felony larceny charge. *Id.*

Even though not controlling in this case, we adopt the logic used in *Schultz* and *Patterson* and concepts of fixture law to determine whether the air-conditioner attached to Ms. Bass's mobile home was affixed such that "it, too, became an irremovable part of the [mobile home]." *Patterson* at *3. The air-conditioner at issue in this case comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home's heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. Mr. Gregory testified that the compressor, which was located inside the condensing unit, had been totally "destroyed," and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, unlike the vases and urns in *Schultz* that could be simply "twisted off," the entire air-conditioner could not be removed but had to be "gutted" and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home's water pipes and heater.

While the mobile home could serve its "contemplated purpose" of providing a basic dwelling without the air-conditioner, *see Patterson* *3, the purpose for which the air-conditioner was annexed to the mobile home supports a conclusion that it had become part of the real property. Mr. Davis attached the air-conditioner to the mobile home for the use and enjoyment of Ms. Bass, who was renting the home; thus, a presumption arises that the air-conditioner was attached to enhance the value of the real property and thus became real property. *See Little*, 79 N.C. App. at 692, 340 S.E.2d at 513 ("The intent with which a party annexes a chattel to real property is determined, in large measure, by the relationship of the parties to the land and to each other. For example, when additions are made to land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land.").

In totality, given the manner in which the air-conditioner was attached to the mobile home, the fact that it was "gutted" instead of removed entirely, and the fact that it was attached by the property owner to the rental property for the use and enjoyment of the renters, there was substantial evidence in this case that the air-conditioner was real property and not, as defendant contends, personal property. Therefore, the trial court did not err in denying defendant's motion to dismiss based on the classification of the air-conditioner as real property.

III. Jury Instruction

[3] Next, defendant argues that the trial court committed reversible error by instructing the jury that "[a]n air conditioner affixed to a house is real property." Specifically, defendant contends that the classification of the air-conditioner as real property is an incorrect statement of law. We disagree.

N.C. Gen. Stat. § 15A-1232 (2013) provides that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." However, any alleged violation of section 15A-1232 is reviewed to determine whether it constitutes harmless error. *State v. Nelson*, 298 N.C. 573, 597, 260 S.E.2d 629, 646 (1979).

> When reviewing jury instructions, they will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

State v. McLean, 205 N.C. App. 247, 252, 695 S.E.2d 813, 817 (2010).

As discussed previously, contrary to defendant's contention, *Primus* is not controlling on this issue. Furthermore, we conclude that the air-conditioner at issue here was properly classified as real property given the nature and circumstances surrounding its annexation to the mobile home.

IV. Restitution

[4] Next, defendant argues that the trial court erred by ordering defendant to pay $7,408.91 in restitution because: (1) the amount was not for damages arising directly and proximately out of the offenses committed by defendant; (2) there was insufficient evidence to support the order;

and (3) the award was not within the scope of permissible bases upon which a trial court may order restitution. We disagree.

The trial court may order a defendant "make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b) (2013). We review *de novo* whether the restitution order was supported by evidence at trial or sentencing. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). "However, when there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *Id.*

Here, after the jury returned its verdict, the State requested that the trial court order restitution even though "the air-conditioner ha[d] not been replaced [yet]." The amount of the requested restitution was based on Mr. Gregory's invoice for his inspection and attempted repair of the air-conditioner—$918.91—and an estimate from Jackson & Sons to replace it—$6,490. Defendant argues that Mr. Gregory's invoice was based on repairs to water pipes, a water line, and a water pump and tank. However, according to defendant, the receipt "failed to link the work completed" on the mobile home to the crimes of which defendant was convicted. Furthermore, defendant asserts that there was insufficient evidence to link the invoice with the mobile home because the receipt did not contain the address of the mobile home but, instead, referenced a subdivision in Goldsboro.

Despite these discrepancies, the receipt was consistent with Mr. Gregory's testimony of the damage he observed at the victim's home and the necessary repairs. Moreover, contrary to defendant's assertions, the description of the work performed was related to defendant's criminal acts of "gutting" the outside unit and cutting the copper piping from underneath the house which, based on Mr. Gregory's testimony, resulted in breaks in the water lines underneath the mobile home. Ms. Bass's testimony corroborated this when she testified that she did not notice any water damage in the crawlspace until immediately after the air-conditioner was damaged. Therefore, there was sufficient evidence to support the trial court's order awarding restitution based on Mr. Gregory's invoice.

Defendant also contends that there was insufficient evidence to support ordering defendant to pay for an entirely new air-conditioning system because "the proper amount of restitution is the fair market value of the property at the time and place of destruction," not the cost to replace the property. Moreover, defendant argues that he should not have to pay for replacement of the heat pump because there was

no evidence that defendant damaged the heat pump, only the air-conditioner. We believe that section 15A-1340.34 should be interpreted to allow a defendant who damages property to be held responsible for all damage directly and proximately caused by the injury to property, including reasonable costs of repair and replacement, especially in a case like this where the air-conditioner was completely inoperable due to defendant's actions. Defendant has provided no case authority prohibiting this interpretation. Furthermore, Mr. Davis testified that the estimate from Jackson & Sons, which was provided to the trial court in support of the restitution award, was for replacing "just . . . the AC." Thus, the amount of the restitution with regard to the replacement cost of the air-conditioner was based on "something more than a guess or conjecture," *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561 (1986), and was supported by evidence at trial.

V. Sentencing

Finally, defendant argues that the trial court erred by sentencing him for both felony larceny and felony possession of stolen goods and that the trial court's order arresting judgment for felony possession of stolen goods did not cure the error. We agree and remand for resentencing.

When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts "are unable to determine what weight, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant." *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127-28 (1990).

Here, defendant was indicted for and convicted of felony larceny and felonious possession of stolen goods ("felony possession"). After the jury returned its verdict, based on the State's agreement to a mitigated sentence, defendant pled guilty to attaining habitual felon status pursuant to N.C. Gen. Stat. § 14-7.6. After determining that defendant had a prior record level of IV, the trial court consolidated the offenses for judgment and sentenced him to 77 months to 102 months imprisonment. Under the version of N.C. Gen. Stat. § 14-7.6 that was in effect at the time defendant committed the offenses, defendant was automatically sentenced as a Class C felon.[3] Although the State requested a sentence at the high end of the mitigated range, the trial court imposed a sentence in the midpoint

3. The statute was amended for offenses committed after 1 December 2011 and habitual felons are now sentenced at a felony class level four classes higher than the principal felony. See S.L. 2011-192, s.3(d) (2011).

of the mitigated range. Defendant was sentenced to 77 to 102 months imprisonment. The allowable mitigated sentence for these offenses committed by a defendant with a class IV prior record level ranges from a minimum of 66 to a maximum of 166 months imprisonment.

Later the same day, following the sentencing hearing, likely based on the trial court's recognition that a defendant may be not be convicted of both larceny and possession of stolen property based on the same conduct, *State v. Perry*, 305 N.C. 225, 237, 287 S.E.2d 810, 817 (1982) *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010), the trial court arrested judgment on the felony possession conviction but did not modify defendant's sentence.

Despite the trial court's subsequent order arresting the entry of judgment for felony possession, we are unable to determine whether the trial court gave any weight to that conviction when it sentenced defendant in the middle of the mitigated range instead of at a lower point in that range, especially since the trial court found the mitigating factor that defendant accepted responsibility for his criminal conduct and found no factors in aggravation. Therefore, we must remand this matter back to the trial court for resentencing. *See Moore*, 327 N.C. at 383, 395 S.E.2d at 128. Sentencing within the mitigated range remains within the trial court's discretion.

Conclusion

In sum, we conclude that the trial court did not commit prejudicial error when it overruled defense counsel's objection and refused to strike hearsay testimony. We further conclude that, given the evidence in this case, the trial court did not err in denying defendant's motion to dismiss the charge of injury to real property and did not err in instructing the jury that the air-conditioner was real property. Because the amount of restitution was supported by evidence at trial, the trial court's order of restitution was without error. Finally, because we are unable to determine what weight, if any, the trial court gave to the erroneous entry of judgment on felony possession despite the fact that the trial court later arrested that judgment, we must remand for resentencing.

NO ERROR IN PART; REMANDED FOR RESENTENCING.

Judges BRYANT and DAVIS concur.

STATE v. HARRIS

[242 N.C. App. 162 (2015)]

STATE OF NORTH CAROLINA
v.
CALVIN LAVANDER HARRIS, DEFENDANT

No. COA14-1281

Filed 7 July 2015

1. Sentencing—aggravating factor—commission of crime during pre-trial release—due process

Defendant's constitutional right to due process was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The N.C. Supreme Court has held this aggravating factor to be constitutional, and the replacement of the Fair Sentencing Act with the Structured Sentencing Act does not affect the applicability of that holding.

2. Sentencing—aggravating factor—commission of crime during pre-trial release—equal protection

Defendant's constitutional right to equal protection was not violated when the trial court imposed an aggravated sentence for first-degree sexual offense with a child based on the aggravating factor of commission of a crime while on pre-trial release. The language of N.C.G.S. § 15A-1340.16 applies to all defendants against whom the State seeks to prove the aggravating factor of committing a crime while on pretrial release.

Appeal by defendant from judgment entered 27 May 2014 by Judge Anderson Cromer in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2015.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

The assigning of an aggravated sentence to defendant, based upon proper notice and a jury finding that an aggravated factor was present in the instant case, does not violate defendant's right to due process. Where the provisions of N.C. Gen. Stat. § 15A-1340.16 concerning

aggravating factors during sentencing are applicable to all defendants, there is no violation of a defendant's right to equal protection.

On 7 November 2011, defendant Calvin Lavander Harris was indicted on one count each of first-degree sexual offense and indecent liberties with a child. A superseding indictment for the same two offenses was issued against defendant on 21 April 2014. The charges came on for trial during the 19 May 2014 criminal session of Guilford County Superior Court, the Honorable Anderson Cromer, Judge presiding. During a pretrial conference, the State elected to proceed only on the first-degree sexual offense charge against defendant. At trial, the State's evidence tended to show the following.

On 11 August 2011, defendant called 911 to report a burglary at his residence where he resided with his girlfriend and her two minor children, three-year-old Sarah and two-year-old James.[1] Upon arriving at the residence, law enforcement officers were told by defendant that someone had broken into the residence and raped Sarah.

Sarah was taken to the hospital where an examination revealed signs of sexual assault. A search of defendant's residence produced no signs of a break-in; to the contrary, police noted undisturbed cobwebs on and around a sliding door through which defendant claimed the burglar had entered. Police found reddish-brown stains on Sarah's bedding and clothes, as well as on the living room sofa and on paper towels and toilet paper found in the kitchen and bathroom trash cans. DNA testing of these stains matched DNA samples collected from defendant and Sarah.

On 23 May, a jury convicted defendant of first-degree sexual offense with a child. The State then presented three aggravating factors to the jury for consideration: that the victim was very young; that defendant committed the offense while on pretrial release on another charge; and/or that defendant took advantage of a position of trust or confidence to commit the offense. In support of the second aggravating factor, the State introduced evidence that defendant had been arrested in February 2011 on a charge of assault with a deadly weapon with intent to kill; the charge was still pending at the time of the instant trial.

The jury found as an aggravating factor that defendant committed the offense while on pretrial release on another charge. The trial court sentenced defendant to an aggravated sentence of 288 to 355 months imprisonment. Defendant appeals.

---

1. Pseudonyms have been used to protect the identities of the minor children.

On appeal, defendant raises two issues as to whether his constitutional rights to (I) due process and (II) equal protection were violated when he received an aggravated sentence for committing a crime while on pre-trial release.

I.

[1] Defendant argues that his constitutional right to due process was violated when he received an aggravated sentence for committing a crime while on pre-trial release. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632—33, 669 S.E.2d 290, 294 (2008) (citations and quotation omitted). "[T]he judicial duty of passing upon the constitutionality of an act of the General Assembly is one of great gravity and delicacy. This Court presumes that any act promulgated by the General Assembly is constitutional and resolves all doubt in favor of its constitutionality." *State v. Fowler*, 197 N.C. App. 1, 13, 676 S.E.2d 523, 536 (2009) (quoting *Guilford Cnty. Bd. of Educ. v. Guilford Cnty. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993)).

Defendant contends his constitutional right to due process was violated when the trial court submitted defendant's "pretrial release aggravating factor" because defendant "never received notice of the potential consequence of his pre-trial release." Defendant's argument lacks merit. A review of the record shows the State properly and timely notified defendant on 14 March 2014, more than six weeks before trial, of its intent to prove the existence of three aggravating factors against defendant: that the victim was very young, that defendant committed the offense while on pretrial release on another charge, and that defendant took advantage of a position of trust or confidence to commit the offense. *See* N.C. Gen. Stat. § 15A-1340.16(a6) (2014) ("The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section . . . at least 30 days before trial. . . . The notice shall list all the aggravating factors the State seeks to establish."). Further, and as acknowledged by defendant, our Supreme Court has held that

> [a]lthough a defendant on pretrial release in an unrelated felony case has not been convicted of the felony and is presumed to be innocent of its commission, he is in a special status with regard to the criminal law. He has not simply been accused of another crime, he has been formally arrested, appeared before a magistrate, and had the conditions of his release pending trial for this crime formally determined. Whether or not one in this position is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, *his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered.* One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance.

State v. Webb, 309 N.C. 549, 559, 308 S.E.2d 252, 258 (1983) (citation omitted) (emphasis added).

Defendant, in acknowledging that *Webb* holds that it is constitutional for a defendant's commission of an offense while on pretrial release for another charge to be used as an aggravating factor in sentencing, nevertheless argues that *Webb* is no longer applicable because *Webb* was decided under the Fair Sentencing Act and defendant's sentence was imposed pursuant to the Structured Sentencing Act. Although defendant is correct that the Fair Sentencing Act under which *Webb* was decided has since been replaced by the Structured Sentencing Act, we disagree with defendant's assertion that the commission of an offense while on pretrial release for another pending charge is unconstitutional for, under both sentencing acts, the consideration of whether a defendant has committed an offense while on pretrial release for another charge as an aggravating factor has remained the same. *Compare* N.C.G.S. § 15A-1340.4(a) (1981) ("In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence," including the aggravating factor that "defendant committed the crime while on pretrial release on another felony charge[]"), *with* N.C.G.S. § 15A-1340.16(c) (2014) ("If the jury finds factors in aggravation [including the aggravated factor under N.C.G.S. § 15A-1340.16(d)(12) that "defendant committed the offense while on pretrial release on another charge"], the court shall ensure that

those findings are entered in the court's determination of sentencing factors form . . . ."). Moreover, this Court has already determined that "the Due Process Clauses of our federal and State Constitutions are not offended by the Structured Sentencing Act." *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001). Accordingly, defendant's argument is overruled.

II.

[2] Defendant next argues that his constitutional right to equal protection was violated when he received an aggravated sentence for committing a crime while on pre-trial release. We disagree.

> The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws, and require that all persons similarly situated be treated alike.
>
> Our [state] courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis. When evaluating a challenged classification, [t]he court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the [statute] meets the relevant standard of review.
>
> Strict scrutiny applies when a [statute] classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the [S]tate to prove that the [statute] is substantially related to an important government interest. If a [statute] draws any other classification, it receives only rational-basis scrutiny, and the party challenging the [statute] must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the [statute] is valid.
>
> However, [a] statute is not subject to the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment of the United States Constitution or [A]rticle I § 19 of the

> North Carolina Constitution unless it creates a classification between different groups of people.

State v. Fowler, 197 N.C. App. 1, 26–27, 676 S.E.2d 523, 543–44 (2009) (citations and quotations omitted).

Defendant contends his constitutional right to equal protection was violated when he received an aggravated sentence for committing an offense while on pretrial release for another charge. Specifically, defendant argues that, based on the language of *Webb* which describes a defendant who commits an offense while on pretrial release for another charge as having a "special status," *Webb*, 309 N.C. at 559, 308 S.E.2d at 258, defendant's equal protection rights have been violated because he received a more severe punishment due to this "special status." We disagree, as the language of N.C.G.S. § 15A-1340.16 applies to *all* defendants against whom the State seeks to prove the aggravating factor of having committed an offense while on pretrial release for another charge. *See* N.C.G.S. § 15A-1340.16. Further, a review of *Webb* indicates that the use of the phrase "special status" is applicable to any and all defendants who commit an offense while on pretrial release for another charge. *See Webb*, 309 N.C. at 559, 308 S.E.2d at 258. Moreover, an argument similar to defendant's has already been rejected by this Court in *Streeter*. *See Streeter*, 146 N.C. App. at 559, 553 S.E.2d at 243 (discussing how the use of aggravating and/or mitigating factors during sentencing of a defendant does not constitute a violation of equal protection). Defendant's argument is, therefore, overruled.

NO ERROR.

Judges STEPHENS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
SHERRI MOONEY HOSKINS, DEFENDANT

No. COA14-1346

Filed: 7 July 2015

1. Appeal and Error—writ of certiorari—not collateral attack—probation extension orders

Defendant's petition for writ of certiorari was not an impermissible collateral attack and was properly before the Court of Appeals. Defendant had no mechanism to appeal her probation extension orders and thus had not waived her right to challenge the probation extension orders.

2. Probation and Parole-probation—improper extension—subject matter jurisdiction

The Buncombe County trial court lacked statutory authority under N.C.G.S. § 15A-1343.2(d) to order a three-year extension more than six months before the expiration of the original period of probation. Additionally, it lacked statutory authority under N.C.G.S. § 15A-1344(d) because defendant's extended period of probation exceeded five years. Thus, the Avery County trial court lacked subject-matter jurisdiction to enter the 2013 orders. The orders were vacated and remanded to the trial court.

Petition for writ of certiorari by defendant from judgments entered on or about 11 July 2013 by Judge Phil Ginn in Superior Court, Avery County. Heard in the Court of Appeals on 6 May 2015.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

STROUD, Judge.

Sherri Mooney Hoskins ("defendant") requests review of orders in which the trial court found defendant in willful violation of her probation, terminated defendant's probation, and converted $5,715 owed by defendant in restitution into a civil judgment against her. We vacate and remand.

I. Background

On or about 8 November 2004, a Guilford County grand jury indicted defendant for felony larceny and thirteen counts of obtaining property by false pretenses, offenses alleged to have been committed in 2002. *See* N.C. Gen. Stat. §§ 14-72(a), -100 (2001). On or about 27 June 2005, pursuant to a plea agreement, defendant pled guilty to four counts of obtaining property by false pretenses, and the State dismissed the remaining charges. On or about 27 June 2005, the Guilford County trial court sentenced defendant to four consecutive sentences of six to eight months' imprisonment but suspended the sentences and placed defendant on five years of supervised probation. The Guilford County trial court also ordered that defendant pay $15,000 in restitution.

Defendant's probation was transferred to Buncombe County. On 16 December 2008, the State alleged that defendant had violated the terms of her probation. On 18 February 2009, the Buncombe County trial court did not find that defendant had violated her probation but ordered a three-year extension of defendant's probation, modifying the termination date of her probation from 27 June 2010 to 27 June 2013.

Defendant's probation was transferred to Avery County. On 19 April 2013, the State again alleged that defendant had violated the terms of her probation. At an 11 July 2013 hearing, defendant moved to dismiss and argued that the 2009 Buncombe County trial court had lacked statutory authority to extend her probation. The Avery County trial court denied defendant's motion. On or about 11 July 2013, the Avery County trial court found defendant in willful violation of her probation, terminated defendant's probation, and converted the remaining $5,715 owed in restitution into a civil judgment against her. On 22 July 2014, defendant gave timely notice of appeal.

On or about 22 September 2014, defendant filed a petition for writ of certiorari with this Court. On or about 8 October 2014, this Court allowed defendant's petition and issued a writ of certiorari to review the 11 July 2013 orders.

II. Appellate Jurisdiction

[1] We first address the State's argument that the petition for writ of certiorari before this Court is an impermissible collateral attack. The State relies on *State v. Pennell*, 367 N.C. 466, 472, 758 S.E.2d 383, 387 (2014), and *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003). In *Pennell*, our Supreme Court held that "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order

revoking his probation and activating his sentence." *Pennell*, 367 N.C. at 472, 758 S.E.2d at 387. An appeal of this nature is an impermissible collateral attack. *Id.* at 471-72, 758 S.E.2d at 387. In *Rush*, this Court similarly held that the defendant waived her right to challenge a judgment entered on a plea agreement, when she failed to file a motion to withdraw her guilty plea, failed to appeal the judgment, and failed to file a petition for writ of certiorari. *Rush*, 158 N.C. App. at 741, 582 S.E.2d at 39.

But *Pennel*l and *Rush* are distinguishable. Defendant is not challenging the trial court's jurisdiction over her original convictions; rather she contends that the 2009 Buncombe County trial court lacked statutory authority to extend her probation. Unlike an original conviction, a probation extension order is not immediately appealable. *State v. Satanek*, 190 N.C. App. 653, 655, 660 S.E.2d 623, 625 (2008); *see also State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 352-53 (2004). As this Court addressed in *Edgerson*, N.C. Gen. Stat. § 15A-1347 provides the only avenues for appeal from a probation order. *See* N.C. Gen. Stat. § 15A-1347 (2009); *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. A defendant may only appeal a probation order that either activates his sentence or places the defendant on "special probation." *See* N.C. Gen. Stat. § 15A-1347; *Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. In extending defendant's probation, the 2009 Buncombe County trial court neither activated defendant's sentence nor placed her on "special probation." *See* N.C. Gen. Stat. §§ 15A-1344(e), -1351(a) (2009). Therefore, like the defendants in *Satanek* and *Edgerson*, defendant here had no mechanism to appeal her probation extension orders. *See id.* § 15A-1347; *Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53. Defendant thus has not waived her right to challenge the probation extension orders. *See Satanek*, 190 N.C. App. at 655, 660 S.E.2d at 625; *Edgerson*, 164 N.C. App. at 714, 596 S.E.2d at 352-53.

The State further contends that defendant's failure to file a petition for writ of certiorari requesting review of the 2009 orders constitutes a waiver of her right to seek review of those orders. But nothing in *Pennell* or *Rush* suggests that the failure to immediately file a petition for writ of certiorari requesting review of non-appealable, interlocutory orders transforms a petition for writ of certiorari requesting review of subsequent orders, in which a defendant challenges the earlier orders, into an impermissible collateral attack. *See Pennell*, 367 N.C. at 472, 758 S.E.2d at 387; *Rush*, 158 N.C. App. at 741, 582 S.E.2d at 39. Therefore, we hold that this petition for writ of certiorari is properly before us.

III. Trial Court Jurisdiction

[2] Defendant contends that the 2013 Avery County trial court (1) lacked subject-matter jurisdiction and (2) erred in converting the remaining restitution owed by defendant into a civil judgment. Because we hold that the 2013 Avery County trial court lacked subject-matter jurisdiction, we need not address defendant's second issue. Defendant specifically argues that the 2009 Buncombe County trial court lacked statutory authority to extend defendant's probation more than six months before the termination of the original five-year period of probation.

A. Standard of Review

> The issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*. It is well settled that a court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute. Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction. If the court was without authority, its judgment is void and of no effect.
>
> An appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review.

State v. Gorman, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citations, quotation marks, brackets, and ellipsis omitted).

B. Analysis

The maximum duration that a trial court can place a defendant on probation is five years, but the court may grant an extension. N.C. Gen. Stat. § 15A-1343.2(d) (2009).[1] A trial court may order an extension

1. N.C. Gen. Stat. § 15A-1343.2 applies to "persons sentenced under Article 81B of [Chapter 15A of the General Statutes.]" *Id.* § 15A-1343.2(a) (2009). "[Article 81B] applies to criminal offenses in North Carolina, other than impaired driving under G.S. 20-138.1 and failure to comply with control measures under G.S. 130A-25, that occur on or after October 1, 1994. [Article 81B] does not apply to violent habitual felons sentenced under Article 2B of Chapter 14 of the General Statutes." *Id.* § 15A-1340.10 (2005). Because defendant pled guilty to offenses committed in 2002, article 81B applies to defendant.

beyond this five-year period only in the "last six months of the original period of probation." *Id.* Additionally, N.C. Gen. Stat. § 15A-1344(d) allows a trial court to extend the period of probation "up to the maximum allowed under G.S. 15A-1342(a)[.]" *Id.* § 15A-1344(d) (2009). N.C. Gen. Stat. § 15A-1342(a) allows for a maximum duration of five years. *Id.* § 15A-1342(a) (2009).

In *Gorman*, the trial court extended a defendant's probation more than six months before the expiration of the original five-year period of probation. *Gorman*, 221 N.C. App. at 331-32, 727 S.E.2d at 732. This Court held that the trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1343.2(d) to grant such an extension. *Id.* at 334, 727 S.E.2d at 734. This Court further held that the trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1344(d) to grant such an extension, because that provision allows the trial court to extend the period of probation only up to the maximum duration allowed under N.C. Gen. Stat. § 15A-1342(a), which is five years, and the defendant's extended period of probation exceeded five years. *Id.* at 335, 727 S.E.2d at 734. This Court vacated the extension orders. *Id.*, 727 S.E.2d at 734.

If a trial court lacks the statutory authority to extend a defendant's probation, we will vacate a subsequent order that derives from the improperly granted extension. *Satanek*, 190 N.C. App. at 656-57, 660 S.E.2d at 625-26. "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 324 (2005).

Here, defendant's original period of probation expired on 27 June 2010. But the Buncombe County trial court extended defendant's probation on 18 February 2009, approximately sixteen months before this date. Following *Gorman*, we hold that the 2009 Buncombe County trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1343.2(d) to order a three-year extension more than six months before the expiration of the original period of probation. *See Gorman*, 221 N.C. App. at 334, 727 S.E.2d at 734; N.C. Gen. Stat. § 15A-1343.2(d). Additionally, the 2009 Buncombe County trial court lacked statutory authority under N.C. Gen. Stat. § 15A-1344(d), because defendant's extended period of probation exceeded five years. *See Gorman*, 221 N.C. App. at 335, 727 S.E.2d at 734; *see also* N.C. Gen. Stat. § 15A-1342(a), -1344(d). Because the 2009 Buncombe County trial court lacked statutory authority to extend defendant's probation, the 2013 Avery County trial court lacked

subject-matter jurisdiction to enter the 2013 orders. *See Satanek*, 190 N.C. App. at 656-57, 660 S.E.2d at 625-26.

IV. Conclusion

For the foregoing reasons, we hold that the trial court lacked subject-matter jurisdiction to enter the 2013 orders. Accordingly, we vacate those orders and remand the case to the trial court.

VACATED AND REMANDED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
RAHMIL INGRAM, DEFENDANT

No. COA15-22

Filed 7 July 2015

Constitutional Law—Miranda rights—waiver—voluntariness—sufficiency of findings of fact—mental condition—police coercion—totality of circumstances

The trial court erred in a felony assault with a firearm on a law enforcement officer case by concluding defendant's waiver of *Miranda* rights and statements were involuntarily given. The trial court's order was vacated and remanded for new findings of fact, and, if needed, a new hearing. The issues of defendant's mental condition and police coercion must be considered by the totality of the circumstances analysis.

Judge Steelman concurred in this opinion prior to 30 June 2015.

Appeal by State from order entered 15 October 2014 by Judge G. Bryan Collins, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 May 2015.

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

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

HUNTER, JR., Robert N., Judge.

The State appeals from a pretrial order suppressing Rahmil Ingram's ("Defendant") statements made to police after waiver of his *Miranda* rights. Because the trial court failed to resolve material conflicts in the evidence presented at the suppression hearing, we vacate and remand with instructions to make additional findings of fact to resolve these issues.

I. Factual & Procedural History

On 20 February 2012, a Durham County Grand Jury indicted Defendant for two counts of felony assault with a firearm on a law enforcement officer. The indictments read as follows:

> [D]efendant . . . unlawfully, willfully, and feloniously did assault . . . a law enforcement officer . . . with a firearm, to wit: the defendant brandished a shotgun and pointed the same at the law enforcement officer just described. At the time of this offense, that law enforcement officer was performing a duty of that office, to wit: . . . executing service of a lawfully issued search warrant at the address of 905 Colfax Street, Apartment A, Durham, North Carolina.

On 2 September 2014, Defendant filed a pretrial motion to suppress statements he made to law enforcement officers at Duke Hospital's emergency room moments before undergoing surgery to treat his bullet wounds.

In his affidavit supporting his motion to suppress, Defendant contends he was shot twice by police officers of Durham Police Department's Selective Enforcement Team ("SET"), after they broke down the front door of his family's residence by use of a battering ram and entered using four flash-bang devices. Defendant contends he was asleep in his bedroom when he heard a window bust and a "commotion" that he thought was someone breaking into his home to rob his family. Defendant grabbed his loaded shotgun and turned the corner into the hallway, where he immediately saw two police officers dressed in SWAT gear advance toward him. Defendant alleged that as soon as he realized the men were police officers, he dropped his shotgun and put his hands up. One officer shot Defendant in the back of the arm, which knocked Defendant to the ground. Defendant alleged the officers kept shooting and, of the four shots Defendant heard while he was on the ground with his legs up, one bullet entered through his backside. After he was shot, Defendant stated four SET officers continued past him to the bedrooms in the back of the house. Defendant was then handcuffed and moved to

the front of the residence, where he was treated by a medic. Durham County EMS and Officer L.M. Kirkman ("Officer Kirkman") of the Durham Police Department transported Defendant to Duke Hospital for further treatment. Following several requests from medical personnel to remove Defendant's handcuffs, Officer Kirkman removed the handcuffs six minutes into his medical treatment. Officer J.J. Wilking ("Officer Wilking") of the Durham Police Department arrived at Duke Hospital at approximately 10:50 a.m. to take custody of Defendant.

According to the nurse's note attached to Defendant's affidavit, Defendant was given three doses intravenously of 50 micrograms of Fentanyl, a strong narcotic medication indicated for severe pain, at 10:55 a.m., 11:05 a.m., and 12:15 p.m. At 2:15 p.m., Defendant was "alternat[ing] between crying loudly and yelling," and at that time, a prescription for Dilaudid, another strong narcotic pain medication, was ordered but not given to Defendant. The nurse's note states: "[w]ill give medication to [patient] after [North Carolina State Bureau of Investigation ("SBI")] interview per police request. [Doctor] informed."

At approximately 2:37 p.m., an SBI agent interviewed Defendant about the shootings. Officer Wilking was present for some of the interview. Defendant was unable to sign the form indicating he waived his *Miranda* rights but wrote his initials in wavy letters. At 2:47 p.m., the interview ended, as medical staff intervened to transport Defendant to the operating room for a procedure requiring general anesthesia. Defendant was administered Dilaudid at approximately 3:08 p.m., and his operation started at approximately 3:40 p.m.

Defendant alleged that he waived his *Miranda* rights and made statements to law enforcement when he was "in a great deal of pain because of his gunshot wounds" and "under the influence of several doses of serious pain medication[;]" therefore, he argues, his waiver was not voluntary and his statements were not reliable. Furthermore, Defendant alleged his statements were involuntary, because they were coerced by police who ordered medical personnel to withhold pain medication from him. Defendant's motion to suppress was heard at the 24 September 2014 Criminal Session of Durham County Superior Court before the Honorable G. Bryan Collins, Jr. The transcript of the suppression hearing reveals the following pertinent facts.

At approximately 2:30 p.m. on 24 January 2012, SBI Agent Brian Fleming ("Agent Fleming") arrived at Duke Hospital's emergency department to interview Defendant about the shootings. Agent Fleming testified he spoke with a nurse or doctor who confirmed Defendant was in

a position to speak with him. Agent Fleming entered Defendant's room, where Officer Wilking was attending for the purpose of arresting and charging Defendant upon release from the hospital.

Agent Fleming testified he advised Defendant of his *Miranda* rights and that Defendant "said he understood." Agent Fleming asked Defendant "if he was willing to speak with [him] now in light of those rights, [and] if he would sign the [*Miranda* rights waiver] form." The record indicates Defendant initialed the *Miranda* form at 2:38 p.m. Agent Fleming testified Defendant was unable to sign, because "he had been shot in the shoulder and that the pain made it hard for him to write. . . . So he just initialed the form." Agent Fleming testified that Defendant seemed to be "[i]n some pain" but appeared "calm[] and spoke plainly[] and coherently[]" during the nine-minute interview he conducted about the circumstances surrounding the shootings earlier that day. Agent Fleming wrote Defendant's statements in a police report.[1]

According to Agent Fleming's testimony, Defendant stated at the emergency room that he awoke that morning to what he thought was someone breaking into his home to rob his family. Defendant grabbed his 12-gauge shotgun and started toward the "commotion." As he turned into the hallway, he saw police officers dressed in SWAT gear. Defendant stated he immediately "threw the gun down and then he was shot." Agent Fleming "took that to be [sic] [Defendant] was implying that some time had elapsed." Agent Fleming "kept asking clarification questions to try to pin down exactly . . . what [Defendant] did and what [the SET officers] did." Agent Fleming then testified Defendant at one point stated: "By the time I threw the gun, I was getting shot." Agent Fleming understood this statement to mean no time elapsed between when Defendant threw his gun and when he was shot. At approximately 2:47 p.m., medical personnel intervened and asked Agent Fleming to leave, so they could transport Defendant to the operating room. During cross-examination, Agent Fleming testified that he did not know what medications were administered to or prescribed for Defendant prior to interviewing him.

Officer Greg Silla ("Officer Silla") of the Durham Police Department testified that he arrived at Duke Hospital around 2:40 p.m. to relieve Officer Wilking. Officer Silla's assignment similarly was to "stand by [Defendant] and when he was to be released, to notify [his] command and take him to jail." After taking command, Officer Silla testified he saw Defendant laying in a stretcher in his room with "[m]edical staff . . .

1. The police report was not included in the record on appeal.

around him[,] so [Officer Silla] stood outside [of] the room." When medical staff transported Defendant to the operating room, Officer Silla followed closely behind. Defendant saw him and asked him "what [he was] doing there." Officer Silla responded: "When you're done here, you're going to jail." Defendant stated: "[I]f [I] knew that, [I] would have shot that cop." Officer Silla testified that this short exchange was the only interaction he had with Defendant. On cross-examination, Officer Silla testified that he did not know what medications were administered to or prescribed for Defendant.

Defendant presented testimony of Dr. Christena Roberts, a forensic pathologist, who had reviewed approximately 200 pages of Defendant's medical records associated with his hospital visit on 24 January 2012. Dr. Roberts referred to a medication sheet in relaying the timing and dosage of pain medications given to Defendant. Dr. Roberts testified that, according to the medication sheet, Defendant was administered intravenously three doses of 50 micrograms of Fentanyl within an hour and nineteen minutes prior to his custodial interview with law enforcement. Dr. Roberts explained the effects of Fentanyl as follows: "in addition to pain relief, as many of the other strong narcotics, you also get some respiratory depression and you also get sedation. And then specifically with [F]entanyl, you also may get confusion." The three intravenously administered Fentanyl doses, doses indicated for "severe pain," were administered at 10:56 a.m., 11:05 a.m., and 12:15 p.m. Dr. Roberts testified a narcotic medication at this dosage would only be given in such a quick succession if "it wasn't providing adequate pain relief, and that's supported by the notes[.]" Dr. Roberts stated that another narcotic pain medication, Dilaudid, was written next on Defendant's medication sheet, but the time when it was administered was not listed, so she looked to the nurses' notes to find more information.

Referring to a nurse's note, Dr. Roberts testified: " 'At 2:15 Dilaudid was prescribed for pain.' [The note] said, 'That the patient was crying loudly and yelling,' and so the doctor had prescribed the Dilaudid. The note continued to say that the medication was being held at the request of police until the SBI interview." The State objected to this testimony on hearsay grounds, which the trial court overruled. Defendant then submitted into evidence the nurse's note to which Dr. Roberts referred. The State objected again on hearsay grounds and the trial court overruled the objection after confirming Dr. Roberts relied upon the nurse's note in forming her opinion. The trial court admitted the nurse's note into evidence. Dr. Roberts was then asked by defense counsel: "And from your review of [Defendant's] medical records, was pain medication withheld

at the request of the police?" She responded: "Yes. According to this handwritten nurse's note."

After the presentation of evidence, the parties made their arguments and then the trial judge made findings of fact, conclusions of law, and orally granted Defendant's motion to suppress. The trial court's 15 October 2014 written order suppressing Defendant's statements lists the following pertinent facts.

On 24 January 2012, two police officers shot Defendant. Defendant was rushed to Duke Hospital. Officer Wilking arrived for the purpose of arresting and charging Defendant upon release from the hospital. While at the emergency department, Defendant was administered intravenously three doses of 50 micrograms of Fentanyl, a narcotic medication, for pain relief. These doses were administered at 10:56 a.m., 11:05 a.m., and 12:15 p.m. At approximately 2:15 p.m., Defendant was alternating between crying and yelling, and another narcotic, Dilaudid, was ordered but not given to Defendant at that time.

Agent Fleming arrived at Duke Hospital to investigate the shootings. Agent Fleming spoke with a doctor or nurse, who advised him that he could interview Defendant. At approximately 2:38 p.m., Agent Fleming read Defendant his *Miranda* rights. Defendant was unable to sign the form due to the bullet wound in his shoulder but indicated he understood by initialing a *Miranda* waiver. Defendant then made a statement to Agent Fleming.

At approximately 2:40 p.m., Officer Silla arrived to relieve Officer Wilking and was assigned to attend to Defendant. At approximately 2:47 p.m., Agent Fleming left Defendant's room at the request of medical personnel, who needed to transport Defendant to the operating room. Officer Silla followed as Defendant was wheeled to the operating room, and Defendant made a statement to Officer Silla not in response to questioning.

The trial judge further found as fact that "[d]uring all times relevant to this suppression issue, the Defendant was in severe pain and under the influence of strong narcotic medication[;]" that Agent Fleming and Officer Silla had no knowledge of the medications given to Defendant; and that at the time of his statements, Defendant still had not been administered the prescribed Dilaudid for pain relief. Excluded from the trial court's findings of fact, however, was a resolution as to whether pain medication was ordered by law enforcement to be withheld until after the custodial interview with Agent Fleming. Also omitted were findings as to Defendant's ability to waive his rights and his degree of impairment.

Based upon the foregoing findings of fact, the trial judge made the following conclusions of law:

> 1. During all times relevant to this suppression issue, the Defendant was in custody for Miranda purposes.
>
> 2. The State failed to prove by a preponderance of the evidence that the Defendant's Miranda waiver was voluntary, based on the Court's finding that the Defendant was in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication.
>
> 3. The Defendant made his statement to [Agent Fleming] while the Defendant was in custody and without a valid waiver of his Miranda rights.
>
> 4. Regarding the Defendant's statement to Office Silla, the State failed to prove by a preponderance of the evidence that the Defendant's statement was voluntary, based on the Court's finding that the Defendant was in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication.
>
> 5. Considering the totality of the circumstances, it cannot be said that either statement was the product of the Defendant's free and rational choice.
>
> 6. Because both of the Defendant's statements were involuntary, and because the Defendant's waiver of his Miranda rights before his statement to [Agent Fleming] was involuntary, his rights to due process under the United States and North Carolina Constitutions were violated.

The trial judge then ordered any statements made by Defendant at the hospital, and any evidence derived therefrom, be suppressed and deemed inadmissible at trial. The State appeals.

II. Analysis

The State contends the trial court erred in concluding Defendant's waiver of *Miranda* rights and statements were involuntarily given. Specifically, the State contends that there is insufficient evidence to support the trial court's findings of fact and that the trial court's findings of fact do not support its conclusions of law. For the following reasons, we vacate the trial court's order and remand for new findings of fact, and, if needed, a new hearing.

A. Standard of Review

"Where a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to ascertain whether defendant has been informed of their constitutional rights and has knowingly, voluntarily, and intelligently waived these rights before making the challenged admissions." *State v. Strobel*, 164 N.C. App. 310, 313, 596 S.E.2d 249, 252 (2004) (citing *State v. Jenkins*, 300 N.C. 578, 584, 268 S.E.2d 458, 463 (1980)).

Our review of a trial court's decision on 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). "Appellate courts are bound by the trial court's findings if there is *some* evidence to support them, and may not substitute their own judgment for that of the trial court even when there is evidence which could sustain findings to the contrary." *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 829 (2009) (emphasis added) (citing *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984)). "[A]n appellate court accords great deference to the trial court in this respect[.]" *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619-20.

However, "[w]hen the *voir dire* evidence is conflicting, as here, the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact." *Jenkins*, 300 N.C. at 584, 268 S.E.2d at 463. Furthermore, "when the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court." *State v. Salinas*, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (citing *State v. McKinney*, 361 N.C. 53, 63-65, 637 S.E.2d 868, 875-76 (2006)). In such a situation,

> [r]emand is necessary because it is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred."

Id. at 124, 729 S.E.2d at 67 (quoting *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620).

B. Trial Court's Findings of Fact

The State contends "[t]here were several errors in the trial court's findings of fact, including the court's improperly considering evidence that could not be considered for its truth as substantive evidence, making facts unsupported by competent evidence, and failing to resolve other relevant evidence."

1. Trial Court Improperly Considering Evidence

First, the State argues the trial judge improperly considered hearsay evidence. This challenge is relevant as to the admissibility into evidence of the nurse's note for a jury to consider, but it is irrelevant as to whether it may be considered by the trial court conducting a *voir dire* hearing on a preliminary motion to suppress. *See In re Will of Leonard*, 82 N.C. App. 646, 648, 347 S.E.2d 478, 479-80 (1986) (dismissing challenge to trial judge's consideration of court records as hearsay and, *inter alia*, not properly authenticated or received into evidence, on the grounds the judge considered the evidence in a *voir dire* examination to determine a witness' competency). Therefore, we dismiss this challenge.

2. Findings of Fact Unsupported by Competent Evidence

Second, the State argues the trial court's findings of fact were unsupported by competent evidence. Specifically, the State challenges findings of fact nos. 14, 15, 18, 19, and 20, which state:

> 14. During all times relevant to this suppression issue, the Defendant was in severe pain and under the influence of strong narcotic medication.
>
> 15. The Defendant was given 50 micrograms of Fentanyl at 10:56 a.m. by IV.
>
> . . . .
>
> 18. The Defendant received another dose of 50 micrograms of Fentanyl at 11:05 a.m., and a third dose of 50 micrograms of Fentanyl at 12:15 p.m.
>
> 19. The Defendant received a total of three doses of 50 micrograms each of Fentanyl within one hour and 19 minutes.
>
> 20. At 2:15 p.m., 23 minutes before [Agent] Fleming began his interview with the Defendant, the Defendant was alternating between crying and yelling, and the narcotic

> Dilaudid was ordered. At the time of the interview and at the time of the statement to Officer Silla, the Dilaudid had not been administered to the Defendant.

The State contends "the trial court erred in admitting 'nurses' notes' for the truth of the matter contained within, and making substantive findings on that evidence." We note that Rules 104(a) and 1101(b)(1) of the North Carolina Evidence Code state explicitly the rules of evidence do not apply in suppression hearings. Therefore, the State's argument is without merit.

Trial judges must decide "[p]reliminary questions concerning . . . the admissibility of evidence[.]" N.C. Gen. Stat. § 8C-1, Rule 104 (2014). When making such a determination, a trial judge "is not bound by the rules of evidence[.]" *Id.* In interpreting Rule 104, this Court has explained: "The Rule's plain meaning, the Commentary to the Rule, and sound judgment all contemplate that, in deciding preliminary matters, the trial court will consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence." *In re Will of Leonard*, 82 N.C. App. at 648, 347 S.E.2d at 480. This is because in deciding a preliminary question such as whether evidence is admissible, "the trial court is not acting as the trier of fact. Rather, it is deciding a threshold question of law, which lies mainly, if not entirely, within the trial judge's discretion." *Id.*

That trial judges are not bound in certain proceedings to the formal rules of evidence is reiterated in Rule 1101(b), which provides: "The rules other than those with respect to privileges do not apply in the following situations: . . . Preliminary Questions of Fact—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)." N.C. Gen. Stat. § 8C-1, Rule 1101(b)(1) (2014). Accordingly, the State's argument that a trial judge during a suppression hearing is unable to rely upon evidence in making its findings of fact because it might be considered hearsay at trial necessarily fails. This conclusion is bolstered by recent decisions of our Supreme Court.

In *State v. Murchison*, our Supreme Court relied on Rule 1101(b) in holding that because the trial court was not bound by the formal rules of evidence in a probation revocation hearing, it acted within its discretion when it admitted hearsay evidence that would have been inadmissible at trial and relied solely thereupon in support of its decision to revoke the defendant's probation. 367 N.C. 461, 464-65, 758 S.E.2d 356, 358-59 (2014). In reaching this decision, the Court in *Murchison* noted that

"[o]ur precedent applying Rule of Evidence 1101(b)(3) to sentencing proceedings is instructive." *Id.* at 464, 758 S.E.2d at 358. Our Supreme Court cited its decision in *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), *cert. denied*, 539 U.S. 949, 156 L.E.2d. 640 (2003), wherein the Court determined "the Rules of Evidence do not apply in capital sentencing proceedings[,]" and concluded it was not error for a trial court to allow a jury to consider and find an aggravating factor that was based solely on inadmissible hearsay. *Id.* at 547, 573 S.E.2d at 913. Additionally, our Supreme Court in *Carroll* reasoned that the hearsay evidence was " 'reliable evidence relevant to the State's duty to prove its aggravating circumstances' and was properly admitted." *Murchison*, 367 N.C. at 464-65, 758 S.E.2d at 358 (quoting *Carroll*, 356 N.C. at 547, 573 S.E.2d at 913).

In addition, our Supreme Court in *State v. Thomas* permitted the admission of hearsay evidence to prove an aggravating factor in a sentencing proceeding, citing Rule of Evidence 1101(b)(3) and concluding as follows: "We have repeatedly stated that the Rules of Evidence do not apply in capital sentencing proceedings. Therefore, a trial court has great discretion to admit any evidence relevant to sentencing." 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, 528 U.S. 1006, 145 L.Ed.2d 388 (1999). We find instructive the reasoning of our Supreme Court in permitting the trial court during sentencing and probation proceedings to admit and rely solely upon evidence which would be inadmissible at trial because the Rules of Evidence do not apply.

Here, as in *Carroll*, *Thomas*, and *Murchison*, we believe the trial court had "great discretion to admit any evidence relevant to" the suppression hearing. *See Murchison*, 367 N.C. at 465, 758 S.E.2d at 358. The trial court appropriately exercised its discretion when it admitted the nurse's note as substantive evidence underlying its findings of fact. This hearsay evidence was reliable and relevant to determining whether Defendant had voluntarily waived his *Miranda* rights and made statements to law enforcement officers. As "the proceeding was a [suppression hearing], the trial court was not bound by the formal rules of evidence and acted within its discretion when it admitted the hearsay evidence." *Murchison*, 367 N.C. at 465, 758 S.E.2d at 359; Rule 1101(b)(1). Furthermore, we find applicable the following passage on the reliability of hospital records:

> There is good reason to treat a hospital record entry as trustworthy. Human life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks. To this extent at least, hospital records

> are deserving of a presumption of accuracy even more than other types of business entries.

Hedrick v. Southland Corp., 41 N.C. App. 431, 436, 255 S.E.2d 198, 202 (1979) (quoting *Thomas v. Hogan*, 308 F.2d 355, 361 (4th Cir. 1962)). We conclude the trial judge did not abuse his discretion in admitting the nurse's note and making substantive findings solely thereupon and, therefore, we dismiss the State's argument on this issue.

3. Failure to Resolve Conflicting Evidence

Third, the State argues the trial court failed to resolve evidentiary issues before it in reaching its conclusions of law, particularly in failing to address circumstances surrounding Defendant's *Miranda* waiver and statements, such as the officers' testimony as to Defendant's "condition, demeanor, interaction, understanding, awareness, consciousness, etc." We agree the trial court failed to resolve issues that arose from the evidence presented at the suppression hearing.

We review *de novo* a trial court's conclusions as to the voluntariness of a defendant's waiver of *Miranda* rights and statements. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994). "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Knight*, 340 N.C. 531, 550, 459 S.E.2d 481, 493 (1995). Where, as here, "a defendant's waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a single matter." *State v. Ortez*, 178 N.C. App. 236, 244, 631 S.E.2d 188, 195 (2006) (citation omitted), *disc. review denied*, 361 N.C. 434, 649 S.E.2d 642 (2007). Whether a waiver and statements were voluntarily made "must be found from a consideration of the entire record[.]" *State v. Pruitt*, 286 N.C. 442, 454, 212 S.E.2d 92, 100 (1975). "[T]he reviewing court applies a totality-of-circumstances test." *State v. Wilkerson*, 363 N.C. 382, 431, 683 S.E.2d 174, 204 (2009).

Involuntariness may be found when "circumstances precluding understanding or the free exercise of will were present." *State v. Allen*, 322 N.C. 176, 186, 367 S.E.2d 626, 631 (1988). "[I]ntoxication is a circumstance critical to the issue of voluntariness[.]" *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L.Ed.2d 369 (1990). When intoxication is the only factor in the analysis supporting a determination of involuntariness, "[a]n inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Phillips*, 365

N.C. 103, 114, 711 S.E.2d 122, 133 (2011) (quoting *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981) (citations omitted)). However, intoxication "is simply [one] factor to be considered in determining voluntariness." *McKoy*, 323 N.C. at 22, 372 S.E.2d at 23. There are a number of other relevant factors:

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

State v. Hyde, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000) (quoting *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (citation omitted). In addition, "age is also to be considered by the trial judge in ruling upon the admissibility of a defendant's confession[.]" *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983). Furthermore, for a waiver of *Miranda* rights to be valid, it "must be . . . given voluntarily 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.]' " *Wilkerson*, 363 N.C. at 430-31, 683 S.E.2d at 203-04 (2009) (quoting *Moran v. Burbine*, 475 U.S. 412, 421, 89 L.Ed.2d 410, 421 (1986)). "[W]here it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible." *Strobel*, 164 N.C. App. at 317, 596 S.E.2d at 255 (citing *State v. Steptoe*, 296 N.C. 711, 716, 252 S.E.2d 707, 710 (1979)). "[T]he question of whether Defendant's incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him." *State v. Flood*, __ N.C. App. __, __, 765 S.E.2d 65, 70 (2014) (citation omitted).

Here, the trial court suppressed Defendant's statements on the grounds Defendant was "in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]" however, the trial court failed to make any specific findings as to Defendant's mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court

should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, Defendant moved to suppress his statements on the grounds that his statements were involuntary due to his being under the influence of strong narcotic medication, his being in severe pain, and police officers allegedly coercing his *Miranda* waiver and statements by withholding pain medication. The trial court failed to resolve the material conflict in evidence as to whether police coercion occurred, which is a material consideration in a voluntary analysis and bolsters our conclusion that remand is required at this stage of the proceedings.

During the suppression hearing, Dr. Roberts testified that the nurses' notes indicated medical personnel were ordered by law enforcement to withhold pain medication from Defendant until after the interview with Agent Fleming. The nurse's note, admitted into evidence and part of the record on appeal, states unambiguously that at 2:15 p.m.: "[Defendant] [a]lternates between crying loudly and yelling. Orders for Dilaudid given. Will give medication to [patient] after SBI interview per police request. [Doctor] informed." Agent Fleming and Officer Silla both testified that they neither requested, nor were they aware of any request by law enforcement, that pain medication ordered for Defendant be withheld until after his custodial interrogation.

We believe that remand to the trial court for further fact finding and a reconsideration of the evidence in light of the totality of the circumstances is the most appropriate remedy at this stage of the proceedings. As guidance on remand, we recommend the trial court reconsider the evidence and make further findings, where appropriate, on the "circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him." *Flood*, __ N.C. App. at __, 765 S.E.2d at 70 (citation omitted).

Upon remand, the trial court may find the evidence does not show any deliberate attempt by law enforcement to withhold pain medication from Defendant to coerce a confession. Nonetheless, the nurse's note supports alternative inferences. The State was on notice of this evidence as a result of Defendant's motion to suppress. Officer Wilking, who according to the hospital records requested that pain medication not be given to Defendant, was not called as a witness by either the State or Defendant. The State argues on appeal: "There was also no evidence of any coercion, or any evidence [Agent] Fleming (or his presence) prevented any attempt by Duke personnel to administer any type of medical treatment or procedure, or give any medication, let alone any threat to

withhold treatment if defendant did not speak with Fleming." This argument is incomplete and could be misleading. The order fails to resolve the issues raised by the State of Defendant's condition after taking these medications and the issue of potential police misconduct.

"[E]xclusionary rules are very much aimed at deterring lawless conduct by police and prosecution[.]" *Lego v. Twomey*, 404 U.S. 477, 489, 30 L.E.2d 618, 627 (1972); *see also Colorado v. Connelly*, 479 U.S. 157, 166, 93 L.Ed.2d 473, 484 (1986) ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."). It is essential that law enforcement be able to procure waivers of *Miranda* rights and incriminating statements voluntarily; however, restraints on law enforcement are required to protect a criminal suspect's constitutional guarantees, such as the exclusion of involuntary statements at trial. *See*, *e.g.*, *State v. Bordeaux*, 207 N.C. App. 645, 656, 701 S.E.2d 272, 279 (2010) (citation omitted).

Because police coercion is a factor that ought to be considered and resolved in a totality-of-the-circumstances analysis on these facts, we conclude the trial court's order does not contain sufficient findings of fact at this stage of the proceedings to which this Court can properly apply the voluntariness standard. Furthermore, the order fails to resolve the issues of Defendant's condition after being administered these medications. Accordingly, the absence of the resolution of conflicting material evidence and the absence of further findings of fact necessary to conduct a meaningful review of the trial court's order requires that we remand this case to the trial court for a reconsideration of the evidence, an entry of an order that contains appropriate findings, and, if the trial court in its discretion deems it necessary, for another suppression hearing. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 67 ("[W]hen the trial court fails to make findings of fact sufficient to allow the reviewing court to apply the correct legal standard, it is necessary to remand the case to the trial court."); *State v. Booker*, 306 N.C. 302, 312-13, 293 S.E.2d 78, 84 (1982) ("The court's failure to find facts resolving the conflicting voir dire testimony was prejudicial error requiring remand to the superior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made."); *see also State v. O'Connor*, 222 N.C. App. 235, 243-44, 730 S.E.2d 248, 253-54 (2012) (remanding where trial court failed to resolve material conflicts in evidence presented at suppression hearing as to whether the police had reasonable suspicion to stop the defendant's vehicle); *State v. Neal*, 210 N.C. App. 645, 656, 709 S.E.2d 463, 470 (2011)

(remanding where trial court failed to resolve material evidentiary conflicts during suppression hearing as to whether officer promised to drop a trespass charge in exchange for a defendant's consent to search); *State v. Ghaffar*, 93 N.C. App. 281, 289, 377 S.E.2d 818, 823 (1989) (remanding for new suppression hearing where trial court failed to resolve conflicting evidence as to whether the defendant gave police consent to search his vehicle).

III. Conclusion

In summary, we agree with part of the State's argument on appeal and are not satisfied the trial judge's findings of fact are complete. Because the issues of Defendant's mental condition and police coercion must be considered in this totality-of-the-circumstances analysis, we remand this matter to the trial court to make such additional findings of fact not inconsistent with this opinion and, if necessary, to conduct a new hearing on Defendant's motion to hear additional evidence.

VACATED AND REMANDED.

Judges STEELMAN and DAVIS concur.

Judge Steelman concurred in this opinion prior to 30 June 2015.

STATE OF NORTH CAROLINA
v.
RICHARD DARNELL JAMES

No. COA15-21

Filed 7 July 2015

1. Indictment and Information—change of address as a sex offender—not reported in three days—"business" omitted—indictment sufficient

A superseding indictment for failing to report a change of address as a sex offender was not fatally flawed where it alleged that defendant did not report his change of address within three days rather than three business days. The superseding indictment gave defendant sufficient notice of the charge against him. Moreover, he did not argue that he was in any way prejudiced in preparing his defense by the omission of the word "business."

2. Appeal and Error—preservation of issues—issue not raised at trial

Defendant did not preserve for appellate review an issue involving his motion to dismiss for insufficient evidence where his motions to dismiss at trial involved the sufficiency of the indictment and not the argument that he raised on appeal.

3. Constitutional Law—effective assistance of counsel—failure to raise issue at trial—no prejudice

A defendant charged with not registering a change of address as a sex offender received effective assistance of counsel where his attorney did not preserve for appellate review the issue of the sufficiency of the evidence. Even if the issue had been preserved on those grounds, the evidence presented by the State was sufficient to raise the question of guilt for the jury.

Judge HUNTER, Jr. dissenting.

Appeal by defendant from judgments entered 26 August 2014 by Judge Claire V. Hill in Johnston County Superior Court. Heard in the Court of Appeals 3 June 2015.

Roy Cooper, Attorney General, by Kevin G. Mahoney, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

DAVIS, Judge.

Richard Darnell James ("Defendant") appeals from his convictions for failure to report a change of address as a sex offender and attaining the status of an habitual felon. On appeal, he contends that (1) his indictment was fatally flawed; (2) the trial court erred in denying his motion to dismiss; and (3) he received ineffective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error and dismiss his appeal in part.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 10 September 2001, Defendant was convicted of taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1. As a result of this conviction, Defendant was required to register as a

sex offender pursuant to N.C. Gen. Stat. § 14-208.7(a) with the sheriff of his county of residence. On 8 July 2013, Defendant notified the Johnston County Sheriff's Office of his change of address from 3521 Old School Road, Four Oaks, North Carolina to 2133 Mamie Road, Four Oaks, North Carolina.

On 29 November 2013, Defendant was discovered living in a vacant rental house located at a third address — 2871 Old School Road. On that date, the owner of the rental house, Leroy Baker ("Baker"), and his son-in-law, Jesse Lee ("Lee"), had gone to the 2871 Old School Road address to check on the property after receiving an abnormally high electrical bill for the home. Upon entering the house, they discovered Defendant, whom neither of them knew or had ever seen before. Defendant told them that "he had just got out of jail and had no place to go" and that "he had been staying there." He further stated that he had been living there "about a month" since "he got out of jail the 30th of October." Baker and Lee ordered Defendant to leave. After Defendant left the residence, Lee discovered an identification card with Defendant's name on it. Lee subsequently contacted the Johnston County Sheriff's Office and informed officers of Defendant's unlawful entry into the rental home.

Captain Chris Strickland ("Captain Strickland") of the Johnston County Sheriff's Office, who oversaw the sex offender registry, reviewed the break-in report naming Defendant as the perpetrator of the offense. Recognizing Defendant as a convicted sex offender, Captain Strickland dispatched Lieutenant Gary Bridges ("Lieutenant Bridges") to Defendant's last reported address, 2133 Mamie Road, to investigate whether Defendant was, in fact, living there.

Upon arriving at a residence located at the 2133 Mamie Road address, Lieutenant Bridges encountered two individuals, Clinton Smith ("Smith") and Janet Mauney ("Mauney"). They informed Lieutenant Bridges that they had been living at that address for nine years and fourteen years, respectively, and that Defendant had never lived there.

On 3 February 2014, Defendant was indicted on the charge of failure to report a change of address as a sex offender in violation of N.C. Gen. Stat § 14-208.11(a)(2) and having attained the status of an habitual felon. On 21 July 2014, a superseding indictment was issued for the former charge. A jury trial was held in Johnston County Superior Court on 25 August 2014 before the Honorable Claire V. Hill. Defendant moved to dismiss the charges against him at the close of the State's evidence and at the close of all the evidence. The trial court denied both of his motions.

On 26 August 2014, the jury found Defendant guilty of both charges. Defendant was sentenced to 90-120 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

I. Sufficiency of Indictment

[1] Defendant first argues that the trial court lacked jurisdiction to enter judgment against him on the ground that the superseding indictment failed to allege all of the essential elements of the offense of failure to report a change of address as a sex offender, thereby requiring that his convictions be vacated. We disagree.

> It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. The purpose of the indictment is to give a defendant reasonable notice of the charge against him so that he may prepare for trial. A defendant can challenge the facial validity of an indictment at any time, and a conviction based on an invalid indictment must be vacated.

State v. Campbell, __ N.C. __, __, __ S.E.2d __, __, slip op. at 5 (filed June 11, 2015) (internal citations and quotation marks omitted). This Court reviews the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409, *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009).

The Supreme Court has also stated the following regarding the legal requirements applicable to indictments:

> [W]e note that the "true and safe rule" for prosecutors in drawing indictments is to follow strictly the precise wording of the statute because a departure therefrom unnecessarily raises doubt as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense. Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. . . . [A]n indictment shall not be quashed by reason of any informality or refinement if it accurately expresses the criminal charge in plain,

> intelligible, and explicit language sufficient to permit the court to render judgment upon conviction. . . . [I]t would not favor justice to allow defendant to escape merited punishment upon a minor matter of form.

State v. Sturdivant, 304 N.C. 293, 310-11, 283 S.E.2d 719, 731 (1981) (internal citations and quotation marks omitted); *see also State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) ("[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form." (citation and quotation marks omitted)).

As we stated in *Harris*, the mere fact that an indictment departs in some way from the strict statutory language is not determinative of the indictment's sufficiency. *See Harris*, 219 N.C. App. at 592-93, 724 S.E.2d at 636 ("The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." (citation and quotation marks omitted)).

With regard to the offense of failure to report a change of address as a sex offender, we have noted that "because N.C.G.S. §§ 14-208.9 and 14-208.11 deal with the same subject matter, they must be construed in *pari materia* to give effect to each." *State v. Fox*, 216 N.C. App. 153, 156, 716 S.E.2d 261, 264 (2011) (citation and quotation marks omitted). Under this statutory scheme,

> [i]f a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. . . .

N.C. Gen. Stat. § 14-208.9(a) (2013).

> A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address as required by this Article.

N.C. Gen. Stat. § 14-208.11(a)(2) (2013).

The three essential elements of this offense are "(1) the defendant is a person required to register; (2) the defendant changes his or her

address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 798 (2015).

In the present case, the superseding indictment lists the date of the offense as "December 2, 2013" and classifies the offense as being a violation of "14-208.11(A)(2)." It then states the following:

> The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did, as person [sic] required by Article 27A of Chapter 14 of the General Statutes to register, fail to notify the last registering sheriff of a change of address in that the defendant failed to appear in person and provide written notification of his address change to the sheriff of Johnston County within three (3) days of the address change.

While the superseding indictment generally tracks the language of N.C. Gen. Stat. § 14-208.9(a), Defendant challenges the portion of the indictment alleging that he failed to notify the sheriff of his change of address within "three (3) days" of the address change, arguing that the indictment was required to instead state the relevant time period as three *business* days. Because of this omission of the word "business" in referencing the three-day period, Defendant argues that the indictment was fatally flawed and therefore invalid.

In support of his position, Defendant relies on *State v. Barnett*, 223 N.C. App. 65, 733 S.E.2d 95 (2012). In *Barnett*, this Court held that an indictment for the failure of a sex offender to report an address change was insufficient to charge the defendant where "the indictment substantially track[ed] the statutory language set forth in N.C. Gen. Stat. § 14-208.9(a) with respect to the second and third elements of the offense, [but] ma[de] no reference to the first essential element of the offense, *i.e.*, that Defendant be 'a person required to register.' " *Id.* at 69, 733 S.E.2d at 98. In light of the omission of this entire element of the offense, we held that the indictment did not set forth all of the essential elements of the offense for which the defendant was charged such that the defendant's conviction was required to be vacated. *Id.* at 70-72, 733 S.E.2d at 99-100. Here, however, unlike in *Barnett*, all of the elements of the offense are referenced on the face of the indictment. We cannot conclude that the omission of the word "business" from the language

addressing the third element of the offense is analogous to the omission of an entire element as in *Barnett*.

While this Court has previously concluded in an unpublished opinion that the word "business" must be included in an indictment charging a violation of N.C. Gen. Stat. § 14-208.9(a), *see State v. Osborne*, __ N.C. App. __, 763 S.E.2d 16 (2014) (unpublished), it is well settled that "[a]n unpublished opinion establishes no precedent and is not binding authority." *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (citation, quotation marks, and brackets omitted). Moreover, our Court has expressly declined to follow *Osborne* in *Leaks*. In *Leaks*, we held that

> the *Osborne* Court held that [an] indictment [for failure of a sex offender to report an address change] was fatally defective because it failed to allege that (1) defendant did not provide "*written notice*" of his move, and (2) did not specify the time requirements as within "three *business* days" of the defendant's move to a new address. In effect, the *Osborne* Court imposed two additional essential elements of the offense set forth in N.C. Gen. Stat. § 14-208.9(a) — the "written notice" requirement and the "three *business* days" requirement. Given the holding in *Osborne*, defendant contends that his indictment was fatally defective because it too did not include the "written notice" requirement. We are not persuaded.

Leaks, __ N.C. App. at __, 771 S.E.2d at 798-99 (internal citation omitted). While we agree that the better practice would have been for the indictment to have alleged here that Defendant failed to report his change of address within "three business days," we are satisfied that the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

On appeal, Defendant does not argue that he ever did actually live at 2133 Mamie Road following his notification to the Johnston County Sheriff's Office on 8 July 2013 that this was his new address. Therefore, the distinction between three calendar days and three business days is immaterial in this case as the testimony of Smith and Mauney shows that Defendant had been in violation of the statute upon which he was charged between 8 July 2013 and his arrest.

Furthermore, Defendant did not argue at trial nor does he argue on appeal that he was in any way prejudiced in preparing his defense as a result of the omission of the word "business" from this portion of the

indictment. Indeed, Defendant does not claim that he (1) was unaware of the offense for which he was being charged; (2) was misled in any way; (3) was precluded from preparing a defense at trial, or (4) may be subjected to double jeopardy for the same offense in the future. *See State v. Jones*, 367 N.C. 299, 306-07, 758 S.E.2d 345, 351 (2014) (explaining that primary purposes of indictment are "(1) to provide such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case" (citation, quotation marks, and brackets omitted)).

Accordingly, we fail to see any valid basis for holding that the superseding indictment was fatally flawed under these circumstances. Defendant's argument on this issue is therefore overruled.

II. Denial of Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying his motions to dismiss based on the insufficiency of the evidence. Because we conclude that Defendant has failed to preserve this issue for appellate review, we dismiss this portion of his appeal.

The motions to dismiss made by Defendant's counsel's at trial were based solely upon the premise that the superseding indictment was invalid. Defendant's counsel did not expressly make the argument in the trial court that he has raised on appeal, which is that there was insufficient evidence for the charge to proceed to the jury. Therefore, as Defendant failed to properly preserve his sufficiency of the evidence argument for appellate review, we dismiss Defendant's appeal as to this issue. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 604-05 (concluding that defendant failed to preserve for appellate review argument regarding sufficiency of evidence because his motion to dismiss at trial was based solely on alleged inadequacies in indictment), *cert. denied*, 540 U.S. 988, 157 L.Ed.2d 382 (2003).

III. Ineffective Assistance of Counsel

[3] Finally, Defendant argues, in the alternative, that he was denied effective assistance of counsel as a result of his trial counsel's failure to assert a motion to dismiss based on the insufficiency of the evidence so as to preserve this argument for appellate review. We disagree.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal."

State v. Stroud, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). This is so because this Court, in reviewing the record, is "without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (internal citation, quotation marks, and brackets omitted). However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal "when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted), *cert. denied*, 546 U.S. 830, 163 L.Ed.2d 80 (2005).

In order to establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert denied*, __ U.S. __, 182 L.Ed.2d 176 (2012).

> 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 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L.Ed.2d 116 (2006).

In the present case, even if Defendant's trial counsel had specifically made a motion to dismiss based on the insufficiency of the evidence, the evidence presented by the State was sufficient to raise a jury question as to whether Defendant was guilty of the offense for which he was charged. As such, Defendant cannot satisfy the second element of a claim of ineffective assistance of counsel.

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion

to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982).

> When determining whether there is substantial evidence to sustain a conviction, all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.

State v. Marion, __ N.C. App. __, __, 756 S.E.2d 61, 68 (citation and brackets omitted), *disc. review denied*, 367 N.C. 520, 762 S.E.2d 444-45 (2014).

As noted above, the essential elements for the offense of failure of a sex offender to report a change of address are "(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *Leaks*, __ N.C. App. at __, 771 S.E.2d at 798. With regard to the first element of the offense — which is unchallenged on appeal — the State presented evidence that Defendant had pled guilty to indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1 in Johnston County Superior Court on 10 September 2001.

As to the second and third elements, the State presented evidence that Defendant had last registered a change of address with the Johnston County Sheriff's Office on 8 July 2013, listing his address as 2133 Mamie Road in Four Oaks, North Carolina. At trial, the State introduced the testimony of Baker and Lee, who discovered Defendant living at Baker's rental house at 2871 Old School Road on 29 November 2013. Lee testified at trial as follows:

> Q. And you stated earlier when [Defendant] came out he said I've been living here since I got out of prison?
>
> A. He said he had been in prison, that he apologized and he didn't have nowhere to go and that he had been staying there for some time.
>
> Q. Did he say approximately how long he had been staying there?
>
> A. I think he said -- from my understanding was thirty days.

Q. Okay. He stated to you I've been living here about thirty days?

A. Yeah, about a month.

The State also introduced the testimony of Smith and Mauney, the actual residents of 2133 Mamie Road, to demonstrate that Defendant had never actually resided at that address. Mauney testified as follows:

Q. How long have you lived at 2133 --

A. Fourteen years.

Q. Fourteen years. And in the 14 years that you've lived there, Ms. Mauney, has [Defendant] ever lived in your residence with you?

A. No ma'am.

Q. And do you know [Defendant] at all, Ms. Mauney?

A. No.

Finally, the State offered testimony at trial from Captain Strickland that Defendant never notified the Sheriff's Office of a new change of address between 8 July 2013 and the date of his arrest. The testimony from Lee, Mauney, and Captain Strickland constitutes substantial evidence of the second and third elements of the offense.

Because Defendant (1) never lived at the address he provided to the Johnston County Sheriff's Office on 8 July 2013; (2) was shown to have been living instead at the 2871 Old School Road address for approximately 30 days before he was discovered there and his presence reported to the Johnston County Sheriff's Office; and (3) never provided the State with a new address, sufficient evidence clearly existed for the jury to have reasonably found that he was in violation of N.C. Gen. Stat. § 14-208.9(a).

Defendant contends that because (1) the superseding indictment lists the date of the offense as 2 December 2013; and (2) that date was three calendar days after Defendant was discovered on 29 November 2013 at the 2871 Old School Road address, by the terms of the statute he would have had until *5 December* 2013 (the date that fell three *business* days after 29 November 2013) in which to notify the Sheriff's Office of his new address and that "[t]he State offered no evidence that [Defendant] had failed to give the required change of address notice on or before" 5 December 2013. We are not persuaded.

As discussed in the preceding section, the undisputed evidence was that Defendant notified the Johnston County Sheriff's Office on 8 July 2013 of a false address. Therefore, while the superseding indictment listed the date of the offense as 2 December 2013, Defendant's violation of the statute had actually been ongoing for almost five months prior to that date. Thus, while he was, in fact, in violation of the statute on 2 December 2013, he was likewise in violation for a period of over 140 days prior to that date.

Accordingly, had Defendant's trial counsel specifically asserted a motion to dismiss based on insufficiency of the evidence, the motion would have lacked merit. *See State v. Pierce*, __ N.C. App. __, __, 766 S.E.2d 854, 859-60 (2014) (finding sufficient evidence that defendant violated N.C. Gen. Stat. § 14-208.9(a) where "testimony of [two neighbors] support[ed] a reasonable inference that defendant resided with [his girlfriend] at her home" and girlfriend's home was not address he had registered with sheriff's office), *disc. review denied*, __ N.C. __, __ S.E.2d __ (2015); *Fox*, 216 N.C. App. at 158, 716 S.E.2d at 265-66 (evidence was sufficient to support conviction where defendant had reported that he was living with his father, his father "advised the officer that [the defendant] did not live [with him], and that defendant lived with his girlfriend somewhere in Morehead by the old Belk," and neighbor of defendant's girlfriend testified "defendant stayed at [his girlfriend's] apartment every day and evening" (brackets omitted)).

Therefore, because Defendant cannot establish prejudice as a result of his trial counsel's failure to make a motion to dismiss in the trial court on this specific ground, we conclude that his ineffective assistance of counsel claim lacks merit. *See State v. Fraley*, 202 N.C. App. 457, 467, 688 S.E.2d 778, 786 ("[I]f the evidence is sufficient to support a conviction, the defendant is not prejudiced by his counsel's failure to make a motion to dismiss at the close of all the evidence."), *disc. review denied*, 364 N.C. 243, 698 S.E.2d 660 (2010).

Conclusion

For the reasons stated above, we conclude that (1) Defendant's superseding indictment was not fatally flawed; (2) Defendant's appeal of the denial of his motion to dismiss must be dismissed; and (3) Defendant has failed to show that he received ineffective assistance of counsel.

NO ERROR; DISMISSED IN PART.

Judge STEELMAN concurs.

Judge HUNTER, JR. dissents in a separate opinion.

Judge STEELMAN concurred in this opinion prior to 30 June 2015.

HUNTER, JR., Robert N., Judge, DISSENTING.

The North Carolina Constitution provides "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22.

> It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony. Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority.

State v. Barnett, 223 N.C. App. 65, 68, 733 S.E.2d 95, 97–98 (2012) (internal citations and quotation marks omitted). In order to be valid and thus confer jurisdiction upon the trial court, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). In the 1800s, our Supreme Court required near identical language in the indictment as in the statutory offense. For example, the Supreme Court held "the use of the word in the singular will not do, when it should be in the plural." *State v. Sandy*, 25 N.C. 570, 575, 3 Ired. 570, 575 (1843). Today, pleading requirements for criminal indictments are more relaxed: "The general rule in this State and elsewhere is that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words." *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953).

Here, Defendant was indicted for the statutory offense of failure to report a change of address as a sex offender in violation of N.C. Gen. Stat. § 14-208.11(a)(2). The statute provides any person required to register as a sex offender is guilty of a Class F felony if he "[f]ails to notify the last registering sheriff of a change of address as required by this Article." N.C. Gen. Stat. § 14-208.11(a)(2) (2014). N.C. Gen. Stat. § 14-208.9 dictates the procedure for effectuating a proper change of address with the sheriff. N.C. Gen. Stat. § 14-208.9(a) provides: "If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the *third business day* after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2014) (emphasis added). Thus,

this Court has held the three essential elements of this statutory offense are: "(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *Barnett*, 223 N.C. App. at 69, 733 S.E.2d at 98.

The indictment in this case neither literally nor substantially charged Defendant with the words of the statute. Instead, the indictment charged Defendant with language that is *substantially different* than the words of the statute—"three days" as opposed to three business days. I am persuaded here by the reasoning of this Court in the unpublished case *State v. Osborne*, ___ N.C. App. ___, 763 S.E.2d 16, COA13-1372, 2014 WL 2993855 (N.C. Ct. App. July 1, 2014). In *Osborne*, we held the indictment was insufficient to charge a violation of N.C. Gen. Stat. § 14-208.11(a)(2) because it used the phrases "without notifying" and "within three days." *Id.* at *3. This language was insufficient to confer jurisdiction in the trial court because the indictment: (1) did not allege a lack of *written* notice, and (2) alleged a three-day time period rather than a three-*business*-day time period, as required by the statute. *Id.* This Court concluded "not every day is a business day. Thus, in preparing for trial, a defendant would believe the State could prevail by proving that three days had passed before he notified the sheriff's office of his move rather than the correct required showing that three *business* days had passed." *Id.* I find this reasoning persuasive.

Furthermore, the majority's reliance on this Court's holding in *Leaks* is misplaced. The majority opinion states "our Court has expressly declined to follow *Osborne* in *Leaks*." The *Leaks* Court declined to follow *Osborne* only with regard to the "written notice" requirement. *State v. Leaks*, ___ N.C. App. ___, ___, 771 S.E.2d 795, 797–98 (2015). The "three business days" element of the indictment was not at issue in *Leaks*, as the defendant was properly charged by the precise language of the statute: "by failing to notify the Forsyth County Sheriff's Office of his change of address with in [sic] three business days after moving from his last registered address." *Id.* at ___, 771 S.E.2d at 798. Thus, *Leaks* is inapposite.

Because I would hold the indictment here contained a fatal variance, and thus jurisdiction was never conferred in the trial court, I do not address the remaining issues on appeal. I would vacate the judgment entered upon Defendant's conviction.

STATE v. MANGUM

[242 N.C. App. 202 (2015)]

STATE OF NORTH CAROLINA
v.
CRYSTAL GAIL MANGUM

No. COA14-909

Filed 7 July 2015

1. Evidence—prior acts—similarity

The trial court did not err in a second-degree murder prosecution by admitting evidence of an earlier incident where the evidence was sufficiently similar. Prior acts or crimes are sufficiently similar to the crime charged "if there are some unusual facts present in both" incidents. Here, the evidence supported the findings, which supported the conclusions, especially in terms of the relationship between the parties involved, defendant's escalation of the violence in response to being restrained, and the general nature of both incidents.

2. Evidence—prior acts—temporal proximity

A prior similar event was sufficiently proximate to be introduced into a second-degree murder prosecution where there was a fourteen-month gap between events but there were substantial similarities between the events. The weight of the evidence was to be determined by the jury.

3. Evidence—prior acts—not more prejudicial than probative

The trial court did not abuse its discretion in a second-degree murder prosecution where evidence of a prior incident was admitted despite an objection under N.C.G.S. § 8C-1, Rule 403 There were significant points of commonality between the Rule 404(b) evidence and the offense charged, and the trial court handled the process conscientiously. Moreover, there was no reasonable possibility that the jury would have reached a different result absent this evidence.

Appeal by defendant from judgment entered 22 November 2013 by Judge Paul Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 20 January 2015.

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

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

CALABRIA, Judge.

Crystal Mangum ("defendant") appeals from judgment entered upon a jury verdict finding her guilty of second degree murder. We find no error.

I. Background

Defendant and Reginald Daye ("Daye") met through mutual friends in January 2011. One month later, the two began living together along with defendant's three children. On 3 April 2011, defendant and Daye went to a party around 11:00 p.m. and returned to the apartment complex where they lived ("the apartment") approximately an hour and a half later. Durham Police Department ("DPD") Officer Curtis Knight ("Knight") was waiting for an illegally-parked vehicle to be towed from the apartment complex when defendant and Daye approached Knight's patrol car and asked what he was doing. Knight told them. Daye and defendant then entered the apartment, but a few minutes later they were back outside. Knight heard Daye yelling, "give me my money" at defendant, referring to $700 he had given defendant to hold for rent. After Knight told them that they could not be outside making so much noise, defendant and Daye went back inside the apartment.

Daye's nephew, Carlos Wilson ("Wilson"), who lived in the same apartment complex, also heard the commotion and went outside where he encountered Knight. Wilson told Knight he would check on Daye; however, no one answered when Wilson knocked on defendant and Daye's apartment door. Wilson left and went to bed, but was awakened by a knock on his door at approximately 3:00 a.m. When he opened the door, Wilson found Daye standing there, shirtless, and bleeding from his left side. Daye told Wilson that defendant had stabbed him. Wilson then called 911 and attempted to provide medical aide until the paramedics arrived.

At approximately 3:20 a.m., DPD Officer Bradley Frey ("Frey") arrived at the apartment. Daye told Frey that he and defendant argued about money, the argument became hostile, and defendant stabbed Daye with a knife. As a result of a stab wound to the left side of his chest, approximately two to three inches deep, Daye sustained extensive injuries requiring emergency surgery. Daye died a few days later due to complications from the stab wound.

Several DPD officers investigated and found broken glass, multiple knives—both broken and intact—and bloodstains throughout the apartment. A serrated knife, five inches long with Daye's blood on the blade, was laying flat on the living room couch. Daye's blood was also found

on the kitchen counter, the hallway carpet, and the ground and staircase railing outside the apartment. The door from the hallway to the bathroom had been broken off its hinges, and a clump of hair was found on the bathroom floor. Another clump of hair was found in the master bedroom.

DPD Officer C.N. Walker ("Officer Walker") was also dispatched to the apartment and, upon his arrival, he learned where defendant was located. Shortly thereafter, DPD Officer Charles Franklin and Officer Walker arrested defendant at the nearby home of Liddie Howard ("Howard"), a friend who was watching defendant's children at the time. When Officer Walker arrived at Howard's home, he did not observe any obvious injuries on defendant; but after arriving at police headquarters, defendant claimed "to hurt all over." Defendant had a scratch below her left eye, which was partially scabbed, and a lesion on the side of her lip.

On 18 April 2011, defendant was indicted for the first degree murder of Daye. From December 2011 to November 2013, defendant filed numerous pre-trial motions which included, *inter alia*, a motion *in limine* requesting that the trial court prohibit "the State from mentioning or eliciting from any witness any alleged acts of [defendant's] prior misconduct . . . or any reference to defendant's past criminal conviction[s]." At the pre-trial motion hearing, the State informed the court that it intended to offer evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence regarding an altercation that occurred between defendant and a man named Milton Walker ("Walker") in February 2010 ("the Walker incident"). Walker had known defendant since high school, and the two dated periodically before they began living together in a duplex ("the duplex") in early 2010. Defendant's trial counsel expressed concern about the Rule 404(b) evidence, and stated that, "at a minimum," the issue should be addressed at the appropriate time during trial. The trial court agreed, and asked that the prosecutor alert both the court and defendant prior to the introduction of any evidence sought to be admitted pursuant to Rule 404(b).

Defendant's trial proceeded in Durham County Superior Court on 12 November 2013 for the first degree murder charge and two charges of larceny of a chose in action. During trial, the State addressed the Rule 404(b) issue regarding the Walker incident to the trial court prior to calling any 404(b) witnesses. The trial court held a *voir dire* hearing on the evidence, during which the State summarized the facts of the Walker incident and sought to introduce the evidence pursuant to Rule 404(b) for the purposes of showing motive, opportunity, intent, absence of mistake or accident, plan, knowledge, and preparation. Defendant objected, but the trial court ultimately determined that a majority of the

Rule 404(b) evidence was admissible and probative of motive, intent, and plan. As a result, multiple witnesses, including Walker, were permitted to testify regarding defendant's involvement in the Walker incident.

The State also presented evidence from DPD Lieutenant Marianne Bond ("Bond"). Prior to his death, Daye spoke with Bond twice regarding the events that transpired between himself and defendant. Bond testified to Daye's statement of the events. After returning from the party, Daye and defendant argued in the apartment's parking lot until a DPD officer approached and told them to calm down. Inside the apartment, defendant called a male—whom Daye believed to be a police officer—to come pick her up and stated that she had a date. Defendant and Daye argued about defendant bringing other men to the apartment. Daye also demanded that defendant return his $700. After more arguing, defendant entered the bathroom and locked the door. Believing defendant had called an unidentified police officer to pick her up, Daye kicked in the bathroom door, grabbed defendant by the hair, and pulled her into the master bedroom. At some point, defendant retrieved multiple knives from the kitchen and "came at him three or four times." As Daye attempted to protect himself, he received a cut on his hand. Daye was heading to the front door trying to leave the apartment when defendant stabbed him in the hallway.

Daye also told Bond that he grabbed defendant during their argument, but he did not recall punching her that night, and insisted that he had never punched her. However, defendant hit Daye four to five times, including once in the eye. Daye denied ever holding or throwing any knives during the altercation. In response to Bond's question regarding multiple hair samples found in the apartment during the investigation, Daye admitted that he was probably the one that pulled out defendant's hair.

Defendant testified in her own defense, and gave a much different account. According to defendant, Daye had never before complained about defendant bringing other men to the apartment. However, on the night in question, Daye felt disrespected because defendant was talking to other men. During their argument, Daye suddenly hit defendant, causing her to fall down on the living room floor. The fighting spilled over to the master bedroom. At some point, Daye went to the kitchen, retrieved several knives, and began throwing them at defendant as she hid behind a mattress. After defendant locked herself in the bathroom, Daye kicked in the door and dragged her by the hair back to the master bedroom, where Daye pinned defendant against the floor, hitting and choking her. In response, defendant grabbed a knife off the floor, "poked" Daye in his side, exited the apartment, and ran to Howard's home.

On 22 November 2013, the jury returned a verdict finding defendant guilty of second degree murder and not guilty on the larceny charges. The trial court entered judgment and sentenced defendant to a minimum term of 170 months and a maximum term of 216 months to be served in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Analysis

[1] Defendant contends that the trial court committed reversible error by admitting evidence concerning the Walker incident pursuant to Rule 404(b). We disagree.

The challenged evidence showed the following: on 17 February 2010, defendant and Walker argued all day, and that evening, defendant told Walker she wanted to end their relationship. Defendant also told Walker she had someone coming over to the duplex the next day. Later, defendant told Walker she was going to take a picture of his penis and put it on the Internet. Defendant began tugging at Walker's pants. When Walker pushed defendant away, she began swinging her arms at him, prompting Walker to grab defendant's neck and restrain her until he thought she had calmed down. When defendant was released, she grabbed a chair and began hitting Walker with it. After Walker grabbed the chair and tossed it aside, defendant grabbed a step stool and began jabbing Walker until he gained control of the stool and threw it to the side. At that time, defendant told Walker she had "something better" and ran to the kitchen. When Walker heard the sound of silverware clinking, he ran out of the duplex and hid across the street.

DPD Officer Hillary Thompson ("Thompson") arrived at the duplex in response to a domestic violence call. Walker was not present when Thompson arrived, but his car was still parked in front of the duplex. DPD Corporal John Tyler ("Tyler") also responded to the call, and noticed that all four tires on Walker's vehicle had been slashed and the windshield was completely smashed. Defendant told both Thompson and Tyler that she did not need any assistance from law enforcement and refused to tell them anything about the events that resulted in the domestic violence call.

When Walker noticed the police presence, he returned to the duplex and was greeted outside by Tyler. Once defendant, Walker, Tyler, and Thompson were all inside the duplex, Walker began to describe the events to Tyler. At this time, Thompson was positioned in the hallway, and defendant was in the back of the duplex. As Walker was describing the events to Tyler, defendant ran from the back of the duplex, jumped

over Thompson's back, and said to Walker, "I'm going to stab you, mother fu****." Walker testified that defendant had a knife in her hand, but Thompson and Tyler both stated they did not see a knife.

Domestic Violence Investigator Leslie Bond ("Investigator Bond") later interviewed Walker and defendant separately. Investigator Bond observed Walker had scratches on his neck, back, and arms. She saw no visible injuries to defendant. During the interview, defendant was not initially forthcoming about damaging Walker's vehicle or threatening him, but eventually admitted that she damaged Walker's vehicle and told Walker that she would stab him if he came back into her house. Defendant also said that Walker had grabbed her around the neck and hit her, which caused her to scratch his arms.

In the instant case, defendant makes two related arguments. First, defendant argues that the prior acts detailed in the Walker incident testimony are not sufficiently similar to the altercation with Daye that led to the murder charge against her. According to defendant, the "two events were starkly different in their details and in their core nature." Second, defendant argues that the prior acts described by Walker and the State's other Rule 404(b) witnesses are too remote in time to be considered relevant.

"When the trial court has made findings of fact and conclusions of law to support its [Rule] 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Our appellate courts "review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *Id.* (italics added). Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C–1, Rule 404(b) (2013). But such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*

"Even if evidence is admissible according to Rule 404(b), it must also be scrutinized under Rule 403, which provides for the exclusion of otherwise admissible evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *State v. Lanier*, 165 N.C. App. 337, 344, 598 S.E.2d 596, 601 (2004) (quoting N.C. Gen. Stat. § 8C–1, Rule 403). "In each case, 'the burden is on the defendant to

show that there was no proper purpose for which the evidence could be admitted.' " *State v. Williams*, 156 N.C. App. 661, 664, 577 S.E.2d 143, 145 (2003) (quoting *State v. Willis*, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000)). "The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Hipps*, 348 N.C. 377, 405–06, 501 S.E.2d 625, 642 (1998).

Here, the trial court properly conducted a *voir dire* hearing to determine whether evidence of the Walker incident was of the type that is made admissible under Rule 404(b) and was relevant for a purpose other than propensity. *See State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986) (the trial judge must determine whether extrinsic conduct evidence is offered pursuant to Rule 404(b), is of a proper type, and is relevant for some purpose other than to show the defendant's "propensity for the type of conduct for which he is being tried"). Next, the court found that the events at issue, which occurred fourteen months apart, were temporally proximate. The court then found that the Walker incident and Daye's death were "substantially similar." Both incidents involved: (1) defendant and a male individual with whom she was romantically involved; (2) the "escalation of an argument that ended in the use of force between the participants"; (3) restraint of defendant by her male counterpart and defendant's subsequent release from that restraint; (4) the "escalation of violence and repeated restraint"; and (5) "statements made [by defendant] . . . regarding the use of a knife or stabbing." The court also found defendant's alleged attempt to assault Walker with a knife and the fact that Walker heard the clattering of silverware were substantially similar to this case.

As a result of these findings, the trial court ruled that evidence regarding certain portions of the Walker incident was both admissible and "particularly [probative] of motive, intent, and plan." However, certain portions of the Walker incident—specifically, the facts that clothing was set on fire and children were present in the apartment—were ruled inadmissible under Rules 403 and 404(b). The trial court then conducted the Rule 403 balancing test and concluded that the probative value of the admissible Walker incident evidence was not substantially outweighed by any unfair prejudice to defendant.

As explained in *State v. Coffey*, Rule 404(b) is

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to

> but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

> Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also "is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried."

State v. Bagley, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (citation omitted). For such evidence to be deemed relevant, it must have the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C–1, Rule 401 (2013).

Despite the inclusive nature of Rule 404(b), it is still "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). In other words, "the ultimate test of admissibility is whether the incidents are sufficiently similar to those in the case at bar and not so remote in time as to be more prejudicial than probative under . . . Rule 403[.]" *State v. Love*, 152 N.C. App. 608, 612, 568 S.E.2d 320, 323 (2002). Prior acts or crimes are sufficiently similar to the crime charged "if there are some unusual facts present in both" incidents, *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890 (1991) (citations omitted) (internal quotations omitted), that "go to a purpose other than propensity[.]" *Beckelheimer*, 366 N.C. at 132, 726 S.E.2d at 160. The similarities between the two situations need not "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593 (1988). Remoteness in time, "for purposes of [Rule] 404(b)[,] must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered." *Hipps*, 348 N.C. at 405, 501 S.E.2d at 642.

To support her claim that the prior acts described in the Walker incident testimony were not sufficiently similar for purposes of Rule 404(b), defendant relies on four sexual assault cases: *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983); *State v. White*, 135 N.C. App. 349, 520 S.E.2d 70 (1999); *State v. Webb*, 197 N.C. App. 619, 682 S.E.2d 393 (2009); *State v. Gray*, 210 N.C. App. 493, 709 S.E.2d 477 (2011). Arguing

by analogy, defendant states that although "courts in this State are most liberal in allowing prior [acts of] the defendant to be admitted in" sexual assault cases, "evidence of prior sexual misconduct [was] excluded as insufficiently similar to the charged offense in [*Moore*, *White*, *Webb*, and *Gray*.]" However, these cases are inapplicable to the situation we confront here.

To begin, the dispositive issue in *Moore*, *White*, *Webb*, and *Gray* was whether the similarities between the prior acts or crimes and the crimes charged were sufficient to provide a reasonable inference that the same person committed both. *Moore*, 309 N.C. at 106-08, 305 S.E.2d at 544-46; *White*, 135 N.C. App. at 353-54, 520 S.E.2d at 73-74; *Webb*, 197 N.C. App. at 623, 682 S.E.2d at 395-96; *Gray*, 210 N.C. App. at 512-13, 709 S.E.2d at 490-91. Here, there is no question that defendant was involved in both the Walker incident and the altercation that led to Daye's stabbing and eventual death. Furthermore, the analysis in *Moore*, *White*, *Webb*, and *Gray* hinged on each respective Court's decision that the differences in the incidents at issue were more significant than the similarities. For example, in *White*, this Court granted the defendant—who had been charged with first degree rape and non-felonious breaking or entering—a new trial because he was prejudiced when the trial court allowed the State to introduce Rule 404(b) evidence of his subsequent act of sexual misconduct that was not sufficiently similar to the crime charged. 135 N.C. App. at 353-54, 520 S.E.2d at 73. Although both incidents involved young female victims who were allegedly assaulted by the defendant in their own homes, these similarities were substantially outweighed by the differences between the crime charged and the Rule 404(b) evidence: the assaults occurred under different circumstances and at different times of day; one assault was perpetrated with the use of threats and a weapon while the other was not; and the victims reacted in very different ways. *Id.* at 353, 520 S.E.2d at 73. As a result, the Rule 404(b) evidence "tend[ed] only to show the propensity of the defendant to commit sexual acts against young female children, a purpose for which the evidence cannot be admitted." *Id.* at 354, 520 S.E.2d at 74.

In contrast to *Moore*, *White*, *Webb*, and *Gray*, we find strong similarities between the crime charged and the Walker incident described by the State's Rule 404(b) witnesses, especially in terms of the relationship between the parties involved, defendant's escalation of the violence in response to being restrained, and the general nature of both incidents. Specifically, as the trial court found, both incidents involved defendant and her current boyfriend, escalation of an argument that led to the use of force between the participants; defendant's further escalation

of the argument; and defendant's deliberate decision to obtain a knife from the kitchen.

Given these similarities, the Walker evidence was probative of defendant's motive, intent, and plan in the instant case. The Rule 404(b) evidence helped establish defendant's motive in stabbing Daye "as it . . . show[ed] how defendant acted after" the break-up and "what [s]he was motivated to do in attempting to effect a satisfactory resolution." *State v. Parker*, 113 N.C. App. 216, 224, 438 S.E.2d 745, 750 (1994). Indeed, this Court has explicitly noted that "[e]vidence of prior behavior following a rejection in a romantic relationship is admissible to prove motive[.]" *State v. Aldridge*, 139 N.C. App. 706, 714, 534 S.E.2d 629, 635 (2000) (citing *Parker*, 113 N.C. App. at 224, 438 S.E.2d at 750–51). *Parker* and *Aldridge* establish the general principle that prior instances demonstrating a defendant's violent response to the deterioration of a relationship are relevant for purposes other than propensity. This principle is especially applicable here, where defendant acted belligerently and violently toward Walker after their relationship collapsed. Moreover, the Walker incident was probative of defendant's intent to stab Daye because, in order to impose her will, defendant deliberately retrieved a knife for the announced purpose of committing a stabbing. Finally, because the features of both incidents were substantially similar, the Rule 404(b) evidence was admissible to show the existence of defendant's plan to stab Daye after becoming enraged during the course of their altercation. *See State v. Barfield*, 298 N.C. 306, 329, 259 S.E.2d 510, 529–30 (1979) ("Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part or toward which it is a step." Essentially, "a concurrence of common features" must be present in both instances.), *abrogated in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Consequently, the State's evidence supports the trial court's findings, and the findings support the court's conclusion on the similarity requirement.

[2] On the issue of temporal proximity, defendant argues that the Walker incident, as detailed in the challenged testimony, was too remote in time to be admissible under Rule 404(b), especially for the purpose of proving that defendant "had in her mind a . . . plan to engage in assaults with a knife."

"[R]emoteness in time generally affects only the weight to be given [Rule 404(b)] evidence, not its admissibility." *State v. Parker*, 354 N.C. 268, 287, 553 S.E.2d 885, 899 (2001) (citations omitted) (internal quotation marks omitted). Although "[r]emoteness in time between an uncharged

crime and a charged crime is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan[,]" it "is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident[.]" *Stager*, 329 N.C. at 307, 406 S.E.2d at 893.

In support of her contention that the Walker evidence was too remote in time to be relevant to the murder charge in this case, defendant cites *State v. Shane*, 304 N.C. 643, 655–56, 285 S.E.2d 813, 820–21 (1982) (holding that a seven-month gap between events that occurred at different places and involved different women was too remote and negated the plausibility of an ongoing and continuous plan) and *State v. Jones*, 322 N.C. 585, 590-91, 369 S.E.2d 822, 825 (1988) (holding that a seven-year gap between prior acts and the offenses charged rendered 404(b) evidence inadmissible). However, we need not discuss *Shane* and *Jones* in depth.

In *Shane*, our Supreme Court based its holding on significant dissimilarities between the prior act and the offense charged, concluding that the passage of time was sufficient to preclude the evidence at issue. 304 N.C. at 655-56, 285 S.E.2d at 820-21. As for *Jones*, the Court simply decided that, given the facts of the case, a seven-year differential "raise[d] serious concerns about the probative nature of [the Rule 404(b)] evidence." 322 N.C. at 589, 369 S.E.2d at 824. In the instant case, we have already held that the similarities between defendant's prior act and the offense charged were *substantial*. "[T]he more striking the similarities between the facts of the crime charged and the facts of the prior bad act, the longer evidence of the prior bad act remains relevant and potentially admissible for certain purposes." *Gray*, 210 N.C. App. at 507, 709 S.E.2d at 488. Furthermore, as noted above, "[r]emoteness for purposes of 404(b) must be considered in light of the specific facts of each case[.]" *Hipps*, 348 N.C. at 405, 501 S.E.2d at 642. On these facts, a fourteen-month gap between the incidents is not too remote. Significantly, our Supreme Court has repeatedly upheld the admission of Rule 404(b) evidence in cases where a significant lapse of years between incidents existed. *See, e.g.*, *Stager*, 329 N.C. at 307, 406 S.E.2d at 893 (holding that, where Rule 404(b) evidence was offered for purposes of intent, motive, plan, preparation, and absence of accident, "the death of the defendant's first husband ten years before the death of her second was not so remote as to have lost its probative value"); *State v. Carter*, 338 N.C. 569, 588–89, 451 S.E.2d 157, 167-68 (1994) (affirming admissibility of Rule 404(b) evidence of prior assault despite eight-year lapse between assaults); *State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) (concluding that

incidents as remote as twenty-seven years earlier were not too remote in time to prove a common scheme or plan); *State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (holding that a ten-year gap between instances of distinct and bizarre sexual misbehavior did not render them so remote as to make the evidence irrelevant or negate the existence of a common scheme or plan). Given the substantial similarities between the Walker incident and Daye's stabbing, the fourteen-month gap between the events "was not so significant as to render [defendant's] prior acts irrelevant . . . , and thus, temporal proximity of the acts was a question of evidentiary weight to be determined by the jury." *Beckelheimer*, 366 N.C. at 133, 726 S.E.2d at 160. Accordingly, the trial court did not err in ruling that the majority of the State's 404(b) evidence was relevant and admissible to show defendant's plan, intent, and motive to stab Daye.

[3] Having determined that the Rule 404(b) evidence was sufficiently similar and not too remote in time, we now review the trial court's 403 ruling for abuse of discretion. As this Court has recognized, "[e]vidence is not excluded under [Rule 403] simply because it is probative of the offering party's case and is prejudicial to the opposing party's case. Rather, the evidence must be *unfairly* prejudicial." *State v. Gabriel*, 207 N.C. App. 440, 452, 700 S.E.2d 127, 134 (2010) (citations omitted). "This determination is within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation omitted) (brackets and internal quotation marks omitted).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give . . . proper limiting instruction[s] to the jury." *Hipps*, 348 N.C. at 406, 501 S.E.2d at 642. Outside the presence of the jury, the trial court heard arguments from the attorneys regarding the Rule 404(b) evidence and ruled on its admissibility. The trial court also excluded portions of the Walker incident that did not share sufficient similarity to defendant's altercation with Daye. Significantly, the trial court gave numerous limiting instructions during the course of the Rule 404(b) testimony and one before its final charge to the jury. "The law presumes that the jury heeds limiting instructions that the trial [court] gives regarding the evidence." *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983). Given the significant points of commonality between the Rule 404(b) evidence and the offense charged, and the trial court's conscientious handling of the process, the trial court's Rule 403 determination was not "manifestly

unsupported by reason or . . . so arbitrary it could not have been the result of a reasoned decision." *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. Accordingly, we discern no abuse of discretion in the trial court's determination that the danger of unfair prejudice did not substantially outweigh the probative value of the Rule 404(b) evidence.

Nevertheless, defendant insists that the trial court's admission of the Rule 404(b) evidence constituted prejudicial error because the Walker incident "had no probative value beyond serving as evidence of [defendant's] bad character as a person who would stab a boyfriend for no good or justifiable reason."

Even if we assumed that the trial court erred in admitting the challenged evidence, defendant would bear the burden of showing that the error was prejudicial. *State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010). "A defendant is prejudiced by the trial court's evidentiary error where there is a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Miles*, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012) (quoting N.C. Gen. Stat. § 15A–1443(a)). We find no reasonable possibility that, in the absence of the admission of the Rule 404(b) evidence, the jury would have reached a different result.

To begin, our review of the record reveals that there was substantial evidence that defendant acted with the requisite malice to support a second degree murder verdict, particularly the fact that she used a five-inch knife blade to stab and kill Daye. *See State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983) ("Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. . . . Malice may be . . . found if there is an intentional taking of the life of another without just cause, excuse or justification.") (citations omitted); *State v. Cox*, 11 N.C. App. 377, 380, 181 S.E.2d 205, 207 (1971) (When used in an assault, "a knife with a three-inch blade constitutes a deadly weapon" as a matter of law); *State v. Posey*, ____ N.C. App. ____, ____, 757 S.E.2d 369, 374 (2014) ("[T]he intentional use of a deadly weapon proximately causing death gives rise to the *presumption* that (1) the killing was unlawful, and (2) the killing was done with *malice*.") (emphasis added) (citation omitted).

In addition, there was substantial evidence before the jury which belied defendant's claim of self-defense. For example, as the State points out, although defendant claimed she stabbed Daye in the master bedroom as he sat on top of her—hitting and choking her—Daye's

blood was not found in that location. Instead, his blood was found in the hallway, where Daye claimed that defendant stabbed him. Evidence that Daye suffered a black eye and defensive injuries during the altercation, while defendant suffered no significant injuries, certainly gave the jury reason to doubt defendant's testimony and accept Daye's version of events.

Finally, defendant's actions following the stabbing suggest that she had not killed in self-defense and indicate a desire to avoid responsibility and prosecution for her actions. After Daye left the apartment, stabbed and bleeding, defendant told a concerned neighbor that everything was fine. Instead of trying to render aid to Daye, defendant fled to Howard's apartment, where she called James Williams ("Williams"), a friend and detention officer. Despite being told by Williams to return to the apartment and call 911, defendant refused to comply with either command. Although defendant eventually dialed 911, she hung up and laid down on the floor. "Defendant's flight after [Daye's stabbing] is clear evidence from which the jury could reasonably infer that defendant knew that [s]he had not killed in self-defense, otherwise [s]he would have stayed and waited for the police to come, or [s]he would have called the police [her]self." *State v. Kirby*, 206 N.C. App. 446, 455, 697 S.E.2d 496, 502 (2010). Accordingly, there was sufficient evidence to establish the jury's verdict finding defendant guilty of second degree murder absent self-defense.

III. Conclusion

Because the Rule 404(b) evidence was sufficiently similar and temporally proximate to the crime charged, the trial court did not err in ruling that it was admissible. Nor did the trial court abuse its discretion in determining that the evidence's probative value was not substantially outweighed by the potential for unfair prejudice. Even if the trial court had erred in admitting the challenged evidence, the error would not have been prejudicial to defendant.

NO ERROR.

Chief Judge McGEE and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY OXENDINE, JR. & SAMUEL JERREN PEDRO

No. COA14-1236

Filed 7 July 2015

1. Native Americans—hunting license exemption—recognized tribe—tribal land

Defendant Oxendine did not qualify for an exemption to hunting license requirements where he did not show an identity card indicating membership in a recognized Native American tribe. Moreover he was hunting on private property, not tribal land.

2. Hunting and Fishing—hunting without a license—evidence sufficient

The evidence was sufficient to show that defendant Pedro was hunting doves without a license where Pedro was holding a shotgun while associating with a group of dove hunters, one of the hunters shot a dove in Pedro's presence, and, although defendant Pedro repeatedly asserted that he was exempt from the hunting license requirement, he did not deny that he was dove hunting.

Appeal by co-defendants from judgments entered 30 May 2014 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 21 April 2015.

Attorney General Roy Cooper, by Special Deputy Attorney Generals Mary L. Lucasse and Jennie Wilhelm Hauser, for the State.

Farber Law Firm, P.L.L.C., by Sarah Jessica Farber, for defendant-appellant Oxendine.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant Pedro.

BRYANT, Judge.

Where the evidence did not support a proposed jury instruction, the trial court did not err in refusing to give that jury instruction. Where the evidence, taken in the light most favorable to the State, was sufficient to show defendant's commission of an offense, the trial court

did not err in denying defendant's motion to dismiss for insufficiency of the evidence.

Defendant Billy Ray Oxendine, Jr., was issued two citations, 12 CRS 3688 and 12 CRS 3784, for "tak[ing] [birds] without first having procured a current and valid hunting license" on 1 and 3 September 2012. Co-defendant Samuel Jerren Pedro was issued a citation, 12 CRS 3782, for the same offense on 3 September 2012. The co-defendants were tried together at the 29 May 2014 session of Robeson County criminal court, the Honorable Robert F. Floyd, Jr., Judge presiding. At trial, the State's evidence tended to show the following.

On 1 September 2012, game warden Officer Raymond Harris was on patrol with several other officers when he came across a group of dove hunters. Oxendine was one of the hunters in the group. When Officer Harris asked to see Oxendine's hunting license, Oxendine became hostile and used profanity towards Officer Harris and the other officers. Oxendine stated to the officers that he did not need a hunting license and that the officers were "trampling on his rights." Officer Harris issued a citation, 12 CRS 3688, to Oxendine for hunting without a license.

Two days later, on 3 September 2012, game warden Officer Kyle Young received a call about hunting taking place on private property. When Officer Young and several other officers arrived at the property, they encountered "a large gathering of folks there who were dove hunting." Oxendine and Pedro were part of this group. When approached by Officer Young and asked for his hunting license, Oxendine became "verbally agitated." Both Oxendine and Pedro were "very adamant" that they were not required to have a hunting license. Officer Young issued citations to Oxendine and Pedro, 12 CRS 3784 and 12 CRS 3782, respectively, for hunting without a valid license.

On 8 October 2013, Oxendine made a pretrial motion to dismiss on grounds that the North Carolina Wildlife Commission could not issue a citation to him because he is a Native American and, as a result, he is exempt from the requirement of obtaining a hunting license. Oxendine filed an amended motion to dismiss on 23 October 2013, reasserting his allegation of exemption, and later arguing before the trial court that he was exempt from the requirement of having a hunting license because at the time he was cited by the game warden, "he was participating in a Native American hunt religious ceremony." Pedro filed a motion to dismiss on 6 January 2014, also asserting that because he is Native American he is exempt from the requirement of having a hunting license. Pedro filed a second motion to dismiss on 29 May 2014 on grounds that his

citation was unconstitutional. The trial court denied all motions to dismiss made by Oxendine and Pedro. Neither Oxendine nor Pedro offered any evidence at trial.

On 30 May 2014, a jury returned guilty verdicts against Oxendine and Pedro on all counts. The trial court sentenced Oxendine to fifteen days imprisonment for each count to be served consecutively, then suspended his sentence and ordered him to serve twelve months supervised probation for each count. The trial court sentenced Pedro to serve fifteen days imprisonment; this sentence was then suspended and Pedro ordered to serve twelve months supervised probation. Oxendine and Pedro each appeal.

On appeal, Oxendine contends (I) the trial court erred in refusing to give a requested jury instruction. In his appeal, Pedro argues that (II) the trial court erred in denying Pedro's motion to dismiss.

I.

Oxendine's Appeal

[1] In his sole issue on appeal, Oxendine argues that the trial court erred in refusing to give a requested jury instruction. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted).

> When reviewing the refusal of a trial court to give certain instructions requested by a party to the jury, this Court must decide whether the evidence presented at trial was sufficient to support a reasonable inference by the jury of the elements of the claim. If the instruction is supported by such evidence, the trial court's failure to give the instruction is reversible error.

Ellison v. Gambill Oil Co., 186 N.C. App. 167, 169, 650 S.E.2d 819, 821 (2007) (citations omitted), *aff'd per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

> A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and quotation omitted).

Oxendine argues that the trial court erred in refusing to give his requested jury instruction on legal justification. The instruction requested by Oxendine was as follows:

> The defendant has been charged with unlawfully and willfully committing a crime.
>
> For you to find that the defendant unlawfully and willfully committed an offense, the defendant must not have had a legal justification as to why he committed the offense.
>
> For the defendant to have unlawfully and willfully committed the offense of hunting [without] a license, you must consider if he was exempt from getting a license under the exempt[ion in N.C. Gen. Stat. §] 113-276.

The trial court denied Oxendine's request for the proposed jury instruction, stating that neither Oxendine nor Pedro had offered evidence of a legal justification, and that the court had already heard arguments about legal justification based on their motions to dismiss during the pretrial conference and denied them.

On appeal, Oxendine argues that the trial court erred in denying his request for the proposed jury instruction because there was sufficient evidence to show that Oxendine was exempt from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. Pursuant to N.C. Gen. Stat. § 113-276,

> [t]he licensing provisions of this Article do not apply to a member of an Indian tribe recognized under Chapter 71A of the General Statutes for purposes of hunting, trapping, or fishing on tribal land. A person taking advantage of this exemption shall possess and produce proper identification confirming the person's membership in a State-recognized tribe upon request by a wildlife enforcement

> officer. For purposes of this section, "tribal land" means only real property owned by an Indian tribe recognized under Chapter 71A of the General Statutes.

N.C.G.S. § 113-276(l1) (2013).

Although Oxendine argues that he is "an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation," Oxendine is not a member of a Native American tribe recognized by this State under Chapter 71A of our General Statutes. *See* N.C. Gen. Stat. §§ 71A-1, 3, 4, 5, 6, 7, 7.1, 7.2 (2013) (North Carolina recognizes the following Native American tribes: the Cherokee Indians of Robeson County; the Lumbee Tribe; the Waccamaw Siouan Tribe; the Haliwa-Saponi Indian Tribe; the Coharie Tribe; the Sappony; the Meherrin Tribe; and the Occaneechi Band of Saponi Nation). Officers Harris and Young both testified that Oxendine stated that he was exempt from the requirement of a hunting license and that the officers were "trampling on his rights"; however, Oxendine did not present either officer with an identification card showing membership in a recognized Native American tribe. *See id.* Further, Oxendine presented no evidence at trial to show that he was hunting on tribal land; rather, the evidence showed that Oxendine was hunting on private property (albeit with permission of the property owners). As such, the trial court did not err in refusing to give Oxendine's proposed jury instruction on legal justification, as the evidence presented showed that Oxendine did not qualify for an exemption to the requirement of a hunting license. Oxendine's argument is, accordingly, overruled.

II.

Pedro's Appeal

[2] In his sole issue on appeal, Pedro contends the trial court erred in denying his motion to dismiss. We disagree.

In reviewing a motion to dismiss, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citations omitted). In ruling on a motion to dismiss, the evidence is to be taken in the light most favorable to the State. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted).

Pedro was charged with a violation of N.C. Gen. Stat. § 113-270.1B(a) which states in pertinent part: "Except as otherwise specifically provided by law, no person may hunt, fish, trap, or participate in any other activity regulated by the Wildlife Resources Commission for which a

license is provided by law without having first procured a current and valid license authorizing the activity." N.C.G.S. § 113-270.1B(a) (2013). This offense, commonly referred to as hunting without a license, requires the State to prove that a defendant took wild birds without a valid license. *See State v. Sizemore*, 199 N.C. 687, 690, 155 S.E. 724, 725 (1930) ("No person shall at any time take any wild animals without first having procured a license."). Pursuant to our General Statutes, a dove is a type of wild bird. *See* N.C.G.S. §§ 113-129(11b)(b) ("Those migratory birds for which open seasons are prescribed . . . [include] Columbidae (wild doves)"; (15a) (defining "Wild Birds" as including "Migratory game birds[.]").

Pedro argues that the State's evidence was insufficient to show that Pedro "was preparing to immediately kill a dove." At trial, the State presented the testimony of Officer Young who described encountering Pedro amongst a group of dove hunters, one of whom, Oxendine, he observed shoot a dove. Officer Young stated that when he saw Pedro, Pedro was holding a shotgun; that Pedro was "very adamant and expressed to me that [he was] not required to have a hunting license. I continued to hear that over and over again." Officer Young determined, based on his experience as a game warden and the hunting operation he observed that day, that he saw Pedro "immediately preparatory, during, and subsequent to an attempt to take wild birds, to hunt wild birds, whether successful or not." *See* N.C. Gen. Stat. §§ 113-130(5a) (defining "To Hunt" as "To take wild animals or wild birds."), (7) (2013) (defining "To Take" as "All operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any . . . wildlife resources.").

Pedro also contends there was insufficient evidence to show he was immediately preparing to kill a dove because Officer Young did not testify as to whether Pedro's shotgun was loaded or whether there were "any dead doves in the vicinity of the large gathering of people[.]" This contention is without merit. Officer Young's testimony that Pedro was holding a shotgun while associating with a large group of dove hunters, and that one of the hunters, Oxendine, shot a dove in the presence of Pedro, was sufficient to show that Pedro was engaged in the act of dove hunting. We further note that although Officer Young testified that Pedro repeatedly asserted that he was exempt from the requirement of having a hunting license, at no point that day did Pedro deny that he was dove hunting. As such, the evidence, taken in the light most favorable to the State, was sufficient to show that Pedro was dove hunting without a

license. Therefore, the trial court did not err in denying Pedro's motion to dismiss. Pedro's argument is, therefore, overruled.

Accordingly, we find no error in the verdict and judgment of the trial court as to both Oxendine and Pedro.

NO ERROR.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA
v.
JAMES MARK PURCELL

No. COA14-1047

Filed 7 July 2015

1. Evidence—physician's testimony—general behavior of abused children

There was no plain error in a prosecution for sexual offenses with a child where the trial court admitted the testimony of a physician that the victim's delay in reporting anal penetration was consistent with the general behavior of children who have been abused in that manner. The physician was the medical director of a family practice program and a board-certified child abuse pediatrician who did not opine on the victim's credibility.

2. Sentencing—maximum too long—effective date of statute

The trial court erred in sentencing defendant for sexual offenses with a child by applying a statute enacted after defendant committed the crimes and calculating a maximum sentence that was too long.

Appeal by defendant from judgments entered on or about 5 June 2014 by Judge Mary Ann Tally in Superior Court, Hoke County. Heard in the Court of Appeals on 19 February 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Nancy A. Vecchia, for the State.

Marilyn G. Ozer, for defendant-appellant.

STROUD, Judge.

James Mark Purcell ("defendant") appeals from judgments entered on jury verdicts, in which the jury found him guilty of rape of a child, two counts of sexual offense with a child, and taking indecent liberties with a child. Defendant contends that (1) the trial court committed plain error in admitting expert opinion testimony and (2) the trial court erred in its sentencing determinations. We find no error in part, reverse in part, and remand.

I. Background

One afternoon in the summer of 2010, S.G.'s mother dropped off eleven-year-old S.G. and her siblings at S.G's grandmother's house.[1] While S.G.'s siblings watched television in her grandmother's bedroom, S.G. watched television in the living room. S.G.'s grandmother was asleep in the living room. Defendant, S.G.'s uncle, entered the living room and told S.G. to go into his bedroom, and she did. Defendant took off his clothes and told S.G. to take off her clothes and get on his bed. S.G. complied. Defendant then got on top of her and felt her chest, bottom, and vagina with his hands. Defendant performed cunnilingus, anal intercourse, and vaginal intercourse. S.G. was crying, but defendant covered her mouth with his hand.

S.G.'s cousin then came into the house and called for defendant. Defendant jumped off the bed, put on his clothes, and told S.G. to put on her clothes. Defendant and S.G.'s cousin spoke outside the house, and S.G. went back to the living room, still crying. S.G.'s grandmother was still asleep. Defendant walked back into the living room and attempted to make S.G. perform fellatio, but S.G. resisted. After S.G.'s grandmother made some movements in her sleep, defendant left S.G. and went back into his bedroom.

On 17 April 2013, S.G. began crying in class at school, so S.G.'s teacher sent her to the school guidance counselor and school social worker. S.G. reported some of defendant's sexual abuse to the guidance counselor and social worker but did not disclose anal penetration. The social worker reported her allegations to the Hoke County Department of Social Services. On 13 May 2013, Dr. Danielle Thomas-Taylor, the medical director of a family medicine program in Fayetteville and a board-certified child abuse pediatrician, interviewed S.G. and

1. We use the juvenile victim's initials to protect her identity.

performed a physical exam. During this interview, S.G. reported to Dr. Thomas-Taylor that defendant had performed anal intercourse, among other sexually abusive acts.

On or about 2 December 2013, a grand jury indicted defendant for rape of a child, sexual offense with a child based on anal intercourse, sexual offense with a child based on cunnilingus, and two counts of taking indecent liberties with a child. *See* N.C. Gen. Stat. §§ 14-27.2A, -27.4A, -202.1 (2009). On or about 4 June 2014, at the close of the State's evidence at trial, the trial court dismissed one count of taking indecent liberties with a child. On or about 5 June 2014, the jury found defendant guilty of the remaining charges. For the conviction of rape of a child, the trial court sentenced defendant to 483 to 640 months' imprisonment. For the conviction of sex offense with a child based on anal intercourse, the trial court sentenced defendant to 483 to 640 months' imprisonment and ordered that this sentence run consecutively to the sentence imposed for the conviction of rape of a child. The trial court consolidated the conviction of sex offense with a child based on cunnilingus and the conviction of taking indecent liberties with a child. For these convictions, the trial court sentenced defendant to 483 to 640 months' imprisonment and ordered that this sentence run concurrently with the sentence imposed for the conviction of sex offense with a child based on anal intercourse. Defendant gave notice of appeal in open court.

II. Admission of Expert Opinion Testimony

[1] Defendant contends that the trial court committed plain error in admitting Dr. Thomas-Taylor's testimony that S.G.'s delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner.[2] Defendant asserts that this testimony amounted to an opinion on S.G.'s credibility and thus was inadmissible.

A. Standard of Review

> For an appellate court to find plain error, it must first be convinced that, absent the error, the jury would have reached a different verdict. The defendant has the burden of showing that the error constituted plain error.

Thus, on plain error review, the defendant must first demonstrate that the trial court committed error, and

2. Defendant concedes that he failed to object to this testimony.

> next that absent the error, the jury probably would have reached a different result.

State v. Larkin, ___ N.C. App. ___, ____, 764 S.E.2d 681, 685 (2014) (citations and quotation marks omitted), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 841 (2015). "[A] trial court is afforded wide latitude in applying [North Carolina Rule of Evidence] 702 and will be reversed only for an abuse of discretion." *State v. Carpenter*, 147 N.C. App. 386, 393, 556 S.E.2d 316, 321 (2001) (brackets omitted), *appeal dismissed and disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002).

B. Analysis

> In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted). "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702 (2013). "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences. . . . . Where the expert testimony is based on a proper foundation, the fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *State v. Treadway*, 208 N.C. App. 286, 292-93, 702 S.E.2d 335, 342 (2010) (quotation marks and brackets omitted), *disc. review denied*, 365 N.C. 195, 710 S.E.2d 35 (2011).

> The nature of the sexual abuse of children . . . places lay jurors at a disadvantage. Common experience generally does not provide a background for understanding the special traits of these witnesses. Such an understanding is relevant as it would help the jury determine the credibility of a child who complains of sexual abuse. The young child . . . subjected to sexual abuse may be unaware or

> uncertain of the criminality of the abuser's conduct. Thus, the child may delay reporting the abuse. In addition the child may delay reporting the abuse because of confusion, guilt, fear or shame. The victim may also recant the story or . . . be unable to remember the chronology of the abuse or be unable to relate it consistently.

State v. Oliver, 85 N.C. App. 1, 11-12, 354 S.E.2d 527, 533-34, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 57, 64, *remanded pursuant to N.C. Gen. Stat. § 15A-1418(b)*, ___ N.C. ___, 358 S.E.2d 65 (1987). In *Oliver*, this Court held that an expert's opinion on the credibility of children *in general* who report sexual abuse was properly admissible under Rule 702, because the expert "was in a better position to have an opinion than the jury." *Id.* at 11-13, 354 S.E.2d at 533-34. Similarly, in *Carpenter*, an expert testified that "an abused child often delays disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser." 147 N.C. App. at 394, 556 S.E.2d at 321. This Court held that this testimony did not amount to an opinion on the victim's credibility and was admissible. *Id.*, 556 S.E.2d at 322.

Here, Dr. Thomas-Taylor gave the following testimony:

> [Prosecutor:] Would it surprise you to hear that [S.G.] had not disclosed anal penetration prior to meeting with you on May 13?
>
> [Dr. Thomas-Taylor:] No, it does not surprise me at all.
>
> [Prosecutor:] And why is that?
>
> [Dr. Thomas-Taylor:] Several reasons. One, oftentimes anal intercourse or assaults are the last thing that children will describe. It is sort of a socially—kind of considered a taboo or something odd, and so children don't often speak about it. Usually, the order of things that kids will disclose is vaginal penetration, because that's the way that people normally have sex, and kids think about it, then oral, and usually the one that they don't disclose as often is anal.

Dr. Thomas-Taylor did not opine on S.G.'s credibility; rather, she testified that S.G.'s delay in reporting anal penetration was not surprising given that children who have been sexually abused in that manner often delay in disclosing that particular abuse. Additionally, defendant does not contend that the State failed to lay a proper foundation for Dr. Thomas-Taylor's expert opinion, and we note that Dr. Thomas-Taylor testified that she is the medical director of a family medicine program

in Fayetteville and a board-certified child abuse pediatrician. The trial court thus did not abuse its discretion in admitting this testimony. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 ("[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith."); *Carpenter*, 147 N.C. App. at 394, 556 S.E.2d at 322; *Oliver*, 85 N.C. App. at 11-13, 354 S.E.2d at 533-34.

Defendant relies on *State v. Heath*, 316 N.C. 337, 341-43, 341 S.E.2d 565, 568-69 (1986). But *Heath* is distinguishable. There, an expert gave the following testimony:

> [Prosecutor:] . . . [D]o you have an opinion satisfactory to yourself as to whether or not [the victim] was suffering from any type of mental condition in early June of 1983, or a mental condition which could or might have caused her to *make up* a story about *the* sexual assault?
>
> . . . .
>
> [Expert:] There is nothing in the record or current behavior that indicates that she has a record of *lying*.

Id. at 340, 341 S.E.2d at 567 (emphasis added). The North Carolina Supreme Court held that the prosecutor's question was improper, because it was "designed to elicit an opinion of the witness as to whether [the victim] had invented a story, or lied, about defendant's alleged attack on her." *Id.* at 341, 341 S.E.2d at 568. The Court also held that the expert's response was inadmissible, because it was an impermissible opinion on the victim's credibility. *Id.* at 343, 341 S.E.2d at 569. In contrast, here, the prosecutor properly elicited Dr. Thomas-Taylor's opinion that S.G.'s delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. Unlike in *Heath*, the prosecutor did not elicit Dr. Thomas-Taylor's opinion on S.G.'s credibility. Accordingly, we hold that the trial court did not abuse its discretion in admitting this testimony, nor did it commit plain error. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789.

III. Sentencing

A. Standard of Review

[2] We review alleged violations of constitutional rights *de novo*. *State v. Ward*, ___ N.C. App. ___, ___, 742 S.E.2d 550, 552 (2013). "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), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 304 (2015).

B. Analysis

Defendant next contends that the trial court sentenced him under a statute enacted after his commission of the offenses, in contravention of article 1, section 10 of the U.S. Constitution and article i, section 16 of the North Carolina Constitution. *See* U.S. Const. art. I, § 10; N.C. Const. art. I, § 16. The State agrees with defendant. Although defendant failed to object to the trial court's sentencing determinations, we may review this issue pursuant to N.C. Gen. Stat. § 15A-1446(d)(18) (2013). *See State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010).

In the indictments, the grand jury alleged that defendant committed the offenses between 1 April 2010 and 19 August 2010. During this time period, N.C. Gen. Stat. § 15A-1340.17(e1) provided:

> Unless provided otherwise in a statute establishing a punishment for a specific crime, when the minimum sentence is 340 months or more, the corresponding maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus *nine* additional months.

N.C. Gen. Stat. § 15A-1340.17(e1) (2009) (emphasis added). But "Session Laws 2011-192, s. 2(e) through (g), effective December 1, 2011, and applicable to offenses committed on or after that date, . . . in subsection (e)(1), substituted '12 additional month[s]' for 'nine additional months' at the end." *See* N.C. Gen. Stat. § 15A-1340.17, Effect of Amendments (2011). Additionally, "Session Laws 2011-307, s. 1, effective December 1, 2011, and applicable to offenses committed on or after that date, added subsection (f)." *Id.* Subsection (f) provides:

> Unless provided otherwise in a statute establishing a punishment for a specific crime, for offenders sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes, the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus *60* additional months.

N.C. Gen. Stat. § 15A-1340.17(f) (2011) (emphasis added).

Here, the trial court found that defendant had a prior record level of VI. For the conviction of rape of a child, a B1 felony, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment. *See* N.C. Gen. Stat. § 14-27.2A. For the conviction of sex offense with a child based on anal intercourse, a B1 felony, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment and ordered that this sentence run consecutively to the sentence imposed for the conviction of rape of a child. *See id.* § 14-27.4A. The trial court consolidated the conviction of sex offense with a child based on cunnilingus, a B1 felony, and the conviction of taking indecent liberties with a child, a Class F felony. *See id.* §§ 14-27.4A, -202.1. For these convictions, the trial court sentenced defendant in the presumptive range to 483 to 640 months' imprisonment and ordered that this sentence run concurrently with the sentence imposed for the conviction of sex offense with a child based on anal intercourse. In total, the trial court sentenced defendant to 966 to 1,280 months' imprisonment.

Defendant does not contend that the trial court erred in sentencing him to a minimum term of imprisonment of 966 months; rather, he argues that the trial court erred in sentencing him to a maximum term of imprisonment of 1,280 months. The applicable version of N.C. Gen. Stat. § 15A-1340.17 provides that the trial court add nine months, not sixty months, to the 120% figure. N.C. Gen. Stat. § 15A-1340.17(e1) (2009). We calculate that the maximum term of imprisonment for each sentence should have been 589 months, rather than 640 months. *See id.* The trial court thus should have imposed a total sentence of 966 to 1,178 months' imprisonment. *See id.* Accordingly, we hold that the trial court erred in its sentencing determinations and remand this case to the trial court for resentencing.

IV. Conclusion

We hold that the trial court committed no error during the guilt-innocence phase of the trial. But we reverse the trial court's sentencing orders and remand this case to the trial court for resentencing.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED.

Judges DILLON and DAVIS concur.

STATE v. SULLIVAN

[242 N.C. App. 230 (2015)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
SHAWN DAVID SULLIVAN, DEFENDANT

No. COA14-1380

Filed 7 July 2015

1. Indictment and Information—facially invalid indictments—felonious sale/delivery of controlled substance—failure to name controlled substances in Schedule III

The trial court lacked jurisdiction on three charges of felonious sale/delivery of a controlled substance because the indictments were facially invalid as they did not name controlled substances listed in Schedule III of the North Carolina Controlled Substances Act. Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are substances that are included in Schedule III. Further, none of these substances are considered trade names for other substances included in Schedule III.

2. Indictment and Information—sale and/or delivery of drugs—identity of purchaser—no evidence of prejudice, fraud, or misrepresentation

The trial court did not err by denying defendant's motion to dismiss the sale and/or delivery charges in case numbers 10 CRS 60224, 10 CRS 60232, 10 CRS 60225, 10 CRS 60233, and 10 CRS 60234 based on his contention that there was a fatal variance between the indictments and the evidence produced during the State's case-in-chief including that there was no evidence that he sold or delivered a controlled substance to A. Simpson. Neither during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." There was no evidence of prejudice, fraud, or misrepresentation.

Appeal by defendant from judgments entered 15 January 2013 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 7 May 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott Stroud, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

ELMORE, Judge.

On 16 May 2011 and 25 June 2012, Shawn David Sullivan (defendant) was indicted on twenty-nine drug-related offenses allegedly involving steroids and human growth hormone. Defendant was tried on his not-guilty plea during the 7 January 2013 session of New Hanover County Superior Court. The jury found defendant guilty of ten of the offenses. Pertinent to this appeal, defendant was found guilty of selling and/or delivering Uni-Oxidrol, Uni-Oxidrol 50, and Sustanon.

Judge Hockenbury consolidated the convictions into two judgments, sentencing defendant to two consecutive terms of five to six months imprisonment, suspended for a period of eighteen months supervised probation. Defendant raises two issues on appeal. He first challenges three of his convictions on the basis that the indictments charging the offenses are facially invalid. We agree with defendant and vacate the requisite three convictions. Next, defendant argues that the evidence presented by the State was insufficient to support five of his convictions. We are not convinced, and accordingly we overrule defendant's second issue on appeal.

I. Background

The facts of this case are not in dispute. On 6 August 2010, Cedric Simpson was stopped for a traffic violation in New Hanover County by Sheriff's Deputy Anthony Bacon, who had information that Mr. Simpson trafficked in cocaine. A K-9 unit searched Mr. Simpson's vehicle during the stop. Steroids and prescription medication were recovered, but no cocaine was found in the vehicle.

Mr. Simpson informed law enforcement that he had purchased the steroids found in his vehicle from defendant. Mr. Simpson alleged that he and defendant had known each other for approximately fifteen years, and that they often went to the gym or movies together. Law enforcement arranged for Mr. Simpson to complete multiple controlled buys of controlled substances, primarily steroids, from defendant.

On 3 September 2010, Mr. Simpson allegedly purchased from defendant 118 pills of Uni-Oxidrol, which resulted in defendant being charged in 10 CRS 60225 for felonious possession with intent to sell/deliver Uni-Oxidrol and Uni-Oxidrol 50. Mr. Simpson also allegedly purchased a bottle of liquid testosterone, which resulted in defendant being charged in 10 CRS 60224 for felonious possession with intent to sell/deliver Testosterone Enanthate, and for intentionally maintaining a building for the purpose of selling the controlled substance(s) Uni-Oxidrol and Sustanon.

On 21 September 2010, Mr. Simpson allegedly purchased from defendant a bottle containing 50 pills of Uni-Oxidrol 50, and a bottle of liquid labeled "Sustanon 250." The pills became the basis for the two charges in 10 CRS 60233 for felonious possession with intent to sell/deliver Uni-Oxidrol. The liquid became the basis for the two charges in 10 CRS 60232 for felonious possession with intent to sell/deliver Sustanon, and for intentionally maintaining a building for the purpose of selling the controlled substance(s) Uni-Oxidrol and Sustanon.

On 29 September 2010, Mr. Simpson allegedly purchased from defendant three glass bottles of liquid labeled Trenbolone Acetate, which became the basis for the charges in 10 CRS 60234 for felonious possession with intent to sell/deliver Trenbolone Acetate, and for intentionally maintaining a building for the purpose of selling the controlled substance Trenbolone Acetate.

On 2 October 2010, the Sheriff's Department executed a search warrant on defendant's home and place of business. At defendant's home authorities found no controlled substances, but they found $120.00 of cash in a safe. The currency in the safe matched the "buy money" Mr. Simpson used to make the purchases from defendant during the controlled buys.

Defendant now appeals his convictions stemming from the alleged sale/transfer of the controlled substances named above.

II. Analysis

A. Sufficiency of the Indictments

[1] Defendant contends that the trial court lacked jurisdiction on three charges of felonious sale/delivery of a controlled substance because the indictments were facially invalid as they did not name controlled substances listed in Schedule III. We agree.

It is well settled that a felony conviction must be supported by a valid indictment which sets forth each essential element of the crime charged. *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996); *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). Identity of a controlled substance allegedly possessed constitutes such an essential element. *State v. Board*, 296 N.C. 652, 658-59, 252 S.E.2d 803, 807 (1979) (testimony that substance a special agent purchased was "MDA" was held insufficient evidence that defendant possessed and sold "3, 4–methylenedioxyamphetamine" as charged in bills of indictment). "An indictment is invalid where it fails to state some essential and necessary

element of the offense of which the defendant is found guilty." *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414 (2005) (citations and internal quotations omitted).

Here, the indictment in 10 CRS 60225 charged defendant with "unlawfully, willfully and feloniously [possessing] with the intent to manufacture, sell and/or deliver a controlled substance, to wit: **UNI-OXIDROL**, which is included in Schedule III of the North Carolina Controlled Substances Act" and also charged defendant with selling and/or delivering to "A. Simpson a controlled substance, to wit: **UNI-OXIDROL 50**, which is included in Schedule III of the North Carolina Controlled Substances Act."

The indictment in 10 CRS 60232 charged defendant with possession with intent to sell or deliver a controlled substance, "to wit: **SUSTANON**, which is included in Schedule III of the North Carolina Controlled Substances Act."

The indictment is 10 CRS 60233 charged defendant with possession with intent to sell or deliver a controlled substance, "to wit: **UNI-OXIDROL**, which is included in Schedule III of the North Carolina Controlled Substances Act."

Defendant contends that because neither Uni-Oxidrol, Uni-Oxidrol 50, nor Sustanon are substances that are included in Schedule III of the North Carolina Controlled Substances Act, the indictments charging the above crimes are fatally flawed and the convictions stemming therefrom must be vacated. Defendant's argument has merit.

In advancing his argument, defendant relies on this Court's opinions in *Ledwell*, 171 N.C. App. 328, 614 S.E.2d 412 (2005), *State v. Ahmadi–Turshizi*, 175 N.C. App. 783, 625 S.E.2d 604 (2006), and *State v. LePage*, 204 N.C. App. 37, 693 S.E.2d 157 (2010).

In *Ledwell*, the indictment charging the defendant alleged that the defendant "did possess Methylenedioxyamphetamine (MDA), a controlled substance included in Schedule I of the North Carolina Controlled Substances Act." *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414. However, this Court held that the indictment was facially invalid and vacated the defendant's conviction because "the substance listed in [the] Defendant's indictment does not appear in Schedule I of the North Carolina Controlled Substances Act." *Id.* at 333, 614 S.E.2d at 415.

Similarly, in *Ahmadi-Turshizi*, the defendant was charged with three offenses for the possession, sale, and delivery of

"methylenedioxymethamphetamine a controlled substance which is included in Schedule I of the North Carolina Controlled Substances Act." 175 N.C. App. at 785, 625 S.E.2d at 605. This Court noted that Schedule I outlined a long list of controlled substances by their specific chemical name, including the substance "3, 4—Methylenedioxymethamphetamine (MDMA)." *Id.* However, a substance simply called "methylenedioxymethamphetamine" was not listed. *Id.* Relying on *Ledwell*, this Court vacated the defendant's convictions on the same basis, concluding that the indictment charging the defendant was fatally flawed because the substance named in the indictment was not listed in Schedule I of our Controlled Substances Act. *Id. at 785-86, 625 S.E.2d at 605-06 (holding "when an indictment fails to list a controlled substance by its chemical name as it appears in Schedule I of North Carolina General Statutes, section 90-89, the indictment must fail").*

Finally, in *LePage*, the challenged indictments charged the defendant with certain crimes involving "BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" 204 N.C. App. at 54, 693 S.E.2d at 168. Because "BENZODIAZEPINES" was not listed among any of the sixty-seven substances listed in Schedule IV, and because there existed derivatives of the benzodiazepine category of drugs that were not listed under Schedule IV, the *LePage* Court vacated the defendant's convictions, holding: "We are bound by the principle established under *Ledwell* and *Ahmadi–Turshizi*, that when an indictment fails to list a controlled substance by its chemical name as it appears in [the relevant Schedule of the North Carolina Controlled Substances Act], the indictment must fail." *Id.* at 54, 693 S.E.2d at 168 (alteration in original).

Here, neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are substances that are included in Schedule III of the North Carolina Controlled Substances Act. Further, none of these substances are considered trade names for other substances included in Schedule III. As such, we note that the State is misguided in arguing that this case is analogous to *State v. Newton*, 21 N.C. App. 384, 386, 204 S.E.2d 724, 725 (1974) (holding that because the substance named in the defendant's indictment, Desoxyn, was a trade name for methamphetamine, which was the substance that the defendant was shown to have possessed and was likewise included in the Controlled Substances Act, there was no variance between the charge listed in the indictment and the proof).

This Court is similarly bound by the principles established under *Ledwell*, *Ahmadi-Turshizi*, and *LePage*. As a consequence, the

challenged indictments must fail as they are fatally flawed. We vacate defendant's convictions resulting from the charges alleged in 10 CRS 60225, 60232, and 60233.

B. Sufficiency of the Evidence

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the sale and/or delivery charges in case numbers 10 CRS 60224, 10 CRS 60232, 10 CRS 60225, 10 CRS 60233, and 10 CRS 60234 based on his contention that there was a fatal variance between the indictments and the evidence produced during the State's case-in-chief. Specifically, defendant argues that no evidence was supplied during the State's case-in-chief that defendant sold controlled substances to "A. Simpson." We disagree. In the first issue, we vacated the convictions for 10 CRS 60232, 60225, and 60233. Therefore, we need only address defendant's argument in regards to 10 CRS 60224 and 60234.

"Where a sale is prohibited, it is necessary for a conviction to allege in the bill of indictment the name of the person to whom the sale was made, or that his name is unknown, unless some statute eliminates that requirement." *State v. Johnson*, 202 N.C. App. 765, 767-68, 690 S.E.2d 707, 709 (2010). Additionally, "the proof must conform to the allegations and establish a sale to the named person or state that the purchaser was in fact unknown." *Id.* at 768, 690 S.E.2d at 709. The intended purpose of describing a person by his or her name is to identify the person. *Id.*

In general, "a person may be designated in a legal proceeding by the name by which the person is commonly known, even though it may not constitute the person's 'true name.' Moreover, it is not necessary that the person be known as well by the one name as by the other, and it is sufficient if the person is known by both names." *Id.* at 768, 690 S.E.2d at 709. "Where different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury." *Id.* at 768-69, 690 S.E.2d at 709.

Defendant notes that the indictments allege that defendant "did sell and/or deliver to *A. Simpson* a controlled substance. . . ." (emphasis added). However, during trial Mr. Simpson testified that he was named "Cedrick Simpson," not "A. Simpson." Because of this discrepancy, on appeal defendant contends that his convictions must be vacated because "there was no evidence that [defendant] sold or delivered a controlled substance to A. Simpson." We are not persuaded.

Here, the indictments name "A. Simpson" as the purchaser of the controlled substances, but Mr. Simpson testified that his name is "Cedric

Simpson." However, neither during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson's identity. The mere fact that the indictment named "A. Simpson" as the purchaser of the controlled substances is insufficient to require that defendant's convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation. *See id.* at 768, 690 S.E.2d at 709. Again, "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide." *Id.* at 768-69, 690 S.E.2d at 709; *see also State v. Walls*, 4 N.C. App. 661, 167 S.E.2d 547 (1969). Here, the question of the purchaser's identity was resolved by the jury. "The indictment and the evidence sufficiently established the identity of the purchaser to meet constitutional standards and requirements of proof." *Johnson*, 202 N.C. App. at 769, 690 S.E.2d at 709. Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss.

Vacated, in part; no error, in part; new sentencing hearing.

Judges GEER and DILLON concur.

CAROLINE ANNE THOMAS, Plaintiff
v.
KEVIN S. WILLIAMS, Defendant

No. COA15-37

Filed 7 July 2015

1. Domestic Violence—protective order—dating relationship—less than three weeks

In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by concluding that defendant and plaintiff had been in a "dating relationship" for purposes of North Carolina's Domestic Violence Act. Even though their relationship had lasted less than three weeks, the facts of this case satisfied the statutory definition.

2. Domestic Violence—protective order—fear of continued harassment

In its domestic violence protective order requiring that defendant have no contact with plaintiff and surrender his firearms for a year, the trial court did not err by finding that defendant placed plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." The evidence showed that plaintiff was afraid of defendant; defendant repeatedly contacted plaintiff over an extended period of time after she told him to stop; and defendant left plaintiff a threatening voice message after he was arrested.

Appeal by Defendant from order entered 4 August 2014 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 1 June 2015.

No brief filed for Plaintiff-Appellee.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for Defendant-Appellant.

McGEE, Chief Judge.

Kevin S. Williams ("Defendant") appeals from a domestic violence protective order ("DVPO") entered 4 August 2014. Defendant contends that the trial court erred by concluding (1) that Defendant and Caroline Anne Thomas ("Plaintiff") had a "dating relationship" and (2) that Defendant had committed acts of domestic violence against Plaintiff by repeatedly contacting Plaintiff after she ended their relationship, thereby placing Plaintiff in fear of continued harassment. We disagree.

I. Background

Plaintiff and Defendant met in early April 2014 on a greenway in Charlotte where Defendant regularly volunteered with the Charlotte-Mecklenburg Park and Recreation Department. Plaintiff and Defendant dated for less than three weeks. Plaintiff attempted to end her relationship with Defendant on 1 May 2014 and asked Defendant to stop contacting her. However, Defendant continued to contact Plaintiff via phone calls, voicemails, and text messages. In response, Plaintiff filed a police report with the Charlotte-Mecklenburg Police Department on 17 May 2014. Detective Melissa Wright ("Detective Wright") spoke to Defendant on 23 May 2014 and directed Defendant to stop contacting Plaintiff. Defendant, however, continued to contact Plaintiff.

Plaintiff filed a verified complaint and motion for a domestic violence protective order on 30 May 2014 ("Plaintiff's verified complaint"). Defendant was served with notice of a hearing on Plaintiff's verified complaint on 2 June 2014. Plaintiff's verified complaint recounted Defendant's repeated attempts to contact her and stated, in part, that Plaintiff ended their relationship because Defendant "said and did controlling things" and that Plaintiff was "afraid" of him. Detective Wright also obtained a warrant to arrest Defendant for stalking on or around 5 June 2014 and arrested Defendant. After Defendant was released from jail, he again contacted Plaintiff and, in a voicemail, reportedly stated: "[Y]ou put me through hell. Now it's your turn."

A hearing on Plaintiff's verified complaint was held on 4 August 2014. Plaintiff testified she ended her relationship with Defendant because she was "very afraid" of him and that Defendant had called her twelve times, left six voicemail messages, and texted her ten times between 1 May 2014 and the day of the hearing, with most of those contacts occurring in May 2014. Plaintiff further testified that Defendant's continued contacts had "severely affected [her] new job that [she had] just [taken] when all this started happening. [She] had to leave work several times. It[ ] [has] caused [her] a lot of emotional distress. [She has had] trouble sleeping. It [gave her] an upset stomach. [She also] purposely avoid[ed] the Greenway [now.]"

In a DVPO entered 4 August 2014, the trial court concluded that Plaintiff and Defendant had been in a "dating relationship" and found that, after Plaintiff tried to end the relationship, Defendant "continued to initiate contact by telephone and [text] message for no legitimate purpose except to torment Plaintiff." The trial court further found that Defendant's conduct had caused Plaintiff to "suffer[ ] substantial emotional distress in that she suffers [from] anxiety, sleeplessness[,] and has altered her daily living activities." The trial court concluded that Defendant had "committed acts of domestic violence against" Plaintiff in that he "placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." Defendant was ordered, *inter alia*, to have no contact with Plaintiff and to surrender his firearms for one year. Defendant appeals.

II. Standard of Review

When the trial court sits without a jury regarding a DVPO,

> the standard of review on appeal is whether there was competent evidence to support the trial court's findings

> of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citation omitted).

III. "Dating Relationship"

[1] Defendant challenges the applicability of North Carolina's Domestic Violence Act ("the Act") to the facts in the present case. *See generally* N.C. Gen. Stat. § 50B-1 *et seq.* (2013). Specifically, Defendant contends the trial court erred by concluding that he and Plaintiff were in a "dating relationship" for the purposes of the Act, primarily because their relationship lasted for less than three weeks. We disagree.

N.C.G.S. § 50B-1 limits the definition of "domestic violence[,]" in relevant part, to the commission of certain acts "by a person with whom the aggrieved party has or has had a personal relationship[.]"

> For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:
>
> . . .
>
> (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

N.C.G.S. § 50B-1(b). N.C.G.S. § 50B-1(b)(6) has rarely been interpreted by our appellate Courts. However, "[i]n interpreting a statute, we first look to the plain meaning of the statute. Where the language of a statute is clear, the courts must give the statute its plain meaning[.]" *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *In re N.T.*,

214 N.C. App. 136, 141, 715 S.E.2d 183, 186 (2011) (citations and quotation marks omitted).

We first begin by examining what a "dating relationship" is not. Specifically, under N.C.G.S. § 50B-1(b)(6), a "casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." The term "acquaintance" means "a relationship less intimate than friendship." Webster's II New College Dictionary 10 (3d ed. 2005). The term "fraternize" means to "associate with others in a congenial or brotherly way." *Id.* at 453. Read together – and in conjunction with the modifiers "*casual* acquaintance" and "*ordinary* fraternization" – this language appears to expressly exclude only the least intimate of personal relationships from the definition of "dating relationship" in N.C.G.S. § 50B-1(b)(6). (emphasis added).

However, N.C.G.S. § 50B-1(b)(6) also provides that a "dating relationship" is one in which the parties are "*romantically* involved *over time* and on a *continuous basis* during the course of the relationship." (emphasis added). Provided that a relationship is not a "casual acquaintance" or results merely from "ordinary fraternization[,]" and provided that this relationship is "romantic" in nature "on a continuous basis" and for a sufficient period of time, then it would appear to constitute a "dating relationship" under N.C.G.S. § 50B-1(b)(6). The primary question this Court must resolve is how long a "continuous" "romantic" relationship must exist in order for it to exist "over time[.]"

As a preliminary matter, we do not believe that the term "over time" is unambiguous. Indeed, this Court has used "over time" to describe everything from the span of minutes or hours, *see State v. Dahlquist*, __ N.C. App. __, __, 752 S.E.2d 665, 668 (2013), *disc. review denied*, 367 N.C. 331, 755 S.E.2d 614 (2014), to months or years, *see In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 395 (2005). "[W]here the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr.*, 350 N.C. at 45, 510 S.E.2d at 163. If the statute also is "remedial" in nature, the "statute must be *construed broadly* in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained," *O & M Indus. v. Smith Eng'r Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (emphasis added) (citation and quotation marks omitted), as well as to "bring[ ] within it all cases fairly falling within its intended scope." *Burgess v. Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979).

"A remedial statute . . . is for the purpose of adjusting the rights of the parties as between themselves in respect to the wrong alleged."

Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 546, 608 S.E.2d 124, 127 (2005) (citation and quotation marks omitted). N.C. Gen. Stat. § 50B-3 (2013) defines the kinds of relief available to aggrieved parties under the Act. This section provides that "[i]f the [trial] court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence" and it authorizes a litany of enumerated forms of relief in order to effectuate that end. *See id.* In essence, N.C.G.S. § 50B-3 "requires the state to engage in prompt *remedial* action adverse to an individual['s] [property or liberty] interest[s]" in order to further "the legitimate state interest in immediately and effectively protecting victims of domestic violence[.]" *Cf. State v. Poole*, __ N.C. App. __, __, 745 S.E.2d 26, 37, *disc. review denied*, 367 N.C. 255, 749 S.E.2d 885 (2013) (emphasis added) (citation and quotation marks omitted) (discussing *ex parte* protective orders under N.C. Gen. Stat. §§ 50B-2(c) and 50B-3.1 (2013)). Moreover, the term "over time" in N.C.G.S. § 50B-1(b)(6) is used to define the General Assembly's "intended scope[,]" *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251, of who may obtain relief under N.C.G.S. § 50B-3. Therefore, to the extent that the term "over time" in N.C.G.S. § 50B-1(b)(6) is ambiguous, it will be "construed broadly" by this Court. *See O & M Indus.*, 360 N.C. at 268, 624 S.E.2d at 348; *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251.

As an additional matter of statutory construction, we also note that "the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." *Burgess*, 298 N.C. at 524, 259 S.E.2d at 251. Given that the last sentence in N.C.G.S. § 50B-1(b)(6), regarding "casual acquaintance[s]" and "ordinary fraternization[,]" appears to expressly exclude from the definition of "dating relationship" only the least intimate of personal relationships, we do not believe that the term "over time" – construed broadly – categorically precludes a short-term romantic relationship, such as the one in the present case, from *ever* being considered a "dating relationship" for the purpose of N.C.G.S. § 50B-1(b)(6). Instead, we agree with courts in other jurisdictions that the question of what constitutes the "minimum conduct to establish a dating relationship . . . is necessarily fact sensitive and thus warrants a 'factor approach' rather than a 'definitional approach[.]' "[1] *Andrews v. Rutherford*, 832 A.2d 379, 382–84, 387

1. For similar reasons, to the extent that there may be ambiguities in determining whether a relationship was sufficiently "romantic" in nature or "continuous" for the purposes of N.C.G.S § 50B-1(b)(6), we believe these ambiguities are also appropriately addressed through a factor approach.

(Ch. Div. 2003) (noting that Vermont, Massachusetts, and Washington also use a factor approach); *accord Brand v. State*, 960 So. 2d 748, 750–52 (Ala. Crim. App. 2006) (adopting the factor approach used in *Andrews*).

The court in *Andrews* provided six non-exhaustive factors that courts should consider when determining if a "dating relationship" existed – factors we believe are informative in the present case:

1. Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?

2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?

3. What were the nature and frequency of the parties' interactions?

4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?

5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?

6. Are there any other reasons unique to the case that support or detract from a finding that a "dating relationship" exists?

Andrews, 832 A.2d at 383–84.

In the present case, under the first factor in *Andrews*, the uncontested evidence shows that Plaintiff and Defendant dated each other for less than three weeks, which appears to exceed the "minimal social interpersonal bonding" of casual acquaintances or of contacts through ordinary fraternization. Under the second factor, Plaintiff testified that she ended her relationship with Defendant after less than three weeks because she was "very afraid" of Defendant and instructed Defendant to never contact her again, at which point Defendant began contacting Plaintiff repeatedly and over a prolonged period of time. There is little evidence in the record regarding the third, fourth, and fifth factors, but we do not believe that this is necessarily dispositive. As for the sixth factor, we find it notable that Defendant felt strongly enough about his relationship with Plaintiff to extend their two-to-three-week-long relationship into essentially a two-to-three-month-long breakup by continuing to contact Plaintiff in direct contravention of Plaintiff's

and Detective Wright's demands that he cease.[2] After reviewing these factors, we believe there was sufficient competent evidence to establish that the relationship between Plaintiff and Defendant fit within the General Assembly's intended definition of "dating relationship" and we find no error by the trial court.

IV. Fear of Continued Harassment

[2] Defendant contends there was insufficient evidence for the trial court to find that Defendant "placed [Plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." *See* N.C. Gen. Stat. § 50B-1(a)(2) (2013). Specifically, Defendant argues that, "[e]xcept for one voicemail that Defendant left after he was arrested, Plaintiff failed to present evidence as to the nature of [Defendant's] voicemails or texts, thereby failing to show Defendant's intent was to harass Plaintiff."

As a preliminary matter, "[t]he plain language of [N.C.G.S §] 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred." *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999). Therefore, N.C.G.S. § 50B-1 does not require Plaintiff to establish that Defendant "intended" to do anything. Instead,

> [d]omestic violence means the commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . . :
>
> . . .
>
> (2) Placing the aggrieved party . . . in fear of . . . continued harassment, *as defined in G.S. 14-277.3A*, that rises to such a level as to inflict substantial emotional distress[.]

N.C.G.S § 50B-1(a) (emphasis added). N.C. Gen. Stat. § 14-277.3A (2013) provides that "harassment" is

> [k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or

2. Defendant even suggests in his brief before this Court that these repeated, unwelcome attempts to contact Plaintiff were done "with the hopes of continuing the [parties'] 'relationship.' "

> voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

The evidence presented at the hearing tended to show that (1) Plaintiff and Defendant entered into a romantic relationship; (2) within several weeks, Plaintiff ended the relationship, reportedly because she was "very afraid" of Defendant, and she expressly instructed Defendant to not contact her again; (3) Defendant nevertheless proceeded to contact Plaintiff repeatedly and over a prolonged period of time, even after Plaintiff filed a domestic violence complaint against him and Detective Wright directed him to stop contacting Plaintiff; (4) after Defendant was arrested for continuing to contact Plaintiff, he left a voicemail on Plaintiff's phone and stated: "[Y]ou put me through hell. Now it's your turn[;]" and (5) Plaintiff consequently suffered from anxiety and sleeplessness and altered her daily living activities. Although Plaintiff testified only about the specific contents of one voicemail during the hearing – which Defendant acknowledges was "hostile" in nature – when combined with the facts described above, there was sufficient competent evidence for the trial court to find that Defendant placed Plaintiff in fear of continued harassment and caused her substantial emotional distress, and this finding supports the trial court's ultimate conclusion that Defendant committed acts of domestic violence against Plaintiff. *See* N.C.G.S. § 50B-1(a)(2). Defendant's argument is without merit.

AFFIRMED.

Judges GEER and TYSON concur.

UNITED COMMUNITY BANK (GEORGIA), PLAINTIFF
v.
THOMAS L. WOLFE AND BARBARA J . WOLFE, TRUSTEES OF THE THOMAS L. WOLFE AND BARBARA J. WOLFE IRREVOCABLE TRUST, THOMAS L. WOLFE, INDIVIDUALLY AND BARBARA J. WOLFE, INDIVIDUALLY, DEFENDANTS

No. COA14-1309

Filed 7 July 2015

Mortgages and Deeds of Trust—foreclosure—deficiency—value of property

Summary judgment for the bank was inappropriate in an action to recover the deficiency on a mortgage after a foreclosure at which the bank bought the property and defendants claimed the relief offered in N.C.G.S. § 45-21.36. A debtor who asserts the statutory defense under that statute bears the burden of forecasting evidence to show that there is a genuine issue of fact about the value of the property. Here, defendants relied on their own joint affidavit; the owner's opinion of value was competent to prove the property's value in North Carolina.

Appeal by Defendants from order entered 30 June 2014 by Judge Marvin P. Pope, Jr., in Transylvania County Superior Court. Heard in the Court of Appeals 7 April 2015.

Van Winkle, Buck, Wall, Starnes, and Davis, P.A., by Esther E. Manheimer and Lynn D. Moffa, for the Plaintiff-Appellee.

Donald H. Barton, P.C., by Donald H. Barton, for the Defendants-Appellants.

DILLON, Judge.

Thomas L. Wolfe and Barbara L. Wolfe ("Defendants") appeal from the trial court's order granting summary judgment in favor of United Community Bank (Georgia) (the "Bank"). For the following reasons, we reverse and remand.

I. Background

In 2008, the Bank loaned Defendants $350,000.00 to purchase certain real property and secured the loan with a deed of trust on said property.

Sometime later, Defendants defaulted on the loan. The Bank foreclosed on the deed of trust, and the foreclosure sale was held in August of 2013. The Bank submitted the high bid of $275,000.00 at the foreclosure sale and, as a result, was subsequently deeded the property. The net proceeds realized from the foreclosure sale ($275,000.00 minus expenses) were not adequate to satisfy the amount outstanding on the note (over $325,000.00), resulting in a deficiency of over $50,000.00.

In November of 2013, the Bank brought this action for the deficiency, and for attorneys' fees, costs, and interest. The Bank moved for summary judgment, which was allowed by the trial court following a hearing on the matter. Specifically, the trial court awarded $57,737.74 representing the deficiency, interest from the date of the judgment, attorneys' fees in the amount of $8,660.66, and the costs of the action. Defendants entered notice of appeal.

II. Analysis

This action involves the application of N.C. Gen. Stat. § 45-21.36, which provides certain obligors a defense or offset brought by their lender to recover the deficiency following a foreclosure sale. Typically, following a foreclosure sale, the amount of the debt is deemed reduced by the amount of the net proceeds realized from said sale, *see* N.C. Gen. Stat. § 45-21.31(a)(4) (2013), and the obligors are then only liable for the remaining debt, *i.e.*, the deficiency. However, this general rule is abrogated by N.C. Gen. Stat. § 45-21.36 in situations where it is the foreclosing creditor (which in this case is the Bank), and not some third party, who is the high bidder at the foreclosure sale. *Branch Banking and Trust Co. v. Smith*, ___ N.C. App. ___, ___, 769 S.E.2d 638, 640 (2015). Specifically, N.C. Gen. Stat. § 45-21.36 provides two alternate forms of defensive relief in deficiency actions brought by the lender who was also the high bidder at foreclosure whereby the liability of certain obligors for the deficiency may be eliminated or reduced: First, the liability of certain obligors for the deficiency may be eliminated entirely where it is shown "that the collateral was [actually] fairly worth the amount of the entire debt[,]" notwithstanding that the creditor's successful bid at foreclosure was less. *Id.* Second (and alternatively), though the value of the collateral may not have been as high as the amount of the debt owed, the liability of certain obligors for the deficiency may still be reduced "by way of offset" where it is shown that the creditor's winning foreclosure bid was "substantially less" than the collateral's true value.[1] *Id.*

1. By way of illustration, if a lender forecloses on collateral securing a $1 million loan and the lender purchases the collateral at the sale for $600,000, the lender would

In the present case, the trial court granted summary judgment for the Bank, effectively concluding that Defendants failed to meet their burden of demonstrating the existence of a material fact as to their defense under N.C. Gen. Stat. § 45-21.36. Defendants argue on appeal that they did meet their burden; and, therefore, summary judgment was inappropriate. We agree.

We review a trial court's order granting summary judgment *de novo*. *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2014) (emphasis added).

Where a debtor asserts the statutory defense under N.C. Gen. Stat. § 45-21.36 by contending *either* that the property was worth the amount of the outstanding debt or the amount of the Bank's bid was "substantially less" than the property's true value, the collateral's true value is generally a *material* fact. *See Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 763, 394 S.E.2d 294, 296 (1990); N.C. Gen. § 45-21.36 (2013).

The debtor bears the burden at summary judgment to forecast evidence to show that there is a *genuine* issue regarding this material fact. *See Lexington State Bank v. Miller*, 137 N.C. App. 748, 751-52, 529 S.E.2d 454, 455-56 (2000).

Our Supreme Court has held that an issue is *genuine* where it "is one that can be maintained by substantial evidence[,]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000), and has defined "substantial evidence" as "relevant evidence which a reasonable mind . . . could accept as adequate to support a conclusion[,]" *In re Gordon*, 352 N.C. 349, 352, 531 S.E.2d 795, 797 (2000). Where Defendants rely on an affidavit to

---

normally have a valid deficiency claim for $400,000 against the obligors. However, the obligors to which N.C. Gen. Stat. § 45-21.36 applies could "defeat" the claim by way of a "defense" by showing that the collateral was worth at least $1 million (the full loan amount). Alternatively, those obligors could "reduce" their liability by way of an "offset" by showing that the $600,000 bid was "substantially less" than the actual value of the collateral. For example, if the collateral was shown to be worth $850,000 and if $600,000 was determined to be "substantially less" than $850,000, then those obligors' liability for the deficiency would be only $150,000, rather than $400,000.00.

satisfy this burden, Rule 56 of our Rules of Civil Procedure requires that the affidavit "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2014).

In the present case, Defendants relied on their own joint affidavit, stating that it was "made on [Defendants'] personal knowledge" and that Defendants "verily believe[] that the [property] was at the time of the [foreclosure] sale fairly worth the amount of the debt it secured." Based on holdings of our Supreme Court, we are compelled to conclude that Defendants, through their affidavit, met their burden of demonstrating a *genuine* issue of fact that their property was "fairly worth" the amount of their debt.

Specifically, where the value of real property is a factual issue in a case, our Supreme Court has repeatedly held that the owner's opinion of value is competent to prove the property's value. *See*, *e.g.*, *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006) (recognizing that "[i]n most instances, landowners seek to prove fair market value through the testimony of the owners themselves and that of appraisers offered as expert witnesses"). Furthermore, while the proponent of opinion evidence generally has the burden of laying a foundation as to the basis of the opinion being offered, our Supreme Court has repeatedly held that the owner of real estate is *presumed* to be competent to give his opinion as to its value, expressly *rejecting* that "the owner, just as any other witness, must establish his qualifications before expressing his opinion of [] value[.]" *North Carolina State Highway Comm'n v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974) (holding that the owner "is deemed . . . to have a reasonably good idea of what [his property] is worth"). As Justice (later Chief Justice) Susie Sharp explained in *Helderman*:

> Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. . . . The weight of his testimony is for the jury[.]

Id. See also Harrelson v. Gooden, 229 N.C. 654, 656-57, 50 S.E.2d 901, 903 (1948); *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 341-42, 315 S.E.2d 311, 313 (1984); *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 542 (4th Cir. 2007) (recognizing that "[c]ourts

indulge a common-law presumption that a property owner is competent to testify on the value of his own property").[2]

In the present case, we are required to regard Defendants' affidavit indulgently. *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998) (directing that "the evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party to benefit from summary judgment must be carefully scrutinized"). Based on a fair reading of Defendants' affidavit, there was evidence at summary judgment that Defendants had personal knowledge as to the amount they owed on their loan at the time of the foreclosure sale (an amount which was not in dispute) *and* that based on their personal knowledge about their property, it was their opinion that the property was worth the amount they owed on the loan. There is nothing in their affidavit or otherwise which affirmatively shows that Defendants did not know the market value of their property. Therefore, we must conclude that Defendants' opinion that their property was worth the amount of the debt is substantial evidence from which a jury could conclude that Defendants' property, indeed, was worth the amount that was owed, a finding which would eliminate Defendants' liability for the deficiency pursuant to N.C. Gen. Stat. § 45-21.36. Accordingly, Defendants have met their burden of creating a *genuine* issue of fact that their property was "fairly worth the amount of the debt[,]" and summary judgment was improper. *See United Carolina Bank v. Tucker*, 99 N.C. App. 95, 101, 392 S.E.2d 410, 413 (1990) (reversing summary judgment for the lender, holding that the debtor had created a genuine issue of fact regarding his defense under N.C. Gen. Stat. § 45-21.36 by producing a single affidavit from a competent witness stating his opinion as to the value of the property, which was more than the amount of the debt).

The Bank cites *Lexington State Bank*, *supra*, in support of its position that summary judgment was proper in this case. However, *Lexington State Bank* is distinguishable from the present case. In *Lexington State Bank*, we held that the debtor claiming that there is a genuine issue of fact that the amount bid by the lender at foreclosure was "substantially less" than the true value of the property fails to meet his burden at summary judgment where the affidavit he relies upon merely states that the property was worth "substantially more" than the amount paid by the lender at foreclosure. 137 N.C. App. at 753-54, 529 S.E.2d at 457.

---

2. Note that an owner's opinion is not competent where it is shown that the owner's opinion is not really his own but is based entirely on the opinion of others. *See Scott v. Smit*h, 21 N.C. App. 520, 522, 204 S.E.2d 917, 919 (1974).

Specifically, we held that the affidavit failed to "set forth [any] *specific facts* with respect to [the property's value.]" *Id.* at 753, 529 S.E.2d at 457 (emphasis added).

However, unlike in *Lexington State Bank*, Defendants here are not contending that the property was worth "substantially more" than the amount bid by the Bank, but rather that the property was worth a specific amount, the amount of their debt. Further, unlike in *Lexington State Bank*, Defendants here have stated in their affidavit "specific facts" regarding the value of their property; to wit, a competent opinion that the property was worth a certain dollar amount. We recognize that the better practice would have been for Defendants' affidavit to state an opinion of value *in the form of a specific dollar amount or minimum dollar amount*, whereas here Defendants merely state that the property was worth "the amount of the debt." However, Defendants' statement is sufficiently equivalent to stating a specific dollar amount since the "amount of the debt" at the time of the foreclosure was not in dispute, Defendants essentially state that they have personal knowledge of the amount of the loan, and there is nothing to indicate that Defendants – as the borrowers on the loan – did not know the amount they owed.

III. Conclusion

Defendants, by way of defense pursuant to N.C. Gen. Stat. § 45-21.36, contend that their property was worth the amount of the debt they owed the Bank at the time of the foreclosure. The Bank put forth strong evidence to suggest otherwise. For instance, the Bank's appraiser valued the property at the Bank's foreclosure bid (far below the debt amount) and the Bank ultimately sold the property for far less than its bid. However, Defendants put forth evidence regarding the value of the property which is at odds with the Bank's evidence. It certainly could be argued that Defendants' evidence is much weaker – for example, there is no indication that Defendants are licensed appraisers, and they fail to lay any foundation in their affidavit to support their opinion of value. However, the jurisprudence of our Supreme Court compels us to conclude that Defendants' affidavit constitutes substantial evidence on the issue, and it is not for the courts to weigh the evidence. Therefore, summary judgment was inappropriate. Accordingly, we reverse the decision of the trial court and remand the matter for further proceedings.

REVERSED AND REMANDED.

Judges ELMORE and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JULY 2015)

BRANCH BANKING & TR. CO. v. SIMPSON No. 14-1160	Forsyth (12CVD3462)	Affirmed
BROCK v. JOHNSON BREEDERS, INC. No. 14-914	Duplin (12CVS818)	Affirmed
BROWNSTEAD v. BROWNSTEAD No. 14-1316	Mecklenburg (07CVD6452)	Affirmed
BYRD v. WATSON No. 14-1137	Durham (12CVD5695)	Reversed and Remanded
GARRETT v. BURRIS No. 14-1257	Mecklenburg (13CVS12992)	Affirmed
HANCE v. FIRST CITIZENS BANK & TR. CO. No. 14-807	Union (12CVS2200) (12CVS2200)	Affirmed
IN RE D.A.J. No. 15-41	Wake (12JT595) (13JT12)	Affirmed
IN RE G.B. No. 14-1207	Guilford (14JA142-143)	Remanded for further proceedings.
IN RE GUTOWSKI No. 14-881	Union (12SP174)	Dismissed. Motion to Remand Denied.
IN RE I.E.H. No. 15-45	Forsyth (14JB16)	Affirmed
IN RE J.G.R. No. 15-56	Wilkes (12JT50-52)	Affirmed
IN RE J.J. No. 15-143	Robeson (02JT185)	Affirmed
IN RE N.T. No. 14-1292	Forsyth (01JT56) (08JT29-30)	Affirmed
IN RE S.D. No. 14-1363	Cumberland (13JA80) (13JA81)	Affirmed

IN RE T.F.L. No. 15-114	Wilkes (12JT154-156)	Affirmed
KELLY v. RAY OF LIGHT HOMES, LLC No. 14-1029	N.C. Industrial Commission (W85477)	Affirmed in part, reversed in part.
KOHN v. FIRSTHEALTH OF THE CAROLINAS, INC. No. 14-1210	Moore (13CVS1147)	Affirmed
OVERTON v. OVERTON No. 14-1269	Pasquotank (12CVD447)	Affirmed
PORTER v. BEARCAT, INC. No. 15-128	N.C. Industrial Commission (W46200)	Affirmed
RICHMOND v. CITY OF ASHEVILLE No. 15-174	Buncombe (13CVS1358)	Affirmed
SHALLOTTE PARTNERS, LLC v. BERKADIA COM. MORTG., LLC No. 15-89	Mecklenburg (14CVS3030)	REVERSED in part; DISMISSED in part
SIMON v. MOORE No. 15-157	New Hanover (13CVS887)	Affirmed
SNOKE v. SNOKE No. 14-1098	Forsyth (10CVD2439)	Affirmed in part, remanded in part
STATE v. ARMSTRONG No. 14-765	Gaston (11CRS10085) (13CRS10396)	No Error
STATE v. COLLINGTON No. 14-1244	Transylvania (12CRS52047) (13CRS463)	NO PLAIN ERROR
STATE v. DAVIS No. 14-1358	Buncombe (13CRS262) (13CRS52691)	No Error
STATE v. FORD No. 15-80	Forsyth (13CRS61650)	No Error
STATE v. GIBBS No. 14-1052	Carteret (13CRS2595-2599) (13CRS3068-3070) (13CRS52201)	No Error

STATE v. LOVE No. 14-1330	Scotland (11CRS52415) (13CRS635)	No Prejudicial Error
STATE v. MARTIN No. 13-956-2	Halifax (12CRS1797) (12CRS51587)	No Error
STATE v. MARTIN No. 14-1375	Pitt (12CRS57098) (12CRS57112-21)	No prejudicial error
STATE v. MUHAMMAD No. 14-1350	Forsyth (13CRS50718) (13CRS50721) (13CRS58824-25)	No Error
STATE v. PERRY No. 14-1009	Duplin (10CRS52030)	Affirmed
STATE v. SORRELL No. 14-986	Wake (13CRS214020)	No Error
STATE v. SULLIVAN No. 15-76	Cleveland (10CRS53485)	Dismissed
STATE v. TAYLOR No. 14-1402	Wake (13CRS208704)	No Error
STATE v. WILKERSON No. 15-95	Durham (10CRS56344)	No Prejudicial Error in Part; Remanded in Part
WATERS v. PEAKS No. 15-36	Beaufort (13CVS185)	Affirmed in part; and Remanded in Part

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS