243 N.C. App.—No. 3 Pages 508-676

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 12, 2018

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 20 OCTOBER 2015

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—appealability—guilty plea—Defendant's right of appeal after a guilty plea was limited by statute and not available in this case. There were no grounds for certiorari, and the appeal was dismissed without prejudice to defendant's pursuit of a motion for appropriate relief. **State v. Miller, 660.**

Appeal and Error—failure to object—failure to assert plain error—On appeal from defendant's conviction for felony larceny, the Court of Appeals did not review the merits of defendant's argument concerning the admission of some of his prior convictions for impeachment purposes. Even though defendant objected to the State's forecast of the Rule 609(b) evidence, he did not object when the evidence was actually introduced before the jury. Defendant lost his remaining opportunity for appellate review by failing to argue in his appellate brief that the trial court's alleged error amounted to plain error. **State v. Joyner, 644.**

EVIDENCE

Evidence—business record—database of pseudoephedrine purchases—foundation laid—In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by admitting a law enforcement officer's testimony regarding defendant's alleged pseudoephedrine purchases and an exhibit showing a report from the NPLEx database. The officer's testimony as to his familiarity with the NPLEx database provided a sufficient foundation for admission of the evidence as a business record. Even assuming admission of this evidence was erroneous, any error would have been harmless because the State presented ample other evidence of defendant's guilt. **State v. Hicks, 628.**

Evidence—clergy privilege—statements to third party about conversation with pastor—no prejudice—In a first-degree murder prosecution, even assuming error in the admission of defendant's statements to a third party about his conversation with a pastor, there was no prejudice where the State presented other relevant and substantial evidence from which the jury could conclude that defendant was guilty. **State v. Crisco, 578.**

Evidence—clergy privilege—statements to third party about conversation with pastor—not privileged—The clergy-communicant privilege did not apply in a first-degree murder prosecution where defendant told another witness about talking to a pastor. N.C.G.S. § 8-53.2 does not restrict the applicability of the privilege based upon which party initiates the communication, but it applies only to communications between defendant and the pastor. There was no privilege between defendant and the third party. **State v. Crisco, 578.**

Evidence—confidential spousal communication—husband weeping in presence of wife—In a trial for first-degree rape, the trial court did not err by allowing defendant's ex-wife to testify that she saw him crying while looking at a composite photo of the victim's assailant in a newspaper. The incident was not a confidential spousal communication pursuant to N.C.G.S. § 8-57(c) because no testimony indicated that defendant intended to communicate anything to his then-wife by crying at the sight of the picture. **State v. Matsoake, 651.**

Evidence—other offense—breaking and entering—intent—probative value not substantially outweighed by prejudice—Defendant did not prevail on an ineffective assistance of counsel claim in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another break-in on the same night. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, given the temporal proximity of the breaking or entering offenses, the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny, and the trial court's instruction that the jury not consider a prior conviction as evidence of defendant's guilt. **State v. Campbell, 563.**

Evidence—impeachment—conclusory findings—probative value apparent from record—Defendant failed to preserve for appellate review his argument that the trial court erred by admitting some of his prior convictions for impeachment purposes in his trial for felony larceny. The Court of Appeals concluded that, even assuming defendant had preserved the issue, defendant's argument would not prevail. Even though the trial court made conclusory findings on the challenged evidence, the probative value of the evidence was apparent from the record. **State v. Joyner, 644.**

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.

POINT SOUTH PROPERTIES, LLC, AND SANCO BUILDERS CORPORATION, PLAINTIFFS
v.
CAPE FEAR PUBLIC UTILITY AUTHORITY AND NEW HANOVER COUNTY, DEFENDANTS
AND
CB WINDSWEPT, LLC, SELLAR'S COVE, LLC, TELFAIR SUMMIT, LLC, AND CB SNOWS CUT LANDING, LLC, PLAINTIFFS
v.
CAPE FEAR PUBLIC UTILITY AUTHORITY AND NEW HANOVER COUNTY, DEFENDANTS

No. COA15-371 and 15-374

Filed 20 October 2015

1. Statutes of Limitation and Repose—impact fees—limitation not based on defendants' duty

The claims of plaintiff developers concerning impact fees were not subject to the three-year statute of limitations for a claim based on a liability set out in N.C.G.S. § 1-52(2). Plaintiffs asserted that defendant-public authorities lacked the authority to impose impact fees under N.C.G.S. § 162A-88 and did not ask defendants to provide water or sewer service or complain of defendants' failure to provide service. Although N.C.G.S. § 162A-88 granted defendants the authority to levy fees for water and sewer services furnished or to be furnished, the statute did not impose any duty on defendants or expose them to liability.

2. Statutes of Limitation and Repose—impact fees—not based on contract

Plaintiffs' claims involving impact fees were not barred by the two-year statute of limitations set out in N.C.G.S. § 1-53(1) for an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." Although defendants-public authorities contended that plaintiffs were seeking damages based on an implied contract, plaintiffs were actually contending that defendants lacked authority to impose the impact fees at issue.

3. Statutes of Limitation and Repose—impact fees—catch-all ten-year period

The proper statute of limitations for plaintiffs' action concerning impact fees was the residual or "catch all" ten-year limitation period of N.C.G.S. § 1-56. It was undisputed that plaintiffs filed suit within ten years of their payment of the challenged impact fees and their claims were not barred by the statute of limitations.

4. Laches—impact fees—no prejudice by delay

Plaintiffs' claims concerning impact fees were not barred by the doctrine of laches where the cases cited by defendants involved equitable relief but plaintiff's claims were legal. Moreover, defendants did not contend that they undertook any expenditures that would not have been otherwise necessary, that their legal position was negatively impacted by the passage of time, or that they were prejudiced by plaintiffs' delay in bringing suit.

5. Public Works—impact fees—no definite plans for property

The trial court did not err in a case involving impact fees by granting summary judgment in favor of plaintiff-developers. There was no evidence that defendant-public utilities ever planned for water and sewer service to be furnished to the subject properties, although the record did demonstrate that defendant-public authorities had stated their intention to extend service to specific locations. If defendants' contention that the documents indicating a generalized goal of extending water and sewer service to unspecified parts of the county at an unspecified time in the indefinite future were sufficient to authorize imposition of impact fees for services "to be furnished," then fees could be imposed whenever a water and sewer board expressed even the vaguest intention to *possibly* extend service at some unspecified time in the future.

6. Public Works—impact fees—source of payments—damages

Summary judgment was properly granted in a case involving impact fees where defendants argued that genuine issues of material fact remained regarding the amount of damages to which plaintiffs could be entitled. Defendants argued that the contested impact fees were paid directly by plaintiff-developers in some cases but in others were paid by a third party; however, defendants did not articulate a defense that would be established by this evidence or cite evidence to support the assertion that the impact fees were passed on to purchasers of homes.

Appeal by defendants from orders entered 23 September 2014 by Judge W. Douglas Parsons in New Hanover County Superior Court. Heard in the Court of Appeals 23 September 2015.

Shipman & Wright, LLP, by William G. Wright and Gary K. Shipman for plaintiffs-appellees.

Ward and Smith, P.A., by Jeremy M. Wilson and Ryal W. Tayloe for defendants-appellants.

ZACHARY, Judge.

In Court of Appeals Case COA 15-371, Cape Fear Public Utility Authority (CFPUA) and New Hanover County (collectively referred to as defendants) appeal from an order granting summary judgment in favor of Point South Properties, LLC and Sanco Builders Corporation (Point South plaintiffs), on plaintiffs' claims arising from the payment of impact fees assessed by defendants. Similarly, in Court of Appeals Case COA 15-374, the same defendants appeal from summary judgment entered in favor of CB Windswept, LLC; Sellar's Cove, LLC; Telfair Summit, LLC; and CB Snows Cut Landing, LLC (Windswept plaintiffs), on claims arising from plaintiffs' payment of impact fees. Pursuant to the provisions of N.C.R. App. P. 40, the cases were consolidated for oral argument by this Court. Moreover, in that "both appeals involve common questions of law, as evidenced by defendants' decision to submit virtually identical appellate briefs in each case," the Court has consolidated "these appeals for the purpose of rendering a single opinion on all issues properly before the Court." *Putman v. Alexander*, 194 N.C. App. 578, 580, 670 S.E.2d 610, 613 (2009).

On appeal defendants argue that plaintiffs' claims were barred by the statute of limitations and the doctrine of laches, that defendants were entitled to charge water and sewer impact fees to plaintiffs, and that plaintiffs' constitutional claims lack merit. We conclude that plaintiffs' claims were not barred by the statute of limitations or the doctrine of laches, that the trial court properly entered summary judgment for plaintiffs on their claim that defendants' imposition of impact fees was *ultra vires*, and that it is not necessary to reach the merits of plaintiffs' constitutional claims.

I. Factual and Procedural Background

In 1983 New Hanover County created the New Hanover County Water and Sewer District (NHCWSD), which provided water and sewer service in the unincorporated areas of the county. In 1987 NHCWSD established an impact fee policy, pursuant to the terms of which the payment of a water and sewer impact fee was a precondition for a developer to receive a building permit. The rationale for this policy was that "the Water and Sewer District was working to expand out its infrastructure with the goal of providing water and sewer services to everybody throughout the county." In 2007 New Hanover County and the City of

Wilmington entered into an interlocal agreement and created CFPUA, a water and sewer authority. Pursuant to the agreement creating CFPUA, all assets and liabilities of NHCWSD were transferred to CFPUA. In 2008 CFPUA replaced the previous ordinances of NHCWSD and of the City of Wilmington with a single CFPUA ordinance that did not assess impact fees for developments prior to the time that service was provided.

Plaintiffs are companies engaged in residential development in southern New Hanover County. Between 2003 and 2006, plaintiffs developed certain properties in New Hanover County (the subject properties). In order to obtain the necessary building permits, plaintiffs were required to pay NHCWSD impact fees associated with the provision of water and sewer service. The fees totaled approximately $238,000 paid by the Point South plaintiffs, and approximately $220,000 paid by the Windswept plaintiffs.

Aqua North Carolina, Inc., (Aqua) is a private utility company providing water and sewer service in various locations throughout North Carolina. At all times since their construction, Aqua has provided water and sewer service for the subject properties. When plaintiffs were first assessed impact fees, they informed defendants that water and sewer service was provided by Aqua and argued that they should not have to pay the fees because plaintiffs' properties were already served by Aqua and therefore the subject properties would not have any impact on the water or sewer facilities operated by NHCWSD. Defendants would not capitulate and ultimately plaintiffs paid the required fees in order to obtain building permits.

As early as 1976, defendants identified the unincorporated areas in the southern part of New Hanover County as a potential location for expansion of water and sewer service. Accordingly, defendants have included this area, which includes the subject properties, in their long range estimates of possible future demand for water and sewer service. It is undisputed, however, that defendants have never made an official decision to extend water and sewer service to any of the subject properties or taken any steps towards extending water and sewer service in these specific developments.

On 21 November 2012 the Point South plaintiffs filed suit against defendants, seeking the refund of the impact fees plaintiffs had paid, together with interest and attorney's fees. The Point South plaintiffs alleged that defendants' actions in assessing impact fees were *ultra vires* and violated plaintiffs' rights to due process and equal protection under the United States and North Carolina Constitutions. On

27 December 2012, defendants filed an answer and a motion to remove the Point South plaintiffs' action to the United States District Court for the Eastern District of North Carolina, on the basis of the Point South plaintiffs' inclusion in their complaint of claims arising under the U.S. Constitution. The parties each filed an amended complaint and answer in federal court. Thereafter, the Point South plaintiffs dismissed their federal constitutional claims and moved for remand to state court. On 26 March 2013 the case was remanded to the Superior Court of New Hanover County. On 5 November 2013 the Point South plaintiffs filed their second amended complaint. On 3 January 2014 defendants filed their answer, raising various defenses, including allegations that the Point South plaintiffs' claims were barred by the applicable statute of limitations and the doctrine of laches, and that the impact fees were authorized by statute. The Point South plaintiffs and defendants moved for summary judgment on 21 August 2014 and 27 August 2014, respectively.

On 27 March 2013 the Windswept plaintiffs filed a complaint seeking damages arising from their payment of impact fees, including refund of the payments with interest and attorneys' fees. The Windswept plaintiffs' complaint similarly alleged that defendants' imposition of impact fees was *ultra vires* and violated plaintiffs' rights to due process and equal protection under the North Carolina Constitution. As the Windswept plaintiffs did not assert any claims arising under the federal constitution, the issue of removal to federal court did not arise in connection with their lawsuit. On 5 February 2014 Judge William G. Wright granted the Windswept plaintiffs' motion to amend their complaint. On the same date, the Windswept plaintiffs filed an amended class action complaint on behalf of themselves and others similarly situated. On 6 March 2014 defendants filed an answer denying the material allegations of the Windswept plaintiffs' complaint and asserting various defenses, including the statute of limitations and the doctrine of laches. The Windswept plaintiffs filed a motion for class action certification on 28 March 2014, which was denied by Judge W. Allen Cobb, Jr., on 18 July 2014. The Windswept plaintiffs filed a motion for summary judgment on 21 August 2014 and defendants filed a motion for summary judgment on 27 August 2014.

As discussed above, the procedural histories of the claims filed by the Point South plaintiffs and the Windswept plaintiffs are slightly different, given that the Point South plaintiffs initially brought claims under the federal constitution and the Windswept plaintiffs initially sought class certification. Nevertheless, because the Point South plaintiffs

voluntarily dismissed their federal claims, and the Windswept plaintiffs did not appeal the denial of their motion for class certification, the parties' summary judgment motions raised the same issues in both cases. Accordingly, on 4 September 2014 the trial court conducted a single hearing on the summary judgment motions of the parties in both cases, at which all plaintiffs were represented by the same law firm. On 23 September 2014 the trial court entered identical orders in both cases granting summary judgment for the plaintiffs in each case. Defendants timely entered notices of appeal from both summary judgment orders. As defendants have raised the same appellate issues in both cases and the plaintiffs have presented the same defenses, in the remainder of this opinion the term "plaintiffs" shall refer to both the Point South plaintiffs and the Windswept plaintiffs.

II. Standard of Review

The standard of review of a trial court's summary judgment order is well-established. Under N.C. Gen. Stat. § 1A-1, Rule 56(c), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." " ' In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) [(2013)], and must be viewed in a light most favorable to the non-moving party.' " *Patmore v. Town of Chapel Hill, N.C.*, __ N.C. App. __ , __ , 757 S.E.2d 302, 304 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 467, 597 S.E.2d 674, 692 (2004) (internal citation omitted)), *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996) (citing *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)). "We review trial court orders granting or denying a summary judgment motion utilizing a de novo standard of review." *Davis v. Woodlake Partners, LLC*, __ N.C. App. __, __, 748 S.E.2d 762, 766 (2013) (citing *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

III. Statute of Limitations

[1] Defendants argue initially that plaintiffs' claims are barred by the applicable statute of limitations. We disagree.

We first clarify the nature of the parties' dispute as it relates to the statute of limitations. Defendants assert that plaintiffs' claims are based

on N.C. Gen. Stat. § 162A-88, which grants defendants the authority to levy fees for water and sewer "services furnished or to be furnished." Based on their contention that plaintiffs' claims arise from this statute, defendants assert that plaintiffs' claims were subject to the three year statute of limitations set out in N.C. Gen. Stat. § 1-52(2) for claims based upon a "liability created by statute." We conclude, however, that defendants' position is based upon a misapprehension both of plaintiffs' complaint and of the provisions of N.C. Gen. Stat. § 162A-88.

Defendants contend that the parties have no disagreement over defendants' authority to impose the impact fees at issue and that plaintiffs "simply allege that the manner in which Defendants have exercised this statutory authority has resulted in liability." In addition, defendants maintain that plaintiffs have claimed that defendants "acted improperly under these statutes by not actually providing sewer service to the Properties." Defendants do not cite a basis in the record evidence for this contention. Our own review of plaintiffs' complaint reveals that plaintiffs assert that defendants lacked the authority to impose impact fees under N.C. Gen. Stat. § 162A-88, and that in their complaint plaintiffs do *not* ask defendants to provide water or sewer service, or complain of defendants' failure to provide service. Moreover, at the hearing on the parties' summary judgment motions, plaintiffs' counsel stated that:

> [Defense counsel] says that we are alleging that there is some implied obligation to provide services within a designated period of time. Hear me again loud and clear, we're not alleging that at all. We're alleging that they levied these fees without authority, period. We don't want them to provide service. We don't need them to provide service. So, we're not alleging that there's some obligation to provide service, we're saying they had no authority to extract the fees.

We conclude that plaintiffs neither conceded defendants' authority to levy the impact fees at issue nor based their claims on defendants' failure to provide water and sewer service for the subject properties, and that plaintiffs do not contend that defendants breached a duty owed under N.C. Gen. Stat. § 162A-88. Instead, it is defendants who raise the statute as a defense to plaintiffs' claims, by arguing that the impact fees were authorized under N.C. Gen. Stat. § 162A-88.

In support of their position that the three year statute of limitations in N.C. Gen. Stat. § 1-52(2) applies to the instant case, defendants cite several cases in which the plaintiff sought to recover damages based on

a statute that established the defendant's alleged liability. For example, defendants cite *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 506, 398 S.E.2d 586, 593 (1990), *rehearing denied*, 328 N.C. 336, 402 S.E.2d 844 (1991), in which the plaintiffs sought damages under N.C. Gen. Stat. § 143-215.93, which provides in part that "[a]ny person having control over oil or other hazardous substances which enters the waters of the State . . . shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry[.]" In *Wilson*, our Supreme Court held that the plaintiffs' "statutory claim based on N.C.G.S. § 143-215.93 is barred by the statute of limitations found in N.C.G.S. § 1-52(2)[.]" Defendants contend that because plaintiffs' claims are based on N.C. Gen. Stat. § 162A-88, plaintiffs are therefore seeking recompense based on a "liability created by statute." Although N.C. Gen. Stat. § 162A-88 grants defendants the authority to levy fees for water and sewer "services furnished or to be furnished," the statute does not impose any duty on defendants, or expose them to liability. Accordingly, the cases cited by defendants are clearly distinguishable from the instant case.

We conclude that plaintiffs' claims are not based upon defendants' alleged breach of a duty or liability established by N.C. Gen. Stat. § 162A-88 and that the statute itself does not expose defendants to liability. Therefore, we hold that plaintiffs' claims are not subject to the three year statute of limitations for a claim based on a liability created by statute.

[2] Defendants also assert, in the alternative, that plaintiffs' claims are barred by the two year statute of limitations set out in N.C. Gen. Stat. § 1-53(1) for an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." Defendants allege that plaintiffs are seeking damages based on an "implied" contract, and assert that "[p]laintiffs apparently attempt to argue that NHCWSD was obligated to immediately provide them with sewer services." Defendants do not cite to any allegations of plaintiffs' complaint for their position, and we conclude that plaintiffs do not maintain that defendants were obligated to provide them with water and sewer service either "immediately" or within some other time limit, but that defendants lacked authority to impose the impact fees at issue. Defendants' argument that plaintiffs' claims are subject to the two year statute of limitations for an action arising under a contract is without merit.

[3] Plaintiffs contend that the ten year statute of limitations set out in N.C. Gen. Stat. § 1-56 applies to their claims. N.C. Gen. Stat. § 1-56 provides that "[a]n action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued." Plaintiffs argue that, because no other statute establishes the

statute of limitations for their claim, the residual or "catch all" period of ten years set out in N.C. Gen. Stat. § 1-56 applies. We agree.

Plaintiffs cite *Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 698 S.E.2d 404 (2010), which applied the ten year statute of limitations in N.C. Gen. Stat. § 1-56 to the plaintiffs' claim for damages arising from payments of allegedly *ultra vires* impact fees, with Judge Jackson dissenting on the basis that plaintiffs' appeal was interlocutory. Upon appeal of *Amward Homes* to our Supreme Court, during which time Justice Jackson was seated on the Supreme Court and did not take part in the consideration of this case, in *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011), the Supreme Court stated that the remaining members of the Court were equally divided and that "[a]ccordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value." *Amward*, 365 N.C. at 306, 716 S.E.2d at 850. As a result, this Court's holding in *Amward* does not constitute binding precedent.

Plaintiffs also direct our attention to *Tommy Davis Constr., Inc. v. Cape Fear Pub. Utility Authority*, 2014 U.S. Dist. LEXIS 92449 (E.D.N.C. July 7, 2014), in which the federal district court for the Eastern District of North Carolina granted summary judgment in favor of the plaintiff. In *Tommy Davis*, which is very similar to the case at hand, the plaintiff real estate developer sued the current defendants for damages based on plaintiff's payment of impact fees. In the opinion, which discusses the same issues raised in the present appeal, the court held that the statute of limitations for the plaintiff's claims was ten years. Although neither *Amward* nor *Tommy Davis* constitutes binding precedent, we agree with the holdings of these cases that the proper statute of limitations is ten years. It is undisputed in the case at bar that plaintiffs filed suit within ten years of their payment of the challenged impact fees, and we conclude that plaintiffs' claims are not barred by the statute of limitations.

IV. Laches

[4] Defendants also argue that plaintiffs' claims are barred by the doctrine of laches. "We [have] previously held, 'laches is an equitable defense and is not available in an action at law.' When a '[p]laintiff's claims are legal in nature, not equitable[,]' laches cannot support judgment for the defendant." *Cater v. Barker*, 172 N.C. App. 441, 448, 617 S.E.2d 113, 118 (2005) (quoting *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 537, 513 S.E.2d 335, 338, *disc. rev. denied and appeal dismissed*, 350 N.C. 826, 537 S.E.2d 815 (1999)

(internal citations omitted)), *aff'd*, 360 N.C. 357, 625 S.E.2d 778 (2006). In the cases cited by defendants, the plaintiffs sought injunctive or other equitable relief, while in this case plaintiffs' claims are legal rather than equitable. Therefore, the doctrine of laches is not applicable to this case.

Moreover, defendants have failed to produce evidence that they were prejudiced by plaintiffs' delay in bringing suit. Defendants assert that they invested the impact fees "into expansion of wastewater service capacity in order to, in part, eventually provide services to communities in southern New Hanover County." It is undisputed, however, that defendants' proposed expansion of wastewater service capacity remains at the planning stage, and that expansion is required without regard to whether or not the subject properties are ever serviced by defendants. Defendants contend that their calculation of projected needs included reference to the subject properties, but have failed to articulate any prejudice arising from inclusion in planning documents of a figure representing the subject properties. Defendants do not contend that they undertook any expenditures that would not have been otherwise necessary, or that their legal position has been negatively impacted by the passage of time. We conclude that plaintiffs' claims are not barred by the doctrine of laches.

V. Authority to Impose Impact Fees

[5] Defendants argue that the trial court erred by granting summary judgment for plaintiffs, on the grounds that defendants' imposition of impact fees was authorized by N.C. Gen. Stat. § 162A-88, which provides in relevant part that:

> The inhabitants of a county water and sewer district created pursuant to this Article are a body corporate and politic . . . [and] may establish, revise and collect rates, fees or other charges and penalties for the use of or [for] the services furnished or to be furnished by any sanitary sewer system, water system or sanitary sewer and water system of the district[.] . . .

Defendants contend that the impact fees were for services "to be furnished." We disagree, and conclude that plaintiffs produced uncontradicted evidence establishing that defendants could not present a *prima facie* case that defendants have ever decided or planned for water and sewer service "to be furnished" to the subject properties. Defendants have not responded to plaintiffs' evidence with any evidence demonstrating a genuine issue of material fact, making entry of summary judgment for plaintiffs proper in this case.

As a preliminary matter, we again spell out the nature of the parties' dispute, this time as it relates to defendants' authority to assess the impact fees at issue. At the hearing on this matter and in their appellate brief, defendants characterize their dispute with plaintiffs as an issue of whether defendants have been sufficiently prompt in arranging to extend water and sewer service to the subject properties. For example, defendants state in their appellate brief that "Plaintiffs contend that NHCWSD's actions were *ultra vires* because NHCWSD charged impact fees for properties that would not immediately be connected to its wastewater system." Plaintiffs' complaint, however, does not fault defendants for failing to "immediately" extend water and sewer service to the subject properties, or allege that it is the timeline of defendants' actions that renders the impact fees *ultra vires*. Rather, plaintiffs assert in their complaint that imposition of the impact fees was "beyond the statutory authority of the Defendants and any of their predecessors in interest," and assert in their appellate brief that the "Impact Fees were *ultra vires* as the fees assessed to Plaintiffs were neither for services that were furnished nor to be furnished." We conclude that the issue before us is not, as defendants have urged, whether defendants were required to "immediately" extend water and sewer service to plaintiffs after assessment of impact fees. Rather, we must decide whether there is evidence from which it might reasonably be found that defendants have ever evidenced a commitment to extending water and sewer service to the subject properties, regardless of the timeline.

The record demonstrates that defendants previously have stated their intention to extend service to specific locations and have set out a target timeline for doing so. For example, the 9 June 2010 CFPUA minutes includes the following:

> Mr. Fletchner provided an overview of [CFPUA's] anticipated CIP [Capital Improvement Program] through FY [Fiscal Year] 2018. Water CIP was summarized as follows:
>
> In Fiscal Year 2011, Porters Neck customers will be added and plans for the extension of a water line down 23rd Street to Castle Hayne Road will begin.
>
> In Fiscal Year 2012, extensions are planned for Bald Eagle Lane, and bulk sales should be underway with Pender County and Figure 8 Island. The distribution system along Kerr Avenue will be continued. FY2012 includes plans to extend water service down Carolina Beach Road to the South. . . .

> In Fiscal Year 2013, . . . [the] Authority plans to expand into the Middle Sound area[.] . . . Extensions will continue in the Southern part of the County and along River Road.
>
> In Fiscal Year 2014, the Sweeny plant expansion will be completed . . . [and the] Authority plans to extend service into the Bayshore area.
>
> No new growth is anticipated for Fiscal Years 2015 and 2016. In Fiscal Year 2017, additional growth is expected in the Porters Neck area and along Castle Hayne road. In Fiscal Year 2018, the Authority expects to continue building the system in the Northern part of the County.
>
> The wastewater CIP was summarized as follows:
>
> In Fiscal Year 2011 . . .[through] 2013, the Authority will address pump station upgrades[.] . . .
>
> In Fiscal Year 2014, the Authority expects to work closely with the New Hanover County Health Department to address failing septic systems in the Southern part of the County. No new expansion is anticipated for Fiscal Years 2015 and 2016.
>
> In Fiscal Year 2017, . . . [the Authority will] continue to increase pump station capacity.
>
> In Fiscal Year 2018, the Authority expects to extend wastewater services in the Heritage Park, Wrightsboro and Prince George Estates areas.

Defendants do not allege that their capital improvement plan includes any specific commitment to extend water and sewer service to any of the developments that comprise the subject properties. Given that these plans extend through Fiscal Year 2018, it appears that the CFPUA has no plans in the foreseeable future to extend service to the subject properties.

Moreover, at all times since their construction, water and sewer service for the subject properties has been provided by Aqua, and the defendants do not have the authority to condemn Aqua's property. N.C. Gen. Stat. § 40A-5, entitled "Condemnation of property owned by other condemnors," provides that a public condemnor, as defined in N.C. Gen. Stat. § 40A-3, "may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner." N.C. Gen. Stat. § 40A-5(b). Under N.C.

Gen. Stat. § 40A-42(c), if a public condemnor such as CFPUA attempts to condemn

> property [that] is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

In this case, it is undisputed that Aqua has continuously provided water and sewer service and, as a result, that the property owned by Aqua is both in actual use and "necessary to the operation of the business of the owner." Therefore, defendants do not have the authority to exercise the right of eminent domain in order to condemn Aqua's property for their own use. In addition, the uncontroverted affidavit of Thomas J. Roberts, the president and Chief Operating Officer of Aqua, avers in relevant part that, as regards the Point South plaintiffs:

> 4. In 2005, Aqua North Carolina, Inc. was granted a Certificate of Public Convenience and Necessity for several subdivisions in southern New Hanover County, including Willow Glen at Beau Rivage subdivision and Point South Apartment complexes.
>
> . . .
>
> 6. Aqua North Carolina, Inc. has entered into sewer and water agreements with the developers of Willow Glen at Beau Rivage subdivision and Point South Apartment complexes and provides sewer and water service to the subdivision and apartment complexes.
>
> 7. To the best of my knowledge and belief no other entity, including the New Hanover County Water & Sewer District or the Cape Fear Public Utility Authority furnished any water or sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes since their creation and construction.
>
> 8. To the best of my knowledge and belief no other entity, including the New Hanover County Water & Sewer District or the Cape Fear Public Utility Authority currently furnishes any water or sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes.

> 9. Aqua North Carolina, Inc.'s intent and plan is to continue to provide water and sewer services to Willow Glen at Beau Rivage subdivision and Point South Apartment complexes and other subdivisions in southern New Hanover County, north of Snow's Cut in accordance with the terms and provisions of its tariff. Aqua North Carolina, Inc. has no current intent or plans to abandon or sell those services and infrastructure and would not anticipate taking any such action for the foreseeable future.
>
> 10. I have informed the Cape Fear Public Utility Authority of Aqua North Carolina, Inc.'s intent and plan as stated above.
>
> 11. Aqua North Carolina, Inc. has never been presented with any offer from the Cape Fear Public Utility Authority to purchase Aqua North Carolina, Inc.'s services or infrastructure in southern New Hanover County.

Mr. Roberts also executed an affidavit in regards to the Windswept plaintiffs, which was essentially identical except for the names of the relevant subdivisions. Thus, the uncontradicted record evidence establishes that Aqua has always provided water and sewer service to the subject properties, intends to continue providing water and sewer service, and that defendants have never contacted Aqua about purchasing the right to extend service to the subject properties.

To summarize, the uncontradicted record evidence shows that at the time that defendants required plaintiffs to pay impact fees and at all times since then, the following circumstances have existed:

> 1. Since 1976 defendants have represented that they have a generalized long range plan to expand water and sewer service to the southern part of New Hanover County, where the subject properties are located.
>
> 2. Although defendants have stated their intention to extend water and sewer service to other specific locations within a projected timeframe, defendants have never expressed any decision or official commitment to expand service to any of the subject properties.
>
> 3. At all times, the water and sewer service for the subject properties have been provided by Aqua, and defendants have never announced an official decision to take

> concrete steps towards replacing Aqua as the water and sewer service provider for these properties.
>
> 5. Defendants have not contacted Aqua about purchasing Aqua's infrastructure or entered into negotiations or communications with Aqua about this possibility.
>
> 6. Defendants have never stated a timeline, or even an aspirational target year, for provision of service to any of the subject properties.

We conclude that there is no evidence in the record that defendants have ever planned for water and sewer service "to be furnished" to the subject properties. We hold that under these factual circumstances defendants have failed to show any evidentiary basis for their contention that the fees were for service "to be furnished."

If we were to accept defendants' contention that the documents indicating a generalized goal of extending water and sewer service to unspecified parts of New Hanover County at an unspecified time in the indefinite future are sufficient to authorize imposition of impact fees for services "to be furnished," then fees could be imposed whenever a water and sewer board expressed even the vaguest intention to *possibly* extend service at some unspecified time in the future. This would be an absurd result, and it is well established that:

> "The Court will not adopt an interpretation which resulted in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences."

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (quoting *Insurance Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977)).

This Court's holding that defendants have failed to show that impact fees were assessed for water and sewer service "to be furnished" is based solely upon the specific facts of this case, in which defendants produced *no* evidence that they had ever made a decision to furnish water and sewer service to the subject properties, and had taken *no* steps towards extending service to these locations. Accordingly, this Court expressly declines to state any criteria, guidelines, or standards for determination of whether the evidence in a particular case is adequate to support assessment of impact fees for services "to be furnished."

Moreover, it is noted that in *McNeill v. Harnett County*, 327 N.C. 552, 570, 398 S.E.2d 475, 485 (1990), our Supreme Court held "that the provisions of N.C.G.S. § 162A-88 authorizing user fees for services 'to be furnished' [are] not limited to the financing of maintenance and improvements of existing customers." In *McNeill*, however, there was no question that sewer service would be provided to the plaintiffs. On the facts of this case, we agree with the analysis in *Tommy Davis*, which distinguished *McNeill* and stated that:

> [D]efendants in the instant matter have been developing "plans" to provide water and sewer services to the southern portion of New Hanover County, which includes [the subject properties], since 1976. As plaintiff points out, these plans are at best vague, and some plans even indicate that water and sewer services will not need to be provided by the government because service is already available through Aqua NC. Defendants have not taken concrete steps to actually provide water and sewer services to [the subject properties]. As of the time of filing the instant motions, Aqua NC continued to provide services to [the properties], eight years after plaintiff paid the impact fees, and Aqua NC intends to continue to provide those services. Aqua NC is unaware of any plan by any other entity, including defendants, to ever provide water and sewer services to [the subject properties] or any other areas in southern New Hanover County that are serviced by Aqua NC. Because no clear steps have been taken over the past decade since [the properties were] first permitted for defendants to provide water and sewer services, the assessment of impact fees was not a reasonable exercise of defendants' powers, but an *ultra vires* act beyond their statutory authority.

Tommy Davis, 2014 U.S. Dist. LEXIS 92449 at *9. We conclude that plaintiffs produced evidence showing that defendants could not make a *prima facie* case that the impact fees were properly imposed for water and sewer service "to be furnished," and that defendants failed to produce evidence to rebut plaintiffs' showing. As a result, the trial court did not err by granting summary judgment in favor of plaintiffs.

In reaching this conclusion, we have rejected defendants' arguments urging us to reach a contrary result. Defendants direct our attention to N.C. Gen. Stat. § 153A-4, which states that:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

Nonetheless, "[w]hen 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." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). The language of N.C. Gen. Stat. § 162A-88 is clear and unambiguous:

> Section 153A-4 does state that any legislative act affecting counties should be "broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power." N.C. Gen. Stat. § 153A-4 [(2013)]. . . . But, in conjunction with our general rules of statutory construction, only if there is an ambiguity in a statute found in chapter 153A should section 153A-4 be part of the courts' interpretative process. If, however, the statute is clear on its face, the plain language of the statute controls and section 153A-4 remains idle.

Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 633-34, 630 S.E.2d 200, 203, *disc review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006). We conclude that N.C. Gen. Stat. § 153A-4 is not applicable to the present case.

Defendants also contend that their assessment of impact fees was authorized under local ordinances. Assuming, without deciding, that the local ordinances cited by defendants might grant a broader right to impose impact fees than is allowed under N.C. Gen. Stat. § 162A-88, N.C. Gen. Stat. § 162A-19 provides that "[a]ll general, special or local laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this Article." We conclude that defendants cannot rely upon a local ordinance to extend the right to assess impact fees beyond what is allowed under N.C. Gen. Stat. § 162A-88.

Defendants have also filed a Memorandum of Additional Authority citing this Court's unpublished opinion in *Quality Built Homes Inc. v. Town of Carthage*, 2015 N.C. App. LEXIS 656 (N.C. Ct. App. Aug. 4, 2015). "An unpublished opinion 'establishe[s] no precedent and is not

binding authority[.]' " *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (quoting *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997)). Furthermore, the primary issue in *Quality Built Homes* was whether the Town of Carthage was authorized to impose fees for service "to be furnished," and the case did not address the question of whether the assessment of impact fees was a reasonable exercise of governmental authority under circumstances similar to those presented in this appeal to this Court. We conclude that *Quality Built Homes* does not indicate that we should reach a different result in the present case.

[6] Finally, defendants argue in their appellate brief that "genuine issues of material fact remain regarding the amount of damages to which plaintiffs may be entitled." This argument is without merit.

Plaintiffs produced records in discovery detailing the impact fees that were assessed against them, and defendants do not dispute the accuracy of the amounts stated in these records. Defendants' designee, Mr. Frank Styers, CFPUA's Chief Operating Officer, acknowledged in his deposition that these documents were defendants' business records and accurately set out the impact fees at issue. Thus, defendants do not challenge plaintiffs' contentions regarding the amounts that were paid. Instead, defendants argue that a genuine issue of material fact arises from the fact that in some instances plaintiffs paid the fees directly, while in other instances the fees were initially paid by a builder or other third party who was then reimbursed by plaintiffs. "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). Defendants do not articulate a defense to plaintiffs' claims that would be established by evidence that plaintiffs paid some of the impact fees directly and others as reimbursement to a builder. Defendants also assert, without citation to any evidence, that plaintiffs may have increased the sale price of the subject properties or "passed on" the impact fees to purchasers of homes. Defendants' contention in this regard is mere speculation. In addition, defendants do not argue that the legal relationship of the parties would be affected if, as defendants allege, plaintiffs included their expenses, including impact fees, in their calculation of the price at which properties were sold. We conclude that defendants have failed to demonstrate that a genuine issue of material fact exists that made it improper for the trial court to award summary judgment in favor of plaintiffs.

We have held that the trial court did not err by granting summary judgment for plaintiffs on their claim that, on the facts of this case, defendants' imposition of impact fees was *ultra vires* and beyond their authority, and for recovery of plaintiffs' damages resulting therefrom. Having reached this conclusion, we have no need to address the parties' arguments regarding plaintiffs' claims under the North Carolina Constitution. We hold that the trial court did not err and that its order should be

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

DONALD G. MILLER, PLAINTIFF
v.
MELINDA L. MILLER (NOW CROWELL), DEFENDANT

No. COA15-309

Filed 20 October 2015

1. Divorce—excess payment—post-separation support—income

The amount plaintiff paid in excess of his legal obligation for post-separation support was income in excess of plaintiff's obligation rather than post-separation support or alimony, neither of which ould have been considered by the trial court. The trial court did not violate N.C.G.S. § 50-20 by considering in its equitable distribution award the income plaintiff paid to defendant in excess of his court-ordered obligation to pay post-separation support.

2. Divorce—excess payment—post-separation support—alimomy

In an equitable distribution action where plaintiff had overpaid his post separation obligation and defendant argued that the overpayment should have been reserved for her pending alimony claim, the extent to which defendant's estate was affected by the judgment on equitable distribution could be a factor for argument in determining alimony.

3. Witnesses—expert—calculation corrected on eve of trial—new calculation excluded—old calculation not reliable

The trial court did not abuse its discretion in an equitable distribution action when it excluded the first of two reports from the

same expert valuing the parties' physical therapy business and the expert's opinion testimony. In the original report, the expert failed to factor in certain taxes but corrected the report upon realizing the mistake; however, the opposing party received the corrected report on the eve of trial and it was excluded. The original report was unreliable and not helpful to the finder of fact.

Appeal by defendant from order entered 8 September 2014 by Judge Jane V. Harper in Cleveland County Superior Court. Heard in the Court of Appeals 22 September 2015.

Tison Redding, PLLC by Joseph R. Pellington and David G. Redding, for plaintiff-appellee.

The Jonas Law Firm, P.L.L.C., by Johnathan L. Rhyne, Jr. and Rebecca J. Yoder, for defendant-appellant.

TYSON, Judge.

Melinda L. Miller (now Crowell) ("Defendant") appeals from the trial court's judgment on equitable distribution. We affirm.

I. Background

Plaintiff and Defendant married in 2004 and separated on 29 March 2009. No children were born of the marriage. Plaintiff is a licensed physical therapist. In 1996, he founded Cleveland Physical Therapy Associates ("CPTA"). Prior to the marriage, Plaintiff transferred seven percent of the stock in CPTA to his younger brother, and retained the remaining ninety-three percent of the stock. Plaintiff transferred ten percent of CPTA's stock to Defendant during their marriage.

Defendant began working at CPTA shortly after the parties married. Her duties included, but were not limited to, administrative tasks and maintaining accounts receivables. Defendant served as Executive Vice President of Operations for CPTA from 2004 until 2010. Defendant continued to work for CPTA for approximately six months after the parties separated. She continued to perform certain tasks for the company from her home office. In October 2009, Defendant's employment ceased pursuant to agreement between the parties.

On 18 April 2011, Plaintiff filed a complaint seeking divorce and equitable distribution. Defendant filed an answer and counterclaim seeking divorce from bed and board, post-separation support, alimony and equitable distribution.

On 10 May 2012, Judge Meredith A. Shuford entered an order addressing Defendant's claim for post-separation support. The court found Plaintiff had voluntarily kept Defendant on CPTA's payroll from March 2009 through April 2012, after the separation, rather than individually paying her post-separation support. The court found the payments made by CPTA to Defendant were for spousal support.

The court further found Plaintiff was paid her normal salary of $8,333.33 per month, totaling $100,000.00 per year, through October 2011. From November 2011 through April 2012, CPTA decreased her income by fifteen percent. After the parties separated, CPTA continued to pay Defendant monthly payments in the aggregate of $281,227.88. CPTA additionally paid Defendant's health insurance, car payments, and miscellaneous other expenses totaling $53,804.18. Judge Shuford found the total value of the income from Plaintiff and CPTA to Defendant between March 2009 and April 2012 was $335,032.06.

The court found: (1) Defendant was entitled to post-separation support from March 2009 through April 2012 in the amount of $4,700.00 per month; (2) the total obligation over that time period is $178,600.00; and, (3) Defendant had received income in excess of Plaintiff's obligation for post-separation support. The court concluded "[P]laintiff is entitled to a credit against the award for the voluntary payments that were made by [CPTA]."

The parties' equitable distribution claims were heard before the trial court on three dates in March and June 2014. The trial court entered judgment on 8 September 2014. With regard to Plaintiff's "overpayment" of post-separation support to Defendant, the court found:

> 152. The distributional factor of excessive compensation paid to Defendant, post-separation, relates to Judge Shuford's Post-Separation Support Order from May 2012. Judge Shuford found that payments to Defendant (salary and other benefits) totaled $335,032.00 between March 2009 and April 2012. Plaintiff's post-separation support obligation during the same period was found to be $178,600.00.
>
> 153. While Judge Shuford's order does not quantify the excess income paid to Defendant, subtraction of the lower from the higher figures shows it to be $156,432.00.
>
> 154. Plaintiff exceeded his post-separation support obligation to Defendant in the amount of $156,432.00.

> 155. Judge Shuford concluded that Plaintiff is "entitled to a credit against the award for the voluntary payments that were made by the company." Judge Shuford did not specify whether the credit should be applied toward any distributional award to Defendant from the Equitable Distribution case or toward Defendant's alimony claim, which is still pending.
>
> 156. Plaintiff's overpayment of post-separation support to the Defendant should be applied as a distributional factor in Plaintiff's favor[.]

The court found an equal distribution would not be equitable, and Defendant should receive a greater share of the marital estate than Plaintiff. The court ruled an equitable, unequal distribution in Defendant's favor required a distributive award of $138,216.00 to Defendant. The court further found, "[h]alf of the credit from Judge Shuford's order – $78,216.00 – should be immediately applied toward the distributive award, reducing the total distributive award [to Defendant] to $60,000.00." The court set guidelines for Plaintiff's payment of the $60,000.00 to Defendant, as follows:

> a. Payment of the $60,000.00 distributive award shall be deferred for one year from the entry of this Order.
>
> b. If within one year from the entry of this Order, Defendant fails to prosecute her claim for alimony OR Defendant's claim for alimony fails OR Defendant's claim for alimony is dismissed, the entire credit from Judge Shuford's Order – $156,432.00 – shall be applied toward the $60,000.00 distributive award in equitable distribution, resulting in Plaintiff owing nothing to Defendant. For purposes of the this paragraph, the phrase 'claim for alimony fails' means that Defendant prosecutes her claim but that Plaintiff is not ordered to pay Defendant any amount of alimony and should include, but not be limited to, the circumstance whereby the court finds Plaintiff has already satisfied his spousal support obligation to Defendant.
>
> c. If within one year from the entry of this Order, Defendant prosecutes her claim for alimony AND Plaintiff is ordered to pay Defendant some amount of alimony, the amount of alimony Plaintiff is ordered to pay Defendant should be offset by the remaining credit of $78,216.00.

> For example, if the total award of alimony is $90,000.00, Plaintiff shall be ordered to pay Defendant a total alimony award of $11,784.00 ($90,000.00 - $78,216.00 = $11,784.00), as well as the $60,000.00 distributive award in equitable distribution. If the total award of alimony to Defendant does not exceed the credit of $78,216.00, then the credit shall first be applied against the alimony award and the difference between the credit (a higher amount) and the amount Plaintiff is ordered to pay in alimony (a lower amount) should next be applied against the distributive award in equitable distribution. For example, if the total award of alimony is $40,000.00, then the credit of $78,216.00 should first be applied against the alimony award, reducing the alimony award to zero. The remaining credit amount of $38,216.00 ($78,216,00 - $40,000.00 = $38,216.00) should next be applied against the distributive award of $60,000.00, resulting in Plaintiff owing Defendant $21,784.00 as a distributive award in equitable distribution.

(emphasis in original).

Defendant appeals from the trial court's determination of equitable distribution.

II. Issues

Defendant argues the trial court erred by: (1) considering post-separation support as a distributional factor and by ordering a credit pending the outcome of her pending alimony claim; and, (2) excluding Defendant's expert's testimony and report from evidence.

III. Credit for Overpayment of Post-Separation Support

A. Standard of Review

[1] "Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion." *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). An abuse of discretion will be found only (1) "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision," *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted), or (2) when "the trial judge failed to comply with the statute." *Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451.

B. Analysis

N.C. Gen. Stat. § 50-20 governs the distribution of marital and divisible property. "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of [the statute]." N.C. Gen. Stat. § 50-20(a) (2013). The court shall determine the net values of the marital property and the divisible property and divide the property equally between the parties unless, as the court determined in this case, an equal division is not equitable. N.C. Gen. Stat. § 50-20(c) (2013). The statute lists twelve factors for the court's consideration to determine whether an equal division of the property is equitable. *Id.* Here, the trial court found Defendant should receive a greater share of the net marital estate.

Under the statute, " '[d]istributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code." N.C. Gen. Stat. § 50-20(b)(3) (2013). The statute further provides, "[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." N.C. Gen. Stat. § 50-20(f) (2013)

In the unchallenged and binding post-separation support order, Judge Shuford found Plaintiff had paid Defendant $156,432.00 more than Defendant was entitled to receive as post-separation support. In the subsequent equitable distribution order, the court found that Judge Shuford's post-separation support order "[does] not specify whether the credit should be applied toward any distributional award to Defendant from the Equitable Distribution case or toward Defendant's alimony claim, which is still pending." The court found an unequal distribution in Defendant's favor was equitable, and would require a distributive award of $138,216.00. The trial court used half of Plaintiff's $156,432.00 "credit" to immediately offset the distributive award, and retained the remaining half as potential credit to Plaintiff if Defendant failed to prosecute her pending alimony claim, or her alimony claim failed. Due to the court's inclusion of the overpayment credit as a distributional factor, Defendant received $78,216.00 less than the court determined her distributive award to be. This amount may be further reduced based upon the outcome of her alimony claim.

Defendant argues the overpayment of post-separation support is not divisible property pursuant to N.C. Gen. Stat. § 50-20, and the court's application of the credit to offset Plaintiff's obligation under the distributive award violates the statute. We disagree.

The parties agree that it would be error for the court to consider Plaintiff's obligation for post-separation support as a distributional factor in equitable distribution. Judge Shuford found Defendant was entitled to receive $178,000.00 in post-separation support. Pursuant to N.C. Gen. Stat. §§ 50-20(b)(3) and (f), it would have been error for the trial court to consider that $178,000.00 in its equitable distribution order.

Plaintiff had paid Defendant $156,432.00 in excess of his legal obligation for post-separation support. This amount, considered by the court in its equitable distribution order, was not post-separation support or alimony. It was, as Judge Shuford found as fact, "*income in excess* of [P]laintiff's obligation for post-separation support." (emphasis supplied).

Precedents from our Court are instructive on this issue. In *Morris v. Morris*, 90 N.C. App. 94, 98, 367 S.E.2d 408, 411 (1988), *overruled on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988), the husband argued the trial court erred by not "allowing him credit for," or considering as a distributional factor in equitable distribution, his post-separation mortgage payments on the marital residence. The husband had made those payments to the wife pursuant to an alimony pendente lite order. This Court affirmed the trial court's refusal to consider the husband's post-separation mortgage payments, because those payments were made pursuant to an alimony order. To award him credit would have been a plain violation of N.C. Gen. Stat. 50-20(f). *Id.* at 99, 367 S.E.2d at 411.

The husband in *Morris* relied on *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987). In *Hunt*, this Court held the trial court should have given the husband credit in equitable distribution for post-separation mortgage payments. The husband made post-separation mortgage payments to the wife, while not under a court order to do so. He argued he should get credit for those payments in equitable distribution, but the trial court determined the payments were spousal support and not eligible for consideration. *Id.* at 490, 355 S.E.2d at 523. This Court held:

> The payments made by defendant after separation . . . consisted entirely of defendant's separate property. From the record before us, it would appear that defendant should be credited with at least the amount by which he decreased

> the principal owed on the marital home. Upon remand the court shall make a determination as to this issue.

Id. at 491, 355 S.E.2d at 523.

According to this Court's holdings in *Morris* and *Hunt*, the trial court is prohibited from considering post-separation payments made pursuant to an alimony order under the statute, but is not prohibited from considering post-separation payments made outside of a court-ordered spouse's support obligation. Here, the trial court was prohibited from giving Plaintiff any credit for the $178,600.00 of post-separation support he was ordered to pay Defendant, and the court gave no consideration to that amount. The trial court did not violate N.C. Gen. Stat. § 50-20 by considering the income Plaintiff paid to Defendant in *excess* of his court-ordered obligation to pay post-separation support in its equitable distribution award.

[2] Defendant also argues the overpayment should have been reserved for the court in determining her pending alimony claim. If and when Defendant prosecutes her claim for alimony, the court may properly consider the estates of the parties, which would include the allocation of assets under the equitable distribution judgment. *See* N.C. Gen. Stat. § 50-20(f) ("After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony . . . should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7."); N.C. Gen. Stat. § 50-16.3A(b) (2013) (setting forth the factors for the court to consider in determining alimony, including "[t]he relative assets and liabilities of the spouses" and "[a]ny other factor relating to the economic circumstances of the parties that the court finds to be just and proper"). The extent to which Defendant's estate is affected by the judgment on equitable distribution may be a factor she may possibly argue to the trial court determining an award of alimony for Defendant. This argument is overruled.

IV. Expert Testimony and Report

[3] Defendant argues the trial court erred by excluding the testimony and report of her expert, Graham D. Rogers ("Rogers"). We disagree.

A. Standard of Review

Trial courts have "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Decisions "regarding what expert testimony to admit will be reversed only for an abuse of

discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005) (citation omitted).

B. Analysis

Plaintiff and Defendant each retained their own experts to prepare a valuation of CPTA. Defendant retained Rogers to review the financial records of CPTA and to render an expert opinion of the value of CPTA as of the date of marriage, the date of separation, and as of 31 December 2011. Rogers has twenty-five years of financial, accounting and business expertise in the context of business valuation. After *voir dire*, the court accepted Rogers as an expert in business valuation.

Rogers prepared a report dated 17 June 2014 containing his conclusions of the fair market value of CPTA as of those three dates. The parties exchanged their expert reports on the Wednesday prior to trial.

Rogers realized he had made a mistake on his report by failing to factor in taxes on CPTA's earnings prior to applying his capitalization rate. Rogers notified Defendant's attorney of the mistake at approximately 11:00 p.m. on the Friday prior to trial. Rogers provided Defendant's attorney with a new report on Saturday evening. Defendant's attorney forwarded it to Plaintiff's attorney. The trial court did not allow the corrected report into evidence because Plaintiff's attorney had received it on the eve of trial.

The court heard *voir dire* testimony from Rogers and ruled upon the admissibility of the original, 17 June 2014 report. The court permitted Plaintiff's counsel to *voir dire* Rogers about the facts and data he used, the reliability of his principles and methods as applied to those facts, and whether his report would assist the trier of fact. The court found Rogers's report contained material errors and his conclusions as to value contained in the report were unreliable. The court excluded the report under Rule of Evidence 702 and determined the report would not assist the trier of fact. N.C. Gen Stat § 8C-1, Rule 702 (2013).

Defendant has failed to show the trial court abused its discretion by excluding the 17 June 2014 report, which Graham admitted contained an inaccurate opinion of the value of CPTA. Rogers's reliance on incorrect data rendered the report unreliable. The trial court did not abuse its discretion when it excluded the report and Rogers's opinion testimony based upon inaccurate data. This argument is overruled.

V. Conclusion

The trial court properly considered income Plaintiff paid to Defendant in excess of his court-ordered obligation to pay post-separation support,

and allowed Plaintiff a credit to offset the amount owed to Defendant under the equitable distribution award.

The trial court properly excluded Graham's 17 June 2014 report and testimony. The report was unreliable and not helpful to the finder of fact. We affirm the trial court's order.

AFFIRMED.

Judges BRYANT and GEER concur.

ALAN SAVAGE, PLAINTIFF
v.
JULIE ANNE ZELENT A/K/A JULIE ANNE PHILLIPS
A/K/A JULIE A. MCSWAIN, DEFENDANT

No. COA15-282

Filed 20 October 2015

1. Judgments—foreign-country money judgment—attorney fees—arising from action for support in family matters—enforceable under N.C. Uniform Foreign-Country Money Judgments Recognition Act

Where plaintiff filed a Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that a Scottish judgment for attorney fees and expenses was not a judgment for support in family matters and therefore was recognizable under the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. Even though the judgment arose out of an action for support in family matters, the plain language of the statute read in conjunction with the General Assembly's express change in the Act to recognize judgments like the one here supported the trial court's conclusion.

2. Judgments—foreign-country money judgment—failure to appear or appeal—judgment not repugnant to public policy

Where the trial court granted plaintiff's Motion to Recognize a Foreign-Country Money Judgment, the trial court did not err by concluding that the £148,516.75 Scottish judgment for attorney fees and expenses was not repugnant to the public policy of North Carolina. Defendant invoked the jurisdiction of the Scottish courts but failed

to appeal after she lost on the merits, and she also failed to participate in the proceedings to determine expenses. Defendant was therefore precluded from arguing the result was unfair.

Appeal by defendant from orders entered 25 August and 14 October 2014 by Judge John E. Nobles in Carteret County Superior Court. Heard in the Court of Appeals 8 September 2015.

Poyner Spruill LLP, by Daniel G. Cahill and Caroline P. Mackie, for plaintiff-appellee.

Jeffrey S. Miller for defendant-appellant.

BRYANT, Judge.

Where a proper statutory interpretation of the North Carolina Uniform Foreign-Country Money Judgments Recognition Act and evidence in the record support the trial court's order that a Scottish judgment at issue (1) was not a judgment for alimony, support, or maintenance in matrimonial or family matters, and (2) was not fundamentally unfair or repugnant to the public policy of North Carolina, we affirm the judgment of the trial court.

Plaintiff Alan Savage and Defendant Julie Anne Zelent met in June 2006 and subsequently developed a romantic relationship. In the same year, defendant moved from England to Inverness, Scotland, where plaintiff and defendant cohabited from 1 September 2006 to 24 August 2007. The pair temporarily separated, but resumed cohabitation in February 2008. Plaintiff and defendant permanently separated in October 2008, after which defendant eventually moved to Carteret County, North Carolina.

In 2011, defendant filed suit against plaintiff in Inverness Sheriff Court in Scotland under the Family Law (Scotland) Act of 2006, Section 28(2)(a), alleging that she sustained economic disadvantage as a result of her relationship with plaintiff and that she was entitled to financial contribution. After a seven day proof (trial), which took place over the course of November 2011, December 2011, and January 2012, the Sheriff (judge) found that defendant was not entitled to financial contribution from plaintiff. Defendant was entitled to appeal the judgment but failed to do so.

After the proof concluded, defendant's counsel withdrew from representing her. Under Scottish Sheriff Court procedure, when a party

becomes *pro se*, the Sheriff calls for a Peremptory Diet (hearing). If the *pro se* party fails to attend, the hearing may be held without the *pro se* party. On 17 August 2012, the Sheriff held the Peremptory Diet to determine whether legal costs should be awarded. Defendant, who had received notice of the Peremptory Diet, wrote an email in response but did not attend. The Sheriff awarded expenses to plaintiff in an amount to be determined by the Auditor of Court.

Under Scottish law, the Auditor of Court is tasked with scheduling a Diet of Taxation (hearing), during which the Auditor assesses the validity of the entry in the Account of Expenses before determining the final sum to be awarded. Again, defendant did not attend the Diet of Taxation, send a representative, seek any corrections, or make any submissions to the Auditor.

On 19 June 2013, the Auditor awarded expenses to plaintiff and submitted the report to the Sheriff. The Sheriff then approved the Auditor's Report and entered an award of attorneys' fees and expenses in the amount of £148,516.75 ("the Scottish judgment") against defendant. Defendant, having previously failed to exercise her right to appeal on the merits, again failed to exercise her right to appeal the amount of expenses awarded. Defendant made no payments on the Scottish judgment.

On 16 January 2014, plaintiff served defendant with a Complaint to Recognize a Foreign-Country Money Judgment filed in Carteret County Superior Court. Defendant answered, asserting a defense pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim. On 27 June 2014, plaintiff filed a Motion to Recognize a Foreign-Country Money Judgment, along with a brief in support of the motion. On 7 July 2014, the matter came on for hearing in Carteret County Superior Court, the Honorable John E. Nobles presiding. By written order entered on 25 August 2014, Judge Nobles granted plaintiff's Motion to Recognize a Foreign-Country Money Judgment.

Defendant's subsequent Motion for a New Trial was denied by Judge Nobles by written order entered on 14 October 2014. Defendant appeals.

On appeal, defendant raises the following issues: whether the trial court erred (I) in recognizing the Scottish judgment under the North Carolina Uniform Foreign-Country Money Judgments Recognition Act; and (II) whether the Scottish judgment is fundamentally unfair or repugnant to North Carolina public policy.

I

[1] Defendant argues that the trial court erred in concluding as a matter of law that the Scottish judgment was not a judgment for alimony, support, or maintenance in matrimonial or family matters. Defendant also argues that the attorneys' fees awarded to plaintiff in defendant's action for support under the Family Law (Scotland) Act constituted a judgment for "support . . . in matrimonial or family matters" within the meaning of N.C. Gen. Stat. § 1C-1852 (2009). We disagree, noting that defendant's argument is one which requires our interpretation of the statute at issue in this case.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Jenner v. Ecoplus*, 224 N.C. App. 275, 277, 737 S.E.2d 121, 123 (2012) (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003)). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Applewood Props., LLC v. New S. Props. LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (quoting *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013)). The Court's statutory analysis thus begins with the statutory words themselves. *Jenner*, 224 N.C. App. at 278, 737 S.E.2d at 123. "[I]f [the words] are clear and unambiguous, they are to be given their plain and ordinary meanings." *Id.* (citation omitted). However, "[w]here a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* Furthermore, "[u]nder the doctrine of *expressio unius est esclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Patmore v. Town of Chapel Hill N.C.*, ___ N.C. App. ___, ___, 757 S.E.2d 302, 307 (2014) (quoting *Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 247 (1993)).

The North Carolina Uniform Foreign-Country Money Judgments Recognition Act ("Recognition Act") applies to foreign country judgments that grant or deny recovery of a sum of money and are final, enforceable judgments under the law of the foreign country. N.C.G.S. § 1C-1852. The Act also states, in pertinent part, that: "(b) This Article does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is . . . (3) A judgment for alimony, support, or maintenance in matrimonial or family matters." N.C.G.S § 1C-1852(b)(3). The North Carolina Act is based on the Uniform Foreign-Country Money Judgments Recognition Act ("Uniform Act") as approved in 2005 by the National Conference of Commissioners on Uniform State Laws. N.C. Gen. Stat. § 1C-1850, North

Carolina Comment (2009).[1] This Court has previously noted that "[t]he Recognition Act is a statute of inclusion with a strong presumption that foreign-country judgments will be recognized." *Jenner*, 275 N.C. App. at 279, 737 S.E.2d at 124. Further, "[a] party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition . . . exists." *Id.* (quoting N.C.G.S. § 1C-1853(g)).

As noted, the North Carolina Act is based on the Uniform Act. However, "[t]he General Statutes Commission inserted 'North Carolina' in the title and short title of the Article because of variations made to the text of the Uniform Act." *Id.* Notably, one such variation is explained in the North Carolina Comment to N.C. Gen. Stat. § 1C-1852(b)(3), which emphasizes the deliberate elimination and substitution of particular language from the Uniform Act:

> In subdivision (b)(3), the General Statutes Commission substituted "alimony, support, or maintenance in matrimonial or family matters" for the Uniform Act language "divorce, support, or maintenance, or other judgment rendered in connection with domestic relations." This change was due to concern that the Uniform Act's language could prevent recognition of an award based on a claim that was brought as part of a divorce action, for example, a tort action against one spouse for damage to the individual property of the other spouse.

N.C.G.S. § 1C-1852(b)(3) Official Comment.

Defendant asserts that the intent of the Recognition Act is that "North Carolina courts maintain a 'hands off' attitude to 'judgments for support in matrimonial or family matters' and consequent judgments for costs, attorneys' fees, etc." Defendant asserts that the attorneys' fees awarded against defendant in her action for support in a family law matter was in fact a judgment for support or alimony within the meaning of N.C. Gen. Stat. § 1C-1852. We disagree with defendant's assertions. To

1. While the policy reasons for excluding judgments for alimony, support, or maintenance in matrimonial matters are not explicitly laid out in either the Recognition Act itself or the official commentary, the following may shed some light on the matter. For instance, the United States, as a nation, is generally reluctant to enter into any international family support agreements, as explained by John L. Saxon in his article "International Establishment and Enforcement of Family Support." *See* John L. Saxon, *International Establishment and Enforcement of Family Support*, 1999 FAM. L. BULL. 1, 11–12 n.24 (1999).

refuse recognition of the Scottish judgment as defendant would have us do, would require that we read the statute to substitute the word "for" and replace it with the phrase "arising out of," in effect revising the statute to read "judgment [arising out of] a claim for alimony, support, or maintenance." This we decline to do.

Here, the statute clearly precludes recognition of judgments "for" alimony, "for" support, or "for" maintenance. *See* N.C.G.S. § 1C-1852(b)(3). The Scottish judgment, rather, is a judgment "for" attorneys' fees and expenses incurred by plaintiff and awarded against defendant. The purpose of the judgment was to reimburse plaintiff for expenses in defense of a claim brought by plaintiff and denied by the Scottish court. The plain language of the Scottish judgment reads as follows:

> The Sheriff, having considered the report by the Auditor of Court taxing the Defender's Account of Expenses in the sum of ONE HUNDRED AND FORTY EIGHT THOUSAND FIVE HUNDRED AND SIXTEEN POUNDS SEVENTY FIVE PENCE (£148516.75) which included £8370.00 of an Audit fee, Approved of the same and *decerned for payment to the Defender's solicitor* of the said sum.

(emphasis added).

This is a *judgment* for attorneys' fees and costs, determined by an Auditor, reviewed and approved by the Sheriff in conformity with the Scottish legal system, and awarded because defendant failed in her efforts to recover anything on her claims against plaintiff. "Because the word 'judgment' is unambiguous," the Court "must refrain from judicial construction and accord [the term its] plain and definite meaning." *Akins v. Mission St. Joseph's Health Sys.*, 193 N.C. App. 214, 218, 667 S.E.2d 255, 258 (2008). "Judgment means the final decision of the court resolving the dispute and determining the rights and obligations of the parties, and the law's last word in a judicial controversy." *Id.* (quoting *Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995)) (internal quotation marks omitted). The word "judgment" implies no reference to the initial claims of an action. Indeed, the Recognition Act only applies to final judgments, and therefore, the initial claims of an action are not relevant when applying the Recognition Act. Thus, even though the Scottish judgment for attorneys' fees resulted from a failed claim for maintenance, because the judgment itself is one "for" attorneys' fees and not one "for" maintenance, application of the Recognition Act is not precluded. *See* N.C.G.S. § 1C-1852(b)(3).

The issue is a pretty fine one in that "for" could be read, under other circumstances, as defendant asserts, to mean "arising out of"; however, here the North Carolina General Assembly's change to the statutory language as noted in the Official Comment, undercuts defendant's argument and supports the trial court's holding that the Scottish judgment is subject to the Recognition Act. The removal of the language "or other judgment in connection with domestic relations" from the Uniform Act supports our interpretation that attorneys' fees, even those resulting from a failed domestic action, can be properly recognized under the Recognition Act. The doctrine of *expressio unius est esclusio alterius* implies the exclusion of situations not contained in the list. *See Patmore*, ___ N.C. App. at ___, 757 S.E.2d at 307. Under that doctrine, the Official Comment to N.C. Gen. Stat. § 1C-1852 makes plain that the exclusion of the language "rendered in connection with domestic relations" from the statute was more than implied and rather was quite explicit. This deliberate change evidences the legislature's intent that judgments like the Scottish judgment are to be properly recognized pursuant to the Recognition Act.

Finally, for the sake of uniformity of interpretation, the legislature endorses examination of cases from other jurisdictions in interpreting the North Carolina Recognition Act. "In applying and construing this Article, consideration may be given to promoting uniformity with respect to its subject matter among states that enact it." N.C. Gen. Stat. § 1C-1859 (2009). Two courts have addressed this narrow issue.

The Ohio Court of Appeals in a similar case held that an English judgment awarding costs to the prevailing spouse in a divorce proceeding "was a judgment for costs, consisting of attorneys' fees. It was, therefore, not an award of support."[2] *Hazzledine v. Hazzledine*, No. 95-CA-35, 1996 Ohio App. LEXIS 1405, *1–2, 5 (Ohio Ct. App. Apr. 5, 1996). The court stated:

> In our view, the record clearly reflects that the judgment of the English court is an award of costs under the English rule that the prevailing party is normally awarded attorneys fees. Accordingly, while the underlying cause of action in which the judgment was awarded may have

2. Ohio's Uniform Foreign-Money Judgments Recognition Act, defining "foreign country judgment" reads as follows: "(B) 'Foreign country judgment' means any judgment of a foreign country that grants or denies the recovery of a sum of money, *other than the following types of judgments: . . . (3) A judgment for support involving matrimonial or family matters.*" Ohio Rev. Code Ann. § 2329.90(B)(3) (LexisNexis 1985) (emphasis added).

> involved matrimonial or family matters, the judgment is not for support . . . .

Id. at *1–2. The Ohio court noted, while an award of attorneys' fees in a domestic relations case might constitute support, it nonetheless held that, in the absence of any evidence that the judgment was intended to support the prevailing party, it was not a judgment for support based on the nature of the English rule (to award costs to the prevailing party). *Id.* at *5–6.

Like the English judgment in *Hazzledine*, the Scottish judgment here is an award of attorneys' fees in favor of the prevailing party, plaintiff, and against the party seeking the support, defendant. Similarly, no evidence shows that the Scottish judgment could constitute an award of support for plaintiff since he did not initiate the action seeking support from defendant. Under the reasoning in *Hazzledine*, and consistent with our own interpretation of the North Carolina Recognition Act, the Scottish judgment is not a judgment for support but rather a judgment based on an award of attorneys' fees.

A New York appellate court faced a similar issue in *Burelle v. Gilbert*, No. 2004-1639 S C., 2005 WL 2276677 (N.Y. App. Term Sept. 16, 2005). There, the judgment was a Canadian order for equitable distribution arising out of a divorce proceeding. *Id.* at *1. The defendant, like defendant here, argued that the judgment was barred based on New York's Recognition of Foreign Country Money Judgments Act because it was a "judgment for support in matrimonial or family matters."[3] *Id.* The New York court disagreed, holding that the judgment was not an award of support, "even though entered in a matrimonial proceeding." *Id.* Similarly, the judgment at issue here is not an award of support but is rather a reimbursement of attorneys' fees and expenses.

We recognize that these cases are not controlling authority. However, with no North Carolina case law on point and the legislature's recommendation that other states' interpretations of their Foreign Country Money Judgments Recognition Acts may be considered, the Ohio and New York cases, while unpublished decisions, are persuasive authority that supports our holding that the Scottish judgment awarding attorneys' fees is not a judgment "for alimony, support, or maintenance."

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3. New York's applicable statute, the Recognition of Foreign Country Money Judgments, reads, in pertinent part, as follows: "(b) Foreign country judgment. 'Foreign country judgment' in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." N.Y. C.P.L.R. 5301(b) (McKinney 1979).

Based on the plain language of the statute, the General Assembly's express change in the Recognition Act in order to recognize judgments like the Scottish judgment, and persuasive authority from other states, we hold the trial court did not err in concluding that the Scottish judgment was not a judgment for support in family matters. The trial court properly recognized the judgment as one for attorneys' fees. Accordingly, defendant's argument is overruled.

II

[2] Defendant argues that the Scottish proceeding under which plaintiff obtained the judgment for attorneys' fees was fundamentally unfair and the rationale employed was repugnant to the public policy of North Carolina, therefore violating North Carolina law. Defendant argues that the Scottish judgment was rendered in circumstances which question the integrity of the rendering court and that the "essential elements of impartial administration and basic procedural fairness" were not met in the foreign proceeding pursuant to N.C. Gen. Stat. § 1C-1853 (2009), *amended by* 2015 N.C. Sess. Laws 2015-264, eff. June 24, 2015.[4] We disagree.

Defendant invoked the jurisdiction of the Scottish court and availed herself of the procedures and processes applicable to her case. Thereafter, once her case was lost on the merits, she did not avail herself of the process or procedures for appealing her case. Further, she declined to participate in the proceedings for expenses—the Peremptory Diet and the Diet of Taxation—that were a continuing part of her case, and she did not avail herself of any appellate process. From the record we have of the proceedings defendant initiated in the Scottish Court, there is nothing to indicate that her failure to avail herself of additional processes, including appeals, was due to a perception by defendant of flaws or lack of fairness in the proceedings. Therefore, defendant should be precluded from arguing the integrity and fairness of the very system she chose to litigate her claims. Notably, the official commentary to N.C. Gen. Stat § 1C-1853(4)(c), addresses just such a situation:

> [I]f the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there

4. N.C. Gen. Stat. § 1C-1853 can be considered the denial of recognition part of the Act. We also note that the amendment to N.C. Gen. Stat. § 1C-1853, effective June 24, 2015, while not relevant to the case here, made no substantive changes to the act or to the subsections at issue here. *See* 2015 N.C. Sess. Laws 2015-264, eff. June 24, 2015 (making changes to subsection (j)).

> may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case *because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country*, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

N.C.G.S. § 1C-1853, cmt. 12 (emphasis added). Nevertheless, we will address plaintiff's argument.

As stated previously, "[q]uestions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Jenner*, 224 N.C. App. at 277, 737 S.E.2d at 123. Additionally, defendant bears the burden of presenting evidence to demonstrate that this Court should not allow recognition of the Scottish judgment. N.C.G.S. § 1C-1853(g).

The portion of the Recognition Act at issue here states, in pertinent part, that:

> (c) If a court of this State finds that any of the following exist with respect to a foreign-country judgment for which recognition is sought, recognition of the judgment shall be denied unless the court determines, as a matter of law, that recognition would nevertheless be reasonable under the circumstances:
>
> . . .
>
> (7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

N.C.G.S. § 1C-1853(c)(7). Official Comment 11 to subsection (c)(7) further states that denial of recognition of the foreign judgment under this subsection "requires a showing of corruption *in the particular case* that had an impact on the judgment that was rendered." N.C.G.S. § 1C-1853 cmt. 11 (emphasis added). Defendant asserts that Mr. William M. Cochrane, Interim Auditor of Court Grampian Highland & Islands, who rendered the Scottish money judgment, had "a substantial doubt about the integrity of the opinion," and, therefore, the proceeding was

fundamentally unfair. Defendant relies on the following excerpt from the Scottish judgment, which defendant asserts is an unfair "rubber stamping" of the attorneys' fees awarded and indicates the Auditor's "substantial doubt":

> Although I still had difficulty in deviating from the practice of Auditors of Court in Grampian Highland & Islands disallowing such expenses such as these in fairness to the other party, I accepted that in the direction that the award was on Solicitor/Client, client paying basis, greatly reduced the ability of the Auditor of Court to carry out his normal function in taxing an account prepared on that basis and subject to the test 'that such expenses have been expressly or impliedly approved by the client' before, allowing to all intents and purposes, the rubber stamping the account save for some necessary corrections . . . .

Yet, the Auditor also stated "that the Account [of expenses] although lengthy was fairly straight forward and all entries appeared to [be] fairly stated and at no time [was there] any indication of being excessive."

We note defendant's argument that the comments defendant urges us to concentrate on suggest the Auditor had doubt about the fairness of the expenses in this case. However, we must reject this argument; for even if the Auditor had doubt about the *fairness* of expenses, such doubt does not rise to the level of "corruption in the particular case" required to deny recognition. *See* N.C.G.S. § 1C-1853 cmt. 11. Clearly, the Auditor also took into consideration the background and complexity of the case:

> [I]t was an action in which the pursuer [defendant] sought payment of a capital of some £500,000.00 from the defender [plaintiff] in terms of section 28(2)(a) of the Family Law (Scotland) Act 2006 and this case in question was at that time one of the first in Scotland and in 'value' exceeded that of the case of *Gow v. Grant* . . . which is the leading case on this section.

Finally, the Auditor stated that he "spent some considerable time reviewing the Account prior to the Diet of Taxation" and ultimately concluded that the award was not excessive.

Additionally, at the Diet of Taxation, where the court's award of expenses was independently examined by the Auditor, defendant had notice of the Diet, an opportunity to be heard, and have counsel

represent her. She chose not to appear, nor did counsel appear on her behalf. Defendant also had the opportunity to appeal the adverse decision on her underlying claims as well as the award of costs, and chose not to pursue an appeal of either decision. Thus, defendant's argument regarding the fundamental unfairness of the proceeding is unpersuasive.

Defendant next argues that the "Solicitor/Client, client paying" method of allowing fees and expenses and the amount of the award runs counter to the North Carolina concept of what is fair and just in awarding attorney's fees and that such a scheme is against public policy. We disagree.

The commentary to North Carolina General Statutes section 1C-1853(c)(3) of the Recognition Act reveals a stringent test for finding a public policy violation:

> Public policy is violated only if recognition of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of the law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."

N.C.G.S. § 1C-1853 cmt. 8 (quoting *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 901 (N.D. Tex. 1980)). "[A] difference in law, even a marked one, is not sufficient to raise a public policy issue." *Id.* "Nor is it relevant that the foreign law allows a recovery that the forum state would not allow." *Id.*

Here, the Auditor concluded in his report "that the Account [of expenses] although lengthy was fairly straight forward and all entries appeared to [be] fairly stated and at no time [was there] any indication of being excessive." Even though defendant asserts that "reasonableness" is the key factor under all North Carolina attorneys' fee statutes, the fact that Scottish law differs from North Carolina law is "not sufficient to raise a public policy issue." *Id.*; *see GE Betz, Inc. v. Conrad*, ___ N.C. App. ___, ___, 752 S.E.2d 634, 655–56 (2013) (discussing "reasonableness" of attorneys' fees and factors to be considered under North Carolina law).

Finally, defendant cites plaintiff's wealth and argues that enforcement of the Scottish judgment will pose a risk of allowing wealthy litigants to "run up" fees in a "loser pays" system, knowing that if the wealthy person prevails, he can financially ruin his opponent through a post-trial "award of expenses." Defendant argues that this poses the

additional risk of deterring non-wealthy persons from taking their cases to court. This argument nevertheless fails to demonstrate how awarding attorneys' fees in this case is repugnant to North Carolina public policy.

North Carolina statutory law explicitly authorizes the award of attorneys' fees in domestic relations matters. *See* N.C. Gen. Stat. § 50-16.4 (2010) (authorizing the award of attorneys' fees in an action for alimony or post-separation support); N.C. Gen. Stat. § 50-13.6 (1973) (authorizing the award of attorneys' fees in an action or proceeding for the custody or support of a minor child). Further, defendant's argument could be equally applicable to a wealthy litigant in North Carolina, where attorneys' fees and costs are regularly taxed to the losing party. *See* N.C. Gen. Stat. § 6-21.1 (2013) (allowing counsel fees as part of costs in certain cases); *Bryson v. Cort*, 193 N.C. App. 532, 668 S.E.2d 84 (2008) (affirming an award of attorneys' fees to prevailing party in a personal injury action); *Robinson v. Shue*, 145 N.C. App. 60, 550 S.E.2d 830 (2001) (affirming an award of attorneys' fees to prevailing party in an automobile negligence action).

Despite the arguably large amount of the attorneys' fees awarded in this case, (£148,516.75), the Auditor indicated in the Scottish judgment that this award was not "excessive," particularly considering that this was the largest claim for support ever made in Scotland under section 28(2)(a) of the Family Law (Scotland) Act of 2006. Both the statutory interpretation of the Recognition Act and the evidence in the record support the trial court's determination that the Scottish judgment is not repugnant to North Carolina public policy. Accordingly, defendant's argument is overruled.

We hold that the trial court did not err in concluding that the Scottish judgment is (I) not a judgment for alimony, support, or maintenance in matrimonial or family matters, and (II) not repugnant to the public policy of North Carolina.

AFFIRMED.

Judges GEER and TYSON concur.

JOHN JAMES SCHEFFER, Individually and as Administrator of the Estate of JEREMY TALBOT SCHEFFER, Deceased, Plaintiff
v.
NATHANIEL EUGENE DALTON, Defendant

No. COA15-264

Filed 20 October 2015

1 Evidence—partially redacted accident report—no prejudice—information admitted elsewhere

There was no prejudice in an automobile accident wrongful death case where a partially redacted accident reported was admitted into evidence. Information about the plaintiff's alcohol or drug use was redacted while information about defendant's alcohol or drug use was not (there was none). Although plaintiff argued that the contrast raised a presumption of the plaintiff's guilt, the same information was admitted without objection elsewhere.

2. Negligence—contributory—moped—improvised light

The trial court did not err in an automobile accident wrongful death case by submitting contributory negligence to the jury where the victim was riding a moped with an inoperable headlight and a bicycle light velcroed to the handlebars.

3. Negligence—last clear chance—traffic accident—left turn

The trial court erred in an automobile accident wrongful death case by not submitting the issue of last clear chance to the jury. Issues existed as to whether defendant should have discovered plaintiff's peril, whether sufficient time and means existed to avoid the accident, and whether defendant adequately looked through the intersection, behind a passing car, to determine if his path was clear before entering the oncoming lane of travel to make a left turn.

Appeal by plaintiff from order entered 25 July 2014 by Judge Timothy S. Kincaid in Iredell County Superior Court. Heard in the Court of Appeals 8 September 2015.

Mills and Levine, P.A., by Michael J. Levine, for plaintiff-appellant.

William F. Lipscomb for defendant-appellee.

TYSON, Judge.

John James Scheffer ("Plaintiff") appeals from the trial court's judgment entered after a jury's verdict determined the death of Jeremy Talbot Scheffer ("Scheffer") was caused by the negligence of Nathaniel Eugene Dalton ("Defendant"), but also found Scheffer's contributory negligence contributed to his death. We affirm in part, reverse in part, and remand for a new trial.

I. Background

On 20 November 2012, Plaintiff, as Administrator of Scheffer's estate, filed a complaint against Defendant. Plaintiff alleged Defendant's negligence resulted in the wrongful death of Scheffer. Defendant filed an Answer and alleged Scheffer's negligence contributed to the accident and barred any recovery. Plaintiff filed a Reply to Defendant's Answer and alleged contributory negligence does not bar Plaintiff's recovery and asserted Defendant had the last clear chance to avoid injury to Scheffer.

Scheffer used a "moped," a portmanteau of "motor" and "pedal," as his primary means of transportation. He was employed at The Spirited Cyclist, a bicycle shop located in Huntersville. On 27 November 2010, Scheffer left the bicycle shop just after 6:30 p.m. The factory installed headlight on the front of Scheffer's moped had been broken in a previous accident. Scheffer had attached a bicycle light to the front of the moped. The light Scheffer used was a "Blackburn Flea 2.0." This particular model of bicycle light was sold at The Spirited Cyclist. Scheffer would often charge the batteries for the light at the bicycle shop. No evidence was presented tending to show whether Scheffer charged the bicycle light battery on the day of the accident.

Kathryn Turner ("Turner") was traveling south on North Carolina Highway 115 in Mooresville on 27 November 2010. She testified she saw a "very, very faint little light" on the road ahead. She stated it was not a headlight or a fixed light. Turner first saw the light when it was about two car lengths away. She initially believed it was someone walking because the light was "moving back and forth." Turner "had no idea" what the light was. She looked in her rearview mirror after the light passed her car and saw nothing. Turner also testified it was very dark that evening. The distance from where Turner saw this light to the scene of the accident is 1.15 miles.

The next morning, Turner learned from television news reports that a moped driver had been killed in the area where she had observed the faint light. She told a co-worker, the wife of a Mooresville police officer, about seeing the light while driving on Highway 115. Several weeks later, Officer Bucky Goodale was investigating the accident and called

Turner to request a statement about what she had seen that evening on Highway 115.

James Cockrell ("Cockrell") also observed an incident that evening. Cockrell stopped his vehicle at the intersection of Highway 115 and Faith Road and prepared to turn right onto northbound Highway 115. Cockrell looked both ways, saw a northbound car approaching, and waited for the car to pass. He did not see either a moped or a light behind the car.

Cockrell looked left again and began to take his foot of the brake to pull onto Highway 115 when he observed "just a streak went by me, and I thought it was a motorcycle." Cockrell was certain he did not see any lights on the moped. He testified he almost pulled out in front of the "streak" or "motorcycle." Cockrell turned onto Highway 115 after the object passed.

Defendant was traveling south on Highway 115 in his 1993 Honda Accord. He approached the intersection of Steam Engine Drive, where he intended to turn left. This four-way intersection is fully signalized with dedicated right and left turn lanes on Highway 115. Steam Engine Drive is approximately 0.3 mile north of Faith Road, where Cockrell had observed the "streak" pass in front of him. Defendant slowed, turned on his left turn signal, entered into the left turn lane, and waited for an oncoming northbound vehicle to pass. Defendant testified he did not see anything else located or travelling behind the vehicle.

Defendant began turning left from Highway 115 onto Steam Engine Drive after the vehicle passed. He did not come to a complete stop before he began to execute the left turn on the green light. Defendant began to execute the turn early, without driving completely into the intersection. He crossed the double yellow line that delineated his lane of travel, the turn lane, from Scheffer's lane of travel, the northbound lane of Highway 115. Defendant crossed the double yellow line twenty-eight feet before the painted stop line. His car was heading towards the outbound, improper lane of Steam Engine Drive.

Scheffer's moped collided with Defendant's car. The collision occurred within Scheffer's lane of travel as Defendant was turning left. Defendant testified, "as soon as the car passed, I was making the left turn, and there was a collision, and I didn't know – I didn't even know what happened." Defendant testified he did not see Scheffer, a moped, or anything else, prior to the collision.

Cockrell arrived at the intersection and saw Scheffer land on the ground, but did not see the collision. He testified the lighting at

the intersection of Steam Engine Road and Highway 115 is "a whole lot better" than the Faith Road intersection where he had observed "the streak" go by him.

Sean Dennis ("Dennis"), an accident reconstructionist, testified as an expert witness on behalf of Plaintiff. Dennis calculated that Defendant had coasted at a speed of slightly less than seven miles per hour for several seconds before turning left on the green light. The investigating officer calculated Defendant's speed prior to the impact as less than six miles per hour. Dennis measured thirty-four feet and nine inches of skid marks left by Scheffer's moped prior to the collision. The left front tire of Defendant's car left two feet of skid marks on the road. Defendant testified he immediately slammed on brakes after the impact and "it scared [him] pretty bad, because [he] didn't know what happened."

The Blackburn Flea 2.0 light was apparently affixed to the left handlebar of Scheffer's moped. Plaintiff's expert, Dennis, testified the light on Scheffer's moped was a bicycle light and was not intended to be used on a motorized vehicle. Scheffer's bicycle light was inoperable following the accident, and Dennis performed his testing and inspection using an "exemplar" light. No physical evidence showed whether Scheffer's light was operating or on at the time of the accident or whether its battery remained charged.

According to Dennis, mounting the light on the left handlebar of a moped causes the light to point fifteen degrees to the left, rather than straight ahead. The four LED bulbs protrude beyond their housing, causing the light to be visible for one-hundred eighty degrees around the light. Dennis testified the "exemplar" light he used for testing was visible at 500 feet and remained visible until the battery died. Dennis answered in the affirmative when asked if the light, "would have been pointing right at Mr. Dalton" in the moments leading up to the accident had it been illuminated.

Officer Goodale investigated the accident and prepared a Mooresville Police Department Traffic Crash Reconstruction Report ("the accident report"), which was admitted into evidence and published to the jury. Officer Goodale inspected the factory installed headlamp housing of the moped and debris at the accident scene. The plastic headlamp assembly did not contain a bulb. The headlamp assembly required a bulb to be placed inside, turned clockwise, and locked into place in the socket. Officer Goodale concluded the metal portion of the bulb that locks into place would have remained present in the socket, even if the bulb had been destroyed in the crash. He concluded Scheffer's moped did not have a functioning headlamp at the time of the accident.

Officer Goodale sifted through the debris from the accident and found a small LED Blackburn Flea light. Velcro was attached to the left handlebar of the moped. One of Scheffer's co-workers told Officer Goodale that Scheffer had attached a "bike light" to his moped, which resembled the LED light found at the accident scene. The co-worker also stated Scheffer's front, factory-installed headlamp on the moped was broken due to another collision Scheffer was involved in approximately one month prior to the collision with Defendant.

Cockrell testified he estimated Scheffer was driving his moped approximately forty to fifty miles per hour and "maybe faster" when Scheffer passed by his vehicle. The manufacturer specifications for Scheffer's moped were incorporated into the accident report. The specifications state the moped has a top speed of twenty-seven miles per hour. Dennis testified the moped's engine did not appear to have been modified or exchanged. Dennis opined Scheffer was driving the moped at a speed of not less than nineteen miles per hour and not more than thirty-two miles per hour.

No evidence was presented to show alcohol contributed to the accident. The trial court granted Plaintiff's motion *in limine* regarding any "mention, reference, implication, or depiction of alcohol." At trial, defense counsel moved to introduce the Mooresville Police Department's complete investigative file as Defendant's Exhibit 1. Plaintiff's counsel objected because references to alcohol were contained on the two DMV-349 Forms contained within the file. The portions of the DMV-349 Forms containing the reference to Scheffer's drug or alcohol use was redacted prior to submission to the jury. The portion of the DMV-349 Form intended for the officer to record Defendant's drug or alcohol use was not redacted. On the handwritten DMV-349 Form, the fields for Defendant's drug and alcohol use were left blank. On the other typewritten form, the fields for Defendant's drug and alcohol use were filled with zeros.

The report also states Scheffer was wearing non-reflective clothing, including a black leather jacket and chaps, and a gray helmet. The moped was also painted black. Officer Goodale testified a street light was located near the southwest corner of the intersection, but it did not illuminate the area where the crash had occurred.

At the close of Defendant's evidence, Plaintiff moved for a directed verdict on the issue of contributory negligence. The trial court denied the motion. The trial court submitted four theories of negligence on the part of Defendant to the jury: (1) failure to use ordinary care by failing to

maintain a reasonable look-out; (2) failure to use ordinary care by failing to keep his vehicle under proper control; (3) violation of a safety statute by failing to yield the right-of-way when turning left in an intersection; and, (4) violation of a safety statute by failing to keep his vehicle in the proper lane of travel.

The trial court declined Plaintiff's request for a jury instruction on the doctrine of last clear chance and stated "[b]ecause all the evidence shows that [Defendant] never saw [Scheffer]." The court determined Defendant could not have had the last clear chance to avoid Scheffer if he never saw him.

The jury returned a verdict finding Defendant's negligence proximately caused Scheffer's death, and that Scheffer was contributorily negligent. Plaintiff filed a motion for judgment notwithstanding the verdict and motion for new trial, which were both denied. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by: (1) allowing a partially redacted accident report showing evidence of alcohol use to be published to the jury; and, (2) submitting the issue of contributory negligence to the jury and denying Plaintiff's request to submit the issue of last clear chance to the jury.

III. Accident Report

[1] Plaintiff argues the trial court erred by allowing Defendant to introduce the partially redacted accident report into evidence, which redacted the drug and alcohol use section of the accident report pertaining to Scheffer, but showed no drug or alcohol use on the part referring to Defendant.

A. Standard of Review

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). "Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). The standard of review regarding a Rule 403 determination is abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citations and quotation marks omitted).

When considering evidentiary errors on appeal, "[t]he burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002) (citations omitted), *disc. rev. denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003).

B. Prejudice

The Mooresville Police Department's investigative file contains both a handwritten DMV-349 Form and a typewritten DMV-349 Form. The typewritten form is dated 29 November 2010, two days after the date of the accident. The handwritten form is dated 2 March 2011.

The forms are divided into columns, each with parallel, identical fields to be evaluated for each party involved in an accident. The parties' drug and alcohol information is listed side by side on the form. On the typewritten form, Scheffer's column included the following fields:

No. 37: Alcohol/Drugs Suspected 7

No. 38: Alcohol/Drugs Test 3

No. 39: Results (if known) 5

Those fields were marked "0" in Defendant's column. The handwritten form contained the same fields but with different results for Scheffer:

No. 37: Alcohol/Drugs Suspected 2

No. 38: Alcohol/Drugs Test 3

No. 39: Results (if known) 2/.03

Those fields were left blank in Defendant's column.

At Plaintiff's request Scheffer's information on both the handwritten and typewritten forms was redacted prior to submission to the jury.

The fields for drugs and alcohol were redacted for Scheffer with what appears to be correction fluid or tape. Those fields on the forms were not redacted for Defendant.

Plaintiff argues that publishing the irrelevant alcohol status of Defendant next to the redacted alcohol status of Scheffer highlighted the fact that those fields were hidden in Scheffer's column. Plaintiff asserts this inevitably raised a presumption of Scheffer's guilt.

Defendant's use or non-use of alcohol would be relevant. The accident report was admitted into evidence without objection and contains the following information:

> The driver of Unit Two (Nathaniel E. Dalton) remained on scene and was interviewed and gave a written statement later on that night. He was questioned by several officers, including myself, just moments after the collision to determine if there were signs of impairment. I spoke with Mr. Dalton while he sat in the rear of a patrol car in depth about the collision. Mr. Dalton appeared normal and there were no signs of impairment noted.

Officer Goodale's trial testimony was similar. He testified he observed Defendant from a close proximity and did not notice any signs of alcohol consumption or impairment. The evidence presented through the crash report and Officer Goodale's testimony was the same information plaintiff argues should have been redacted from the DMV-349 Forms.

Our Court has held:

> Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on the appellant to show this. . . . Presuming error, [the appellant] has not shown prejudice and we will not speculate whether such error was prejudicial.

Boykin v. Morrison, 148 N.C. App. 98, 102, 557 S.E.2d 583, 585 (2001) (citation and quotation marks omitted).

Here, plaintiff has failed to meet his burden of showing the trial court's admission of the "partially redacted" DMV-349 Forms was prejudicial. The information on the forms which Plaintiff claims was erroneously admitted and prejudicial, was also presented, without objection,

through the accident report and Officer Goodale's testimony. This argument is overruled.

IV. Contributory Negligence

[2] Plaintiff argues the trial court erred in submitting the issue of contributory negligence to the jury because Defendant failed to satisfy his burden of showing Scheffer was contributorily negligent. We disagree.

A. Standard of Review

In North Carolina, a plaintiff's right to recover in a personal injury or wrongful death action is barred upon a finding of contributory negligence. *Brewer v. Harris*, 279 N.C. 288, 298, 182 S.E.2d 345, 350 (1971); *Prior v. Pruett*, 143 N.C. App. 612, 622-23, 550 S.E.2d 166, 173 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 572 (2002). "In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, [the appellate court] must consider the evidence *in the light most favorable to the defendant and disregard that which is favorable to the plaintiff.*" *Prevette v. Wilkes General Hospital, Inc.*, 37 N.C. App. 425, 427, 246 S.E.2d 91, 92 (1978) (emphasis supplied) (citation omitted). "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to [the] plaintiff and others to the defendant, it is a case for the jury to determine." *Id.* (citation and quotation marks omitted).

"If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (citation and quotation marks omitted). Any evidence that Scheffer was contributorily negligent in that "he failed to use ordinary care to protect himself from the asserted injury, or that his behavior was a proximate cause of his injury, would dictate the submission of this issue to the jury." *Id.*

B. Analysis

"Contributory negligence is the breach of duty of a plaintiff to exercise due care for his or her own safety, such that the plaintiff's failure to exercise due care is the proximate cause of his or her injury." *Prior*, 143 N.C. App. at 622, 550 S.E.2d at 173 (citation omitted). "Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980).

> Two elements, at least, are necessary to constitute contributory negligence: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. . . . There must be not only negligence on the part of the plaintiff, but *contributory* negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action.

Ellis v. Whitaker, 156 N.C. App. 192, 195, 576 S.E.2d 138, 141 (2003) (citations omitted) (emphasis in original).

The trial court instructed the jury as follows:

> With respect to the defendant's first contention [pertaining to contributory negligence], the Court would instruct you as follows:
>
> The lighting requirements for a moped are different from the lighting requirements for a motorcycle. A moped is a vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement, and cannot propel the vehicle at a speed greater than 30 miles an hour on a level surface. A motorcycle is a vehicle having a saddle for the use of a rider and designed to travel on not more than three wheels in contact with the ground, including motor scooters and motor driven bicycles.
>
> The motor vehicle law provides that every moped shall be operated upon a highway during the period from sunset to sunrise, and shall carry on the left side one or more lighted lamps or lanterns projecting a white light visible under normal atmospheric conditions from a distance of not less than 500 feet to the front of such vehicle, and visible under light conditions from a distance of not less than 500 feet to the rear of such vehicle. The Court instructs you that a lamp is a light constructed to project a powerful beam and to defuse this beam through a reflector and special lens in order to better illuminate the road ahead in serving as a warning to other vehicles. A failure to carry or maintain such lighting is negligence within itself.
>
> With respect to the defendant's second contention, the motor vehicle law provides it is unlawful to operate a

> motor vehicle on a highway at a speed greater than reasonable and prudent under the conditions then existing. A violation of this safety statute is negligence in and of itself. In determining whether the vehicle was being operated at a speed greater than was reasonable and prudent, you should consider all the evidence about the physical features at the scene, the hour of day or night, the weather conditions, the extent of other traffic, the width and nature of the roadway, and other such circumstances as are shown to exist. Considering all such circumstances, the rate of speed may be unreasonable and prudent even though it is within the posted maximum speed limit at the time and at the scene.

Evidence was presented tending to show: (1) Scheffer was operating a moped on Highway 115 on a dark night; (2) Scheffer had attached a battery-powered bicycle light to the left handlebar of his moped because the factory installed headlamp had been broken a month earlier; (3) Turner, who passed Scheffer on his moped 1.15 miles from the accident scene, described the light on the moped as "a very, very faint little light," and she did not see the light until it was two car lengths away; (4) Cockrell did not see Scheffer until he was passing right in front of his car and was "certain" he did not see a light on the moped; (5) Defendant did not see the light from Scheffer's moped or anything else prior to executing the left turn; and (6) no street lights illuminated the area where the collision occurred.

The trial court was required to submit the issue of contributory negligence to the jury, if Defendant presented "more than a scintilla" of evidence to show Scheffer drove his moped without sufficient lighting to be adequately seen by other drivers or in an imprudent manner. *Cobo*, 347 N.C. at 545, 495 S.E.2d at 365. Considering the evidence in the light most favorable to Defendant, and "disregard[ing] that which is favorable to [P]laintiff," sufficient evidence required the trial court to submit the issue of Scheffer's contributory negligence to the jury. *Prevette*, 37 N.C. App. at 427, 246 S.E.2d at 92. This argument is overruled.

V. Last Clear Chance

[3] Plaintiff asserts the trial court erred in failing to submit the issue of last clear chance to the jury. Plaintiff argues the doctrine of last clear chance applies because, after the oncoming car passed, Defendant failed to look down the highway to determine if any other vehicles were approaching before executing the left turn. We agree.

A. Standard of Review

The issue of last clear chance "[m]ust be submitted to the jury if the evidence, when viewed in the *light most favorable to the plaintiff*, will support a reasonable inference of each essential element of the doctrine." *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 200 (2002) (emphasis supplied) (citation omitted). Plaintiff bears the burden to show and establish whether the doctrine of last clear chance is applicable to the facts of his case. *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977).

B. Analysis

Our Supreme Court has articulated the elements a plaintiff must establish to invoke the doctrine of last clear chance as follows:

> Where an injured [plaintiff] who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the [plaintiff] negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the [plaintiff's] perilous position and his incapacity to escape from it before the endangered [plaintiff] suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered [plaintiff] by the exercise of reasonable care after he discovered, or should have discovered, the [plaintiff's] perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered [plaintiff], and for that reason struck and injured him.

Wade v. Jones Sausage Co., 239 N.C. 524, 525, 80 S.E.2d 150, 151 (1954) (citations omitted).

"In situations where this doctrine applies, the focus is not on the preceding negligence of the defendant or the contributory negligence of the plaintiff which would ordinarily defeat recovery." *Culler*, 148 N.C. App. at 379, 559 S.E.2d at 200-01 (citing *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E.2d 636 (1964)). "A negligent plaintiff who is unable to avoid the harm placing [him] in helpless peril immediately before the accident which results in [his] injury may recover against a defendant who has

the means and ability to avoid the accident but fails to do so." *Overton v. Purvis*, 154 N.C. App. 543, 545, 573 S.E.2d 219, 224 (2002) (Thomas, J., dissenting) (emphasis removed) (citation omitted), *rev'd for reasons stated in dissenting opinion*, 357 N.C. 497, 586 S.E.2d 265 (2003).

Evidence was presented tending to show that, "immediately before the accident," Scheffer "negligently placed himself in a position of peril from which he could not escape." *Id.; Wade*, 239 N.C. at 525, 80 S.E.2d at 151. Evidence was presented tending to show Plaintiff's moped was insufficiently illuminated and Defendant did not see Scheffer before executing the left turn. Plaintiff's expert, Dennis, testified Scheffer's moped created thirty-five feet of skid marks on the road prior to the accident. This evidence raises a "reasonable inference" to suggest Scheffer's attempt to extricate himself from peril. *Overton*, 154 N.C. App. at 545, 573 S.E.2d at 224.

Scheffer's perilous situation did not occur solely as a result of driving his moped without sufficient lighting. His perilous position occurred when Defendant began executing the left turn off Highway 115 toward Steam Engine Road into on-coming traffic, rendering Scheffer unable to stop his moped in time to escape without injury. Scheffer's peril began at the moment he applied his brakes in an attempt to stop his moped before hitting Defendant's car.

With regard to the second element of the doctrine of last clear chance, Plaintiff argues Defendant, by exercising reasonable care and maintaining a proper lookout before executing the left turn, "knew, or by the exercise of reasonable care could have discovered" Scheffer. *Wade*, 239 N.C. at 525, 80 S.E.2d at 151. The trial court instructed the jury that Defendant owed Scheffer a duty to maintain a proper lookout for oncoming traffic, keep his vehicle under proper control, yield to oncoming traffic when turning left at the intersection, and maintain his vehicle in the proper lane of travel. Neither the verdict sheet nor the record indicates under which theory or theories the jury found Defendant was negligent.

Viewed in the light most favorable to Plaintiff, the evidence is sufficient to submit the question to the jury of whether Defendant, after he began to turn left, "by the exercise of reasonable care *could have* discovered" Scheffer's peril. *Id.* (emphasis supplied). This is an issue of fact appropriate for the jury, and not for a court to determine as a matter of law.

With regard to the third element, it is also a jury issue to determine whether Defendant "had the time and means to avoid injury to [Scheffer] by the exercise of reasonable care after he discovered, or could have

discovered" Scheffer's peril. *Id.* Evidence was presented which tends to show as Scheffer saw Defendant's car begin to turn left, he applied his brakes, and his moped left thirty-five feet of skid marks before striking the front right corner of Defendant's car. A question of fact exists to whether Defendant could have taken some action to avoid Scheffer striking his vehicle after he knew, or with the "exercise of reasonable care could have discovered," Scheffer approaching him. *Id.*

It is well established that to satisfy the third element of last clear chance there must be "an appreciable interval of time between plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." *Ingram v. Smokey Mountain Stages, Inc.*, 225 N.C. 444, 448, 35 S.E.2d 337, 340 (1945); *see also Bass v. Johnson*, 149 N.C. App. 152, 158, 560 S.E.2d 841, 846 (2002) (holding the trial court did not err in finding defendant did not have the time and means to avoid the accident based on the defendant's testimony that he "couldn't see [the plaintiff's car] until it was too late."); *Watson v. White*, 309 N.C. 498, 506, 308 S.E.2d 268, 273 (1983) (holding that while the interval of 1.28 seconds may have been sufficient for a last possible chance to avoid an injury, such interval did not amount to a last clear chance). The doctrine of last clear chance "contemplates a last 'clear' chance, not a last 'possible' chance to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Battle v. Chavis*, 266 N.C. 778, 781, 147 S.E.2d 387, 390 (1966).

In *Bass* and *Watson*, both the defendants saw the plaintiffs, but neither had sufficient time to avoid the accident. *Bass*, 149 N.C. App. at 158, 560 S.E.2d at 846; *Watson*, 309 N.C. at 506, 308 S.E.2d at 273. Here, issues exist as to whether Defendant should have discovered Scheffer's peril, and whether sufficient "time and means" existed to avoid the accident. *See Harrison v. Lewis*, 15 N.C. App. 26, 32-33, 189 S.E.2d 662, 665-66 (1972) (holding the doctrine of last clear chance was properly submitted to the jury where, had a driver maintained a proper lookout, he could have observed a pedestrian in the act of crossing the highway and could have avoided striking him by merely turning slightly).

Sufficient evidence was also presented for the jury to determine the fourth element, whether Defendant negligently failed to use the available time and means to avoid injury to Scheffer. Defendant was asked whether he "look[ed] before [he] turned left." He stated, "Yes, I was already looking in the direction of travel." Defendant's statement is unclear and could be reasonably interpreted that he was looking through the intersection, or that he was looking toward the left. Viewed

in the light most favorable to Plaintiff, evidence tends to raise an issue of fact of whether Defendant adequately looked through the intersection, behind the passing car, to determine if his path was clear before entering the oncoming lane of travel.

Where "the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine," the issue of last clear chance should have been submitted to the jury. *Nealy v. Green*, 139 N.C. App. 500, 504, 534 S.E.2d 240, 243 (2000) (citation omitted). Here, evidence was presented tending to show each element of the doctrine to support a jury instruction on the doctrine of last clear chance. The trial court should permit the jury to determine the issue.

VI. Conclusion

The trial court did not commit prejudicial error by allowing the accident report into evidence, which showed redactions for Scheffer's alcohol use and zeros or blanks for Defendant's alcohol use. Other unchallenged and admitted evidence showed Defendant was not under the influence of alcohol through other evidence and testimony. Plaintiff failed to show any prejudice to warrant a different result at trial.

The evidence, viewed in the light most favorable to Defendant, was sufficient to allow the jury to consider the issue of contributory negligence. The trial court did not err in submitting this issue to the jury.

Evidence was presented tending to raise an issue of fact regarding the four elements of last clear chance. The jury should be allowed to determine whether Defendant had the last clear chance to avoid the accident. We affirm in part, reverse in part, and remand for a new trial.

AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR NEW TRIAL.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL, DEFENDANT

No. COA13-1404-2

Filed 20 October 2015

1. Constitutional Law—effective assistance of counsel—failure of counsel to object—inadmissible evidence

Defendant was not denied effective assistance of counsel in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another breaking or entering the same night. The evidence tended to show intent and was not inadmissible under Rule 404(b).

2. Evidence—other offense—breaking and entering—intent—probative value not substantially outweighed by prejudice

Defendant did not prevail on an ineffective assistance of counsel claim in a prosecution for breaking or entering a place of religious worship where his counsel did not object to evidence that he committed another break-in on the same night. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, given the temporal proximity of the breaking or entering offenses, the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny, and the trial court's instruction that the jury not consider a prior conviction as evidence of defendant's guilt.

3. Indictment and Information—fatal variance—larceny from church—ownership of stolen property

The trial court erred by failing to dismiss a larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. The larceny indictment alleged that the stolen property belonged to "Andy Stevens and Manna Baptist Church," but the evidence at trial did not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. Possession by an employee of the owner is not a sufficient type of special property interest.

Appeal by defendant from judgment entered on or about 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Originally heard in the Court of Appeals on 7 May 2014, with opinion filed

1 July 2014. An opinion reversing the decision of the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court of North Carolina on 11 June 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Allison A. Angell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

Thomas Craig Campbell ("defendant") appeals from a judgment entered on a jury verdict finding him guilty of breaking or entering a place of religious worship with intent to commit a larceny therein and larceny after breaking or entering. Defendant contends that (1) the indictment for larceny was fatally defective because it failed to allege that Manna Baptist Church was an entity capable of owning property; (2) insufficient evidence supports his conviction for breaking or entering a place of religious worship with intent to commit a larceny therein; (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge. On 1 July 2014, this Court agreed with defendant on issues (1) and (2) and therefore failed to address defendant's remaining arguments. *State v. Campbell*, ___ N.C. App. ___, ___, 759 S.E.2d 380, 387 (2014). But on 11 June 2015, on discretionary review, the North Carolina Supreme Court reversed this Court's decision and held that (1) the larceny indictment was valid on its face even though it did not specify that Manna Baptist Church was an entity capable of owning property; and (2) sufficient evidence supported defendant's conviction for breaking or entering a place of religious worship with intent to commit a larceny therein. *State v. Campbell*, ___ N.C. ___, ___, 772 S.E.2d 440, 444-45 (2015). The North Carolina Supreme Court remanded the case to this Court for consideration of any remaining issues. *See id.* at ___, 772 S.E.2d at 445.

Accordingly, we examine the remaining issues (3), (4), (5), and (6). We disagree with defendant on issue (3) but agree with defendant

on issue (4). Because we agree with defendant on issue (4), we do not address issues (5) and (6). We find no error in part, vacate in part, and remand.

I. Background

We review our discussion of the factual and procedural background from our previous opinion:

> On 8 October 2012, defendant was indicted for breaking or entering a place of religious worship and larceny after breaking or entering. The larceny indictment alleged that on 15 August 2012 defendant "willfully and feloniously did steal, take, and carry away a music receiver, microphones, and sounds [sic] system wires, the personal property of Andy [Stevens] and Manna Baptist Church, pursuant to a breaking or entering in violation of N.C.G.S. 14-54.1(a)." Defendant pled not guilty and proceeded to jury trial.
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> At trial, the State's evidence tended to show that Pastor Andy [Stevens] of Manna Baptist Church, located on Burke Road in Shelby, North Carolina, discovered after Sunday services on 19 August 2012 that a receiver, several microphones, and audio cords were missing. The cords were usually located at the front of the church, by the sound system, or in the baptistery changing area. It appeared that the sound system had been opened up and items inside had been moved around. Pastor [Stevens] found a wallet in the baptistery changing area that contained a driver's license belonging to defendant.
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> Pastor [Stevens] testified that when the church secretary arrived on Thursday morning earlier that week, she had noticed that the door was unlocked. She assumed that it had been left unlocked after Wednesday night services, which had ended around 9 p.m. Although the front door is normally locked at night, on cross-examination, Pastor [Stevens] admitted that the church door had been left unlocked overnight before. Pastor [Stevens] said that the secretary did not notice anything amiss on Thursday morning.
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> After Pastor [Stevens] realized that the audio equipment was missing he called the Cleveland County Sheriff's

Office. Deputy Jordan Bowen responded to the scene. The deputy examined the premises but found no signs of forced entry. He recovered defendant's wallet from the pastor.

Investigator Jessica Woosley went to speak with defendant at the Cleveland County Detention Center, where he was being held on an unrelated breaking or entering charge. When Investigator Woosley introduced herself, defendant said, "[T]his can't possibly be good. What have I done now that I don't remember?" Investigator Woosley read defendant his *Miranda* rights and defendant invoked his right to counsel. Investigator Woosley tried to end the interview, but defendant continued talking.

Defendant admitted that he had been to Manna Baptist Church on the night in question, but stated that he could not remember what he had done there. He explained that he had mental issues and blacked out at times. Defendant claimed to be a religious man who had been "on a spiritual journey." He said that he remembered the door to the church being open, but that he did not remember doing anything wrong.

After speaking with defendant, Investigator Woosley searched through a pawn shop database for any transactions involving items matching those missing from the church but did not find anything. The missing items were never recovered.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant then elected to present evidence and testify on his own behalf. Defendant testified that he was a [fifty-one-year-old] man with a high school education and one semester of college. He said that on 15 August 2012, he had been asked to leave the home he was living in, so he packed his possessions in a duffel bag and left. He started walking toward a friend's house but dropped the bag in a ditch because it was too heavy to carry long-distance.

Around midnight, defendant arrived at his friend's house, but his friend's girlfriend asked him to leave, so he did. Defendant continued walking down the road until

he came upon the church. He noticed that the door was cracked slightly and a "sliver of light" was emanating from within. Defendant explained that after all his walking, he was thirsty and tired, so he went into the church looking for water and sanctuary. He said that while he was inside, he got some water, prayed, and slept. He claimed that he did not intend to take anything and did not take anything when he left around daybreak.

After leaving the church, defendant began walking down the road again. He soon began having chest pains and called 911. Defendant explained that he was on a variety of medications at the time, including powerful psychotropic medication. An ambulance arrived and took him to Cleveland Memorial Hospital.

Calvin Cobb, the Emergency Medical Technician (EMT) who responded to defendant's call, also testified on defendant's behalf. Mr. Cobb said that they received a dispatch call around 6:30 a.m. When they arrived at the intersection of Burke Road and River Hill Road, they saw defendant near an open field, sitting on the back of a fire truck that had been first to respond. Defendant told Mr. Cobb that he had been wandering all night. Mr. Cobb noticed that defendant looked disheveled and worn out, and that defendant had worn through the soles of his shoes. Mr. Cobb did not see defendant carrying anything and did not find anything in his pockets.

After defendant rested his case, the State called another officer in rebuttal. The State wanted to offer his testimony regarding defendant's prior breaking or entering arrest. The trial court asked the State to explain the relevance of the prior incident. The State argued that it contradicted part of defendant's testimony regarding what happened before he got to the church, but did not elaborate on how it contradicted defendant's testimony and did not otherwise explain its relevance. The trial court excluded the rebuttal testimony under [North Carolina Rule of Evidence 403]. At the close of all the evidence, defendant renewed his motion to dismiss all charges, which the trial court again denied.

The jury found defendant guilty of both charges. The trial court consolidated the charges for judgment and

> sentenced defendant to a split sentence of 13-25 months [of] imprisonment, suspended for 24 months of supervised probation, and an active term of 140 days in jail. Defendant gave timely written notice of appeal.

Campbell, ___ N.C. App. at ___, 759 S.E.2d at 382-83 (first alteration in original).

II. Discussion

We examine defendant's remaining issues (3), (4), (5), and (6). Defendant contends that (3) he was deprived of effective assistance of counsel, because his counsel failed to object to the admission of evidence that defendant had committed a separate breaking or entering offense; (4) the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the property; (5) insufficient evidence supports his larceny conviction; and (6) the trial court violated his constitutional right to a unanimous jury verdict with respect to the larceny charge. We disagree with defendant on issue (3) but agree with defendant on issue (4). Because we agree with defendant on issue (4), we do not address issues (5) and (6).

A. Ineffective Assistance of Counsel ("IAC")

[1] Defendant argues that his trial counsel rendered ineffective assistance, because he failed to object to the admission of evidence of defendant's breaking or entering a house on the same night that he entered the church. Defendant argues that his trial counsel should have (1) filed a motion *in limine* objecting to this evidence; (2) moved to redact the audio recording of defendant's interview with Investigator Woosley, in which he admits to breaking or entering the house; and (3) objected when the prosecutor cross-examined defendant about breaking or entering the house. Because defendant complains of the admission of evidence, we need no further factual development to address defendant's IAC claim. *See State v. Davis*, 158 N.C. App. 1, 15, 582 S.E.2d 289, 298 (2003) ("[IAC] claims may . . . be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue.").

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, ___ N.C. App. ___, ___, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Defendant specifically contends that he received ineffective assistance of counsel, because the evidence was inadmissible under North Carolina Rules of Evidence 403 and 404(b). N.C. Gen. Stat. § 8C-1, Rules 403, 404(b) (2013). Rule 404(b) provides:

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

Id. § 8C-1, Rule 404(b). Although Rule 404(b) is a rule of inclusion, it is still "constrained by the requirements of similarity and temporal proximity." *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012). The State argues that this evidence was admissible for the purpose of proving motive, plan, and intent. In the police interview, defendant admitted that he broke into a house on the same night that he entered the church. This evidence tends to show that defendant's intent in entering the church was to commit a larceny therein and tends to contradict defendant's later testimony that he entered the church for sanctuary. Because the two breaking or entering offenses occurred on the same night and because the evidence tends to show that defendant's intent in entering the church was to commit a larceny therein, we hold that Rule 404(b) does not bar the admission of this evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b); *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

[2] Defendant also argues that this evidence was inadmissible under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* § 8C-1, Rule

403 (emphasis added). "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one." *State v. Baldwin*, ___ N.C. App. ___, ___, 770 S.E.2d 167, 171 (2015) (brackets omitted). When defendant's trial counsel objected to this evidence during the State's rebuttal, the trial court excluded the evidence under Rule 403. Defendant argues that this ruling shows that his trial counsel should have objected earlier to this evidence. But in responding to defendant's objection, the prosecutor failed to make a Rule 404(b) argument, and the trial judge misquoted Rule 403 when he ruled that "[i]ts prejudicial effect outweighs the probative value." Because defendant committed the two breaking or entering offenses on the same night and because the evidence tends to show that defendant's intent in entering the church was to commit a larceny therein, we hold that its probative value was not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. Accordingly, we hold that this evidence was admissible under Rule 403.

Defendant further argues that his trial counsel should have requested a limiting instruction that the jury could not consider the evidence of defendant's breaking into a house as evidence of his character to act in conformity therewith. We agree that a limiting instruction would have mitigated any potential unfair prejudice resulting from the evidence's admission. *See State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 74-75 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). But we hold that any resulting unfair prejudice did not substantially outweigh the evidence's probative value, given the temporal proximity of the breaking or entering offenses and the evidence's tendency to show that defendant's intent in entering the church was to commit a larceny therein. Additionally, we note that in the context of impeachment evidence, the trial court properly instructed the jury to not consider a prior conviction as evidence of defendant's guilt in this case.

Because defendant has failed to show that the evidence's admission was error, we hold that he cannot prevail on an IAC claim. *See State v. Chappelle*, 193 N.C. App. 313, 330, 667 S.E.2d 327, 337, *appeal dismissed and disc. review denied*, 362 N.C. 684, 670 S.E.2d 568 (2008).[1]

1. We note that the North Carolina Reports, 362 N.C. 684 (2008), incorrectly states that the defendant's petition for discretionary review was allowed, and that the State's motion to dismiss was denied.

B. Fatal Variance as to the Ownership of the Stolen Property

i. Rule 2

[3] Defendant next contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance between the indictment and the evidence as to the ownership of the stolen property. Defendant's trial counsel failed to raise this issue at trial, so defendant requests that we invoke North Carolina Rule of Appellate Procedure 2, or, alternatively, that we review this issue for ineffective assistance of counsel. N.C.R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). In *State v. Gayton-Barbosa*, this Court invoked Rule 2 to review a similar fatal variance argument and held that this type of error is "sufficiently serious to justify the exercise of our authority under [Rule 2]." 197 N.C. App. 129, 134, 676 S.E.2d 586, 589-90 (2009). Accordingly, we exercise our discretion under Rule 2 to review this issue.

ii. Analysis

Defendant contends that the trial court erred in failing to dismiss the larceny charge due to a fatal variance as to the ownership of the stolen property. Defendant specifically argues that a fatal variance occurred "because the State never proved the property was owned by both Andy Stevens and Manna Baptist Church." Defendant relies on *State v. Hill* for the proposition that where an indictment alleges multiple owners, the State must prove that there were in fact multiple owners. *See* 79 N.C. 656, 658-59 (1878).

In *Hill*, the indictment alleged that the stolen property belonged to "Lee Samuel and others," but the evidence at trial showed that the stolen property belonged to Lee Samuel alone. 79 N.C. at 658. Our Supreme Court held that this inconsistency constituted a fatal variance. *Id.* at 658-59. *Hill* has been consistently cited and followed as binding precedent by North Carolina courts since 1878. *See*, *e.g.*, *State v. Albarty*, 238 N.C. 130, 131-32, 76 S.E.2d 381, 382 (1953); *State v. Hicks*, 233 N.C. 31, 34, 62 S.E.2d 497, 499 (1950); *State v. Williams*, 210 N.C. 159, 161, 185 S.E. 661, 662 (1936); *State v. Corpening*, 191 N.C. 751, 753, 133 S.E. 14, 15 (1926); *State v. Harbert*, 185 N.C. 760, 762, 118 S.E. 6, 7 (1923). Most recently, our Supreme Court cited *Hill* in *State v. Ellis*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (No. 405PA14) (Sept. 25, 2015). The Court did not overrule *Hill* or suggest that its holding is no longer binding precedent in the fatal variance context, as is the case here. *Id.* at. ___, ___ S.E.2d at ___. In fact, in *Ellis*, our Supreme Court carefully distinguished between

cases raising the issue like the one addressed by *Ellis*, the "facial sufficiency of the underlying criminal pleading" and the issue raised here, whether "a fatal variance exist[s] between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial[.]" *Id.* at ___, ___ S.E.2d at ___. Our Supreme Court discussed *Hill* as part of its explanation of this distinction:

> According to defendant, this Court's decisions establish that, where a criminal pleading purporting to charge the commission of an injury to personal property lists two entities as property owners, both entities must be adequately alleged to be capable of owning property for the pleading to properly charge the commission of the crime. Although defendant cites numerous cases in support of this position, each decision on which he relies involves a claim that a fatal variance existed between the crime charged in the relevant criminal pleading and the evidence offered by the State at trial, rather than a challenge to the facial sufficiency of the underlying criminal pleading. For example, in *State v. Greene*, 289 N.C. 578, 585-86, 223 S.E.2d 365, 370 (1976), this Court held that there was no fatal variance between the indictment and the evidence in a case in which both men listed as property owners in the indictment were shown to have an ownership interest in the property. Similarly, we concluded in *State v. Hill*, 79 N.C. 656, 658-59 (1878), that a fatal variance did exist in a case in which the indictment alleged that the property was owned by "Lee Samuel and others" while the evidence showed that Lee Samuel was the sole owner of the property in question. Finally, in *State v. Burgess*, 74 N.C. 272, 272-73 (1876), we determined that a fatal variance existed in a case in which the indictment alleged that the property was owned by Joshua Brooks while the evidence tended to show that the property in question was owned by both Mr. Brooks and an individual named Hagler.

Id. at ___, ___ S.E.2d at ___. Thus, if the State fails to present evidence of a property interest of some sort in both of the alleged owners, there is a fatal variance between the indictment and the proof. *See id.* at ___, ___ S.E.2d at ___.

This Court recently summarized the types of property interest that constitute a "special property interest," which, if proven, are consistent with a larceny indictment's allegation of ownership:

> According to well-established North Carolina law, "the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976). "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). In other words, "the allegation and proof must correspond." *Id.* "A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged." [*State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971).] "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." *State v. Mason*, 35 N.C. 341, 342 (1852).
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> However, if it can be shown that the person named in the indictment, though not the actual owner of the stolen item, had a "special property interest" in the item, then the defect in the indictment will not be fatal. *State v. Craycraft*, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) ("The State may prove ownership by introducing evidence that the person either possessed title to the property or had a special property interest. If the indictment fails to allege the existence of a person with title or special property interest, then the indictment contains a fatal variance." (citation omitted)).
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> Our Courts have evaluated circumstances in which a special property interest has been established. *See e.g. State v. Adams*, 331 N.C. 317, 331, 416 S.E.2d 380, 388 (1992) (spouses have a special property interest in jointly possessed property, though not jointly owned); *State v. Schultz*, 294 N.C. 281, 285, 240 S.E.2d 451, 454-55 (1978) (a "bailee or a custodian" has a special property interest in items in his or her possession); *State v. Salters*, 137

> N.C. App. 553, 555-56, 528 S.E.2d 386, 389 (2000) (parents have a special property interest in their children's belongings kept in their residence, but "that special interest does not extend to a caretaker of the property even where the caretaker had actual possession")[, *cert. denied*, 352 N.C. 361, 544 S.E.2d 556 (2000)]; *State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it).
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> Conversely, our Courts have established situations in which a special property interest does not exist. *See e.g. State v. Eppley*, 282 N.C. 249, 259-60, 192 S.E.2d 441, 448 (1972) (owner of a residence did not have a special property interest in a gun kept in his linen closet, but owned by his father); *State v. Downing*, 313 N.C. 164, 167-68, 326 S.E.2d 256, 258-59 (1985) (the owner of a commercial building did not have a special property interest in items stolen from that building as the items were actually owned by the business that rented the building); *Craycraft*, 152 N.C. App. at 214, 567 S.E.2d at 208-09 (landlord did not have a special property interest in furniture he was maintaining after evicting the tenant-owner).

Gayton-Barbosa, 197 N.C. App. at 135-36, 676 S.E.2d at 590-91 (brackets omitted).

Here, the larceny indictment alleges that the stolen property belonged to "Andy Stevens and Manna Baptist Church[.]" But the evidence at trial simply does not demonstrate that Pastor Stevens held title to or had any sort of ownership interest in the stolen property. All of the evidence tends to show that he dealt with the property only in his capacity as an employee of Manna Baptist Church. Pastor Stevens testified that he was employed as the pastor of Manna Baptist Church and lived on the church property, and the entirety of the evidence relevant to his interest in the property, if any, was as follows:

> [Prosecutor:] On August 19th of 2012, did you arrive at the church for Sunday services?
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> [Pastor Stevens:] I did.

[Prosecutor:] And upon entering the church that day, what did you observe?

[Pastor Stevens:] We had normal services in the morning. It wasn't until at the end of the service that we were aware that some of the equipment was missing.

[Prosecutor:] Okay. And how was it that you became aware of that?

[Pastor Stevens:] The sound man was trying to record the message and had to divert back to the pulpit [microphone] because the lapel [microphone] was not picking up and at the close of the service, we found that the receiver was missing.

[Prosecutor:] Okay. Were there any other items besides the receiver that were missing?

[Pastor Stevens:] Yes, sir. There were some microphones and some audio cords.

[Prosecutor:] Where are those generally stored in your church?

[Pastor Stevens:] Usually at the front. The cords are usually at the front or in the baptistery changing area in the back and there are also a couple by the sound system.

[Prosecutor:] And how many microphones and cords were missing?

[Pastor Stevens:] I know that there [were] three—three, maybe four microphones and probably a similar amount of cords.

[Prosecutor:] Do you know what the value or have an estimate as to what the value of those items were?

[Pastor Stevens:] We estimated about five hundred dollars.

. . . .

[Prosecutor:] Were you able to recover any of the items that were taken?

[Pastor Stevens:] No, sir.

[Prosecutor:] Has the church had to replace those items?

[Pastor Stevens:] We have. We replaced the receiver.

Pastor Stevens testified that "we" had the church service, discovered the missing items, reported this to the police, estimated the value of the items, and replaced the receiver. He does not state who is included in the term "we," although from context he seems to be referring to the entire congregation in regard to having the church service, to himself and the "sound man" in regard to discovering the missing items, and probably to himself and various other persons as to the estimation of value and the replacement of the receiver. In any event, he never identifies any sort of special property interest in the items stolen and he clearly identifies himself as an employee of Manna Baptist Church.

Based upon our Supreme Court's opinion in this case on discretionary review, Manna Baptist Church was an entity capable of owning property. *Campbell*, ___ N.C. at ___, 772 S.E.2d at 444 ("[W]e hold that alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a "company" or "incorporated," signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."). The evidence showed that Manna Baptist Church owned the property, but no evidence suggests that Pastor Stevens individually had any sort of ownership interest in the property. Additionally, the fact that Pastor Stevens is an employee of Manna Baptist Church, the true owner of the property, does not cure the fatal variance. In *State v. Greene*, our Supreme Court quoted *State v. Jenkins*, 78 N.C. 478, 479-80 (1878), in support of the rule that an employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property:

> "The property in the goods stolen must be laid to be either in him who has the *general* property or in him who has a *special* property. It must [in] all events be laid to be in some one [sic] who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no *property*, his possession is the possession of his master."

The Court then gave the following example:

> "A is the general owner of a horse; B is the special owner, having hired or borrowed it, or taken it to keep for a time; C grooms it and keeps the stable and the key, but

> is a mere servant and has no property at all;—if the horse be stolen, the property may be laid to be either in *A or B*; but not in C although he had the actual possession and the key in his pocket." (Emphasis added). *State v. Jenkins*, *supra* at 480. *Accord*, *State v. Allen*, 103 N.C. 433, 435, 9 S.E. 626, 627 (1889).

Greene, 289 N.C. at 584, 223 S.E.2d at 369 (brackets omitted). Based upon the example given by our Supreme Court in *Jenkins*, Pastor Stevens was in the position of C, the groom who cared for the horse, while Manna Baptist Church is in the position of A, the owner. Even if Pastor Stevens had actual possession of the property, he had no ownership interest in it. *See id.*, 223 S.E.2d at 369.

In *Greene*, the indictment alleged that the defendant stole "one Ford Diesel Tractor and one set of Long Brand Boggs of one Newland Welborn and Hershel Greene[.]" *Id.*, 223 S.E.2d at 369 (ellipsis omitted). But the evidence showed that "Welborn had legal title to the tractor and that Greene had legal title to the disk boggs and had loaned them to Welborn, who was using them on his tractor for his farming." *Id.*, 223 S.E.2d at 369. The defendant argued that there was a fatal variance because "alleging a property interest in both Greene and Welborn automatically means that the allegation is that they are joint owners." *Id.* at 585, 223 S.E.2d at 370. Our Supreme Court rejected this argument because the State's evidence showed that both alleged owners had either legal title or a special ownership interest in the property: "Welborn was the bailee or special owner of the disk boggs, and Greene had legal title to them." *Id.* at 585-86, 223 S.E.2d at 370. Our Supreme Court also noted that in the indictment, "the order in which the property was listed corresponded to the order that the title holders of the respective pieces of property were listed"; that is, Welborn owned the tractor, and Greene owned the disk boggs. *Id.* at 586, 223 S.E.2d at 370.

In this case, the State's evidence did not show that Pastor Stevens had any special property interest in the stolen items. As noted above, the evidence showed that they belonged solely to Manna Baptist Church and Pastor Stevens dealt with the property only as an employee of the church. Although both *Jenkins* and *Hill* are very old cases, they have been followed by our courts for many years, and this Court is not at liberty to disregard them. Based upon these binding precedents, the State must demonstrate that both alleged owners have at least some sort of property interest in the stolen items. In addition, possession by an employee or servant of the actual owner is not a type of special property interest which will support this indictment.

Following *Greene* and *Hill*, we hold that a fatal variance exists because the evidence showed that the stolen property belonged to the church only. *See id.* at 584, 223 S.E.2d at 369; *Hill*, 79 N.C. at 658-59.

III. Conclusion

We hold that the trial court committed no error in convicting defendant of breaking or entering a place of religious worship with intent to commit a larceny therein. But we vacate defendant's conviction for larceny after breaking or entering. Because the trial court consolidated these convictions for sentencing, we remand this case to the trial court for resentencing.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
VICTOR JAY CRISCO, JR.

No. COA15-272

Filed 20 October 2015

1. Evidence—clergy privilege—statements to third party about conversation with pastor—not privileged

The clergy-communicant privilege did not apply in a first-degree murder prosecution where defendant told another witness about talking to a pastor. N.C.G.S. § 8-53.2 does not restrict the applicability of the privilege based upon which party initiates the communication, but it applies only to communications between defendant and the pastor. There was no privilege between defendant and the third party.

2. Evidence—clergy privilege—statements to third party about conversation with pastor—no prejudice

In a first-degree murder prosecution, even assuming error in the admission of defendant's statements to a third party about his conversation with a pastor, there was no prejudice where the State presented other relevant and substantial evidence from which the jury could conclude that defendant was guilty.

STATE v. CRISCO

[243 N.C. App. 578 (2015)]

Appeal by defendant from judgment entered 15 August 2014 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Gilda C. Rodriguez for defendant-appellant.

TYSON, Judge.

Victor Jay Crisco, Jr. ("Defendant") appeals from his conviction of first-degree murder. We find no prejudicial error.

I. Background

Defendant was tried and convicted by a jury of murdering Carrie Welch ("Welch"). On 2 July 2010, a lineman employed with the power company was relocating power lines in Fayetteville when he discovered Welch's body. The body was found on Neptune Drive, a dirt road off of Bragg Boulevard, and behind the former Stereo World building. The lineman immediately called his supervisor, who called the police.

Fayetteville Police Officer John Newland arrived on the scene where the body was discovered. Although Officer Newland was very familiar with Welch, it took him ten or fifteen minutes to identify the body, due to the presence of blood and disfigurement of the face.

Dr. Jonathan Privette, a staff pathologist in the Medical Examiner's office, performed the autopsy on Welch's body. He was admitted and testified as an expert witness in forensic pathology, and opined that Welch died as a result of blunt force injuries to her head. He also testified that Welch was struck at least seven times on the head. Dr. Privette was unable to determine with certainty the type of instrument which caused the injuries, but testified they could have been caused by a baseball bat.

The State's evidence tended to show Welch and her husband, Patrick Welch ("Patrick"), rented a residence owned by Defendant located on Rhew Street in Fayetteville. Patrick's mother paid Welch and Patrick's rent. Patrick's mother died approximately one month before Welch was murdered. Defendant lived about two blocks from the house he rented to Welch and Patrick.

Marisha Garland ("Garland") supplied drugs to Welch, Patrick, and Defendant. Garland had known Welch for about ten years. On

24 June 2010, Defendant called Garland's cellphone from the Cumberland County jail. Defendant was trying to reach Welch, who was present with Garland at the time. Garland handed the phone to Welch, who spoke with Defendant. According to Garland, Defendant wanted money retrieved from his house to use for his bail. Garland heard Welch say to Defendant that "she would have to get Patrick to do it because she couldn't go do it." According to Garland, Defendant agreed Patrick was to go into Defendant's house and get money to bail him out of jail.

Patrick and an acquaintance went to Defendant's house. Shortly thereafter, Officer Rodney Miller responded to a complaint of someone loitering behind Defendant's house. When he arrived, he saw Patrick enter the back door of Defendant's house. Officer Miller called for backup and the officers entered the house. Patrick stated he had permission from Defendant to be in the house to get money for Defendant's bail. Defendant, who was still in jail, was contacted and told the police that no one was allowed to be in his house. Patrick and his acquaintance were arrested for breaking and entering. They were released the same day with unsecured bonds.

Patrick failed to appear in court on the breaking and entering charge. A week later, on 1 July 2010, Defendant telephoned Officer Trevor Durham. Officer Durham testified that Defendant was out of jail and "irate" because Welch and Patrick broke into his house while he was in jail. Defendant wanted them immediately arrested and told Officer Durham where Patrick was located. The same evening, Officer Durham arrested Patrick for failing to appear in court on the breaking and entering charge.

The same day, 1 July 2010, Welch called her sister-in-law, Wanda Wingard ("Wingard") around 10:00 p.m. from Defendant's cellphone. Welch asked Wingard for $300.00 to bail Patrick out of jail. Ms. Wingard asked her to call back the following morning so that she could verify the information given by Welch.

A. Garland's Testimony

According to Garland, Welch engaged in prostitution to raise the money needed to bail Patrick out of jail. Garland picked Welch up from a gas station after her last "date." They saw Defendant at the gas station. Garland drove Welch to Defendant's house around 3:00 a.m. Defendant arrived home approximately five minutes later. Garland went inside Defendant's house and stayed for approximately twenty minutes. She sold drugs to Welch and gave drugs to Defendant to "watch over" Welch because Welch was "scared."

Garland testified Welch was supposed to call her around 8:00 a.m. for them to meet at 9:00 a.m. to go post Patrick's bail. At approximately 5:00 a.m., Garland received a call from Defendant's cellphone. Garland did not answer the call and a voicemail message was left. When Garland listened to the voicemail message, she heard loud "Elvis" music playing in the background and Welch screaming hysterically "wait, wait, wait." Garland testified Defendant often listened to "Elvis" music.

Garland went to Defendant's house around 10:00 a.m. and spoke with Defendant, who was standing outside. She testified that Defendant appeared "normal" and was smoking a cigarette. Garland did not go inside the house, nor did she later describe the subject matter of that conversation with Defendant.

Garland thereafter learned that Welch's body had been found behind the former Stereo World building. She returned to Defendant's house around 2:00 p.m. and entered Defendant's residence through the back door. She observed Defendant cleaning and wiping the kitchen floor. The house smelled of "a lot of Clorox, or bleach." She stated, "[t]he box said bleach."

The day after Welch's murder, Defendant went to Wingard's house to collect Welch and Patrick's rent. Wingard told Defendant that the "money trail" stopped with the death of her mother-in-law. They would not be paying Welch and Patrick's rent. Defendant then asked Wingard if she had heard about Welch's death and stated there was a rumor going around the neighborhood that he had killed Welch.

B. Matthew Black's Testimony

Matthew Black ("Black") was an acquaintance of Defendant's since grade school. Black would occasionally perform handyman repair services for Defendant. One day in early 2011, Defendant called Black and stated he wanted Black to board up some windows in his house. Black picked Defendant up and the two men drove to Defendant's house. Upon arrival, they sat in Black's truck for a while. Black testified Defendant stated he had "an eerie feeling" about going inside the house. While they were inside the house, Defendant stated to Black that he was a "prime suspect" in the Carrie Welch murder case. Defendant also asked Black about applying polyurethane to the kitchen cabinets.

Defendant and Black later purchased a bottle of tequila and went to Black's mother's house. They began drinking shots of the tequila. According to Black, Defendant told him that he had killed Welch with a baseball bat in his kitchen. Defendant explained to Black that Patrick

Welch was in jail, and that Defendant had pending charges and would be going to jail. Defendant claimed Welch was blackmailing him. Defendant stated Welch told him "if he didn't take care of her . . . he was going to become [Patrick's] bitch."

Defendant went to the bathroom. Black called his wife, Michelle, and told her to stay on the phone and just listen. Defendant returned and Black and Defendant continued to discuss Welch's murder. Defendant told Black again that he had killed Welch. He stated he burned the baseball bat in the fire pit outside his house and took the body to a remote area off Bragg Boulevard near the former Stereo World building. Defendant spent that night at Black's mother's house. The next morning Defendant told Black to forget what he had told him the previous night.

Michelle Black testified her husband called her and told her to listen, but not talk. She heard her husband ask a man, whose voice she recognized as Defendant's, to repeat what he had just said. Defendant stated he and Welch were in the kitchen, he beat her with a baseball bat, and took her body to Bragg Boulevard.

In February 2011, Matthew Black placed two calls to Crime Stoppers to report what Defendant had told him. Crime Stoppers offers rewards for tips that lead to criminal convictions. Michelle Black testified her husband called Crime Stoppers the day after Defendant confessed to the murder.

Detective Jason Sondergaard received the tips from Crime Stoppers on 14 February 2011. He contacted Black on 28 February 2011 and set up an interview. Detective Sondergaard interviewed Black and his wife on 1 March 2011.

Sometime later, Defendant contacted Black and asked him if he had contacted the police. Black lied and told Defendant he had not. Defendant stated to Black that he had told a preacher from Sanford about the murder. Defendant told Black he regretted telling the preacher, because the preacher was now acting differently. Defendant also told Black he did not believe the preacher would keep the information to himself.

C. Search of Defendant's Residence

On 1 March 2011, Fayetteville police officers and SBI agents executed a search warrant on Defendant's residence. Officer Dianne Bettis, a K-9 handler certified in cadaver recovery, searched the house with a cadaver dog. The dog alerted on a set of drawers located in the kitchen.

Chadrick Barefoot ("Agent Barefoot"), an SBI crime scene agent, searched the house for evidence of blood. He observed dark red stains in a linear pattern on the kitchen ceiling. Agent Barefoot also discovered blood stains on the wooden floor in a room adjacent to the kitchen and underneath the floorboards. He applied Luminol to areas throughout the home and observed a pale blue glow, indicating a positive result for the presence of blood. These areas included the kitchen floor; an area near the bathroom and bedroom; on the couch in the living room; and in the area between the living room and kitchen.

Jessica Posto, a former SBI expert witness in body fluid identification, examined items located in Defendant's house for the presence of blood. The swabbings from the kitchen ceiling and a deadbolt lock in the kitchen returned a positive chemical reaction to indicate the presence of blood.

Sharon Hinton ("Hinton"), a forensic analyst at the North Carolina State Crime Laboratory, tested the blood samples collected from Defendant's house to determine whether the DNA profile contained in the samples matched Welch's DNA profile. Hinton testified three blood samples obtained from the house completely matched Welch's DNA profile. Those three samples were obtained from the kitchen ceiling, the kitchen wall near a door, and underneath a wooden floor board in an additional room in the house.

Charles Lee Newcomb ("Newcomb"), an SBI fire and arson investigator, examined three pieces of burned wood recovered from Defendant's backyard fire pit. Newcomb testified that the pieces of wood had a "very tight grain pattern" and a slight curvature. He testified that each piece of charred wood could have been portions of a baseball bat.

Defendant was indicted for Welch's murder on 19 March 2012. On 11 August 2014, Defendant filed a motion to suppress from the jury any confession Defendant made to Ronnie Roy ("Pastor Roy"), pastor at Messiah Baptist Ministries, pursuant to N.C. Gen. Stat. § 8-53.2. Defendant also filed a motion *in limine* to exclude Matthew Black's testimony that Defendant told him he had confessed to a preacher. This motion requested the court to order the State to "refrain from directly or indirectly eluding to a confession made by the defendant to his pastor" pursuant to N.C. Gen. Stat. § 8-53.2 and Rules 402 and 403 of the Rules of Evidence. This motion asserted Black had been interviewed several times by the State and defense counsel, and had only mentioned Defendant's confession to a pastor within the ten days preceding the filing of the motion.

The court heard the motions immediately prior to the commencement of trial. The court heard *voir dire* testimony from Black and Pastor Roy. Black testified to the statements Defendant made to him at his mother's house about Welch's murder. Black also testified about Defendant's phone call to him in which he asked Black if he had talked to the police and stated he had told a preacher in Sanford about the murder.

Pastor Roy testified at the motion hearing that he was ordained by Bethel Bible College in Sanford. He had previously served as the pastor of Messiah Baptist Church in Harnett County. Pastor Roy met Defendant, while both were students at Fayetteville Technical Community College, and they became acquaintances. The two men later lost touch and Pastor Roy became ordained as a pastor.

Pastor Roy stated he had not spoken with Defendant for a "long time." He re-connected with Defendant after he saw Defendant's name in a "crime magazine" pertaining to an unrelated charge. Pastor Roy contacted Defendant and informed him that he had become a pastor, saw that Defendant was in trouble, and offered to help Defendant. Pastor Roy thereafter contacted Defendant once or twice per week and they talked. Defendant accepted Pastor Roy's offer to participate in counseling sessions with him. Defendant stated he wanted to stop using drugs and to change his life.

During one of the counseling sessions, Defendant and Pastor Roy discussed truthfulness as part of Pastor Roy's program: "12 Steps to Freedom in Christ." Defendant told Pastor Roy he murdered Welch by beating her to death with a baseball bat, disposed of her body, and attempted to clean up the murder scene. Defendant also told Pastor Roy that Welch was trying to raise money to get her husband out of jail, but Defendant was afraid of her husband and did not want him to be out of jail. Defendant also told Pastor Roy that Welch came to his house one night and believed Defendant was going to give her money. While Welch was on the phone, Defendant picked up a baseball bat and beat her to death.

Pastor Roy stated Defendant participated in several more counseling sessions with him over the next few weeks. On these occasions, Defendant would ask him whether their conversation was being recorded or if he had called the police. Pastor Roy stated he became fearful of Defendant and called the police. Pastor Roy testified at the motion hearing only, out of the presence of the jury.

The trial court ruled the clergy-communicant privilege did not exist because Pastor Roy had initially sought Defendant and offered to help him. The trial court determined Defendant was not seeking counsel and advice from his minister. If the privilege did exist, the court determined it was waived when Defendant confessed to Black and told Black he had told a preacher about the murder. Pastor Roy was present at trial, but was not called to testify.

The jury found Defendant guilty of first-degree murder. The trial court sentenced him to life in prison without the possibility of parole. Defendant appeals.

II. Issue

Defendant argues the trial court erred in concluding the clergy-communicant privilege did not apply and by denying Defendant's motion to suppress and motion *in limine* concerning his statements.

III. Clergy-Communicant Privilege

A. Standard of Review

[1] This Court's review of the trial court's order denying 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. Stanley*, 175 N.C. App. 171, 174, 622 S.E.2d 680, 682 (2005) (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citation omitted).

B. Application of Privilege

N.C. Gen. Stat. § 8-53.2, entitled "Communications between clergymen and communicants," provides:

> No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing

> out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred.

N.C. Gen. Stat. § 8-53.2 (2013).

Our Supreme Court has held that § 8-53.2 has two requirements for the clergy-communicant privilege to apply: (1) the defendant must be seeking the counsel and advice of his minister; and (2) the information must be entrusted to the minister as a confidential communication. *State v. West*, 317 N.C. 219, 223, 345 S.E.2d 186, 189 (1986). This statute expressly allows the communicant to waive the privilege in open court. N.C. Gen. Stat. § 8-53.2.

The State did not call Pastor Roy to testify before the jury. However, the trial court's denial of Defendant's motion to suppress and motion *in limine* allowed evidence that Defendant had communicated with Pastor Roy to be admitted into evidence through the testimony of other witnesses. Black testified as follows:

> Q: During any conversation he – Mr. Crisco said what to you about – you started to say a preacher?
>
> A: Yeah, he said that he had met a preacher in Sanford and that he had told the preacher about it and he was uncomfortable that he had told the preacher about it, and that — that the preacher wasn't acting right about him telling him, you know, like he would keep it to himself or something. I don't –
>
> Q: Now, you said "it" a lot, like what you're talking about; he told the preacher about what?
>
> A: The murder.

The trial court *ex mero moto* also asked Black about Defendant's conversation with Pastor Roy in front of the jury:

> THE COURT: Can you tell me exactly what Mr. Crisco said about any conversation with a preacher?
>
> THE WITNESS: Yes, sir. He told me that he – the preacher was helping him in Sanford get on his feet, and then he told me that he had told the preacher about this murder, and that he wished he wouldn't had [sic] told him that, that the preacher kind of – in other words, wasn't going to — he didn't think he was going to keep it to himself, something of that nature, that he was telling.

The State brought up the subject of the preacher again during its direct examination of the lead detective, Detective Sondergaard, its last witness:

> Q: Were you present in the courtroom when Matthew Black during his testimony mentioned a phone call that he received from Mr. Crisco and discussed talking to a preacher, that Mr. Crisco spoke to a preacher; do you recall that testimony?
>
> A: Yes.
>
> Q: Right now just answer with a yes or no: Throughout the course of your investigation, were you contacted by a preacher?
>
> A: Yes.
>
> Q: What was –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled as to that.
>
> BY [THE PROSECUTOR]:
>
> Q: What was his name?
>
> A: Ronnie Roy.
>
> Q: Is he present in the courtroom?
>
> A: Yes, he is.

By its plain and ordinary meaning, N.C. Gen. Stat. § 8-53.2, applies to the competency of clergyperson's testimony, and only applies to communications between Defendant and Pastor Roy. Although Pastor Roy was not called and did not testify before the jury at trial, Defendant argues the State circumvented Defendant's privileged communication to Pastor Roy by eliciting testimony from Black and Detective Sondergaard about the privileged communication. Even without calling the preacher to testify, Defendant argues the State was able to show the jury Defendant had confessed to a preacher, and the preacher was real and present before them, all in violation of the privilege.

A party who communicates and makes disclosures to his preacher does not have "any reason to expect confidentiality" when the disclosures are made in the presence of a third party. *West*, 317 N.C. at 223, 345 S.E.2d at 189 (holding the defendant's admissions to his preacher

were not "entrusted" to the preacher in pursuit of counsel and advice when the preacher's wife was present). In the context of the clergy-communicant privilege, our appellate courts have not considered whether a disclosure made to clergy can be waived by an out of court, voluntary disclosure of the substance of the communication to a third party.

However, "[i]t is well established in this state that even absolutely privileged matter may be inquired into where the privilege has been waived by disclosure." *Industrotech Constructors, Inc. v. Duke University*, 67 N.C. App. 741, 743-44, 314 S.E.2d 272, 274 (1983) (holding any privilege of confidentiality in arbitration transcripts had been waived by the university's disclosure of the materials to a non-party). The plain language of the statute itself allows waiver in open court.

N.C. Gen. Stat. § 8-53.2 applies only to "confidential" communication between clergy and communicant. The statute does not restrict the applicability of the privilege based upon which party initiates the communication. Presuming Defendant was seeking the counsel and advice of Pastor Roy when he confessed to Welch's murder, Defendant's statements were "entrusted" to Pastor Roy under the privilege. N.C. Gen. Stat. § 8-53.2.

Defendant told Black, a third party and not a pastor, that he had confessed to "a preacher in Sanford" about the murder. *West*, 317 N.C. at 223, 345 S.E.2d at 189. No recognized privilege exists between Defendant and Black. The statement by Defendant to Black that Defendant had confessed to a preacher is not privileged. The State was permitted to present evidence of statements Defendant made to Black because N.C. Gen. Stat. 8-53.2, by its express terms, does not apply to or exclude those statements.

D. Prejudice

[2] Even if we accept Defendant's argument that the trial court erred in admitting Black's testimony that Defendant stated he had told "a preacher from Sanford" about the murder or Detective Sondergaard's testimony, Defendant has failed to show prejudice to warrant a new trial. Erroneous admission of evidence requires a new trial only when the error is prejudicial. *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2013). The burden rests upon Defendant to show prejudice. *Id.*

The State presented other relevant and substantial evidence from which a jury could find beyond a reasonable doubt that Defendant killed Carrie Welch and committed first-degree murder: (1) Garland left Welch with Defendant at his home in the early morning hours of 1 July 2010; (2) around 5:00 a.m., Welch called Garland from Defendant's cellphone; (3) in the voicemail message left on Garland's phone, "Elvis" music was playing and Welch was hysterically screaming "wait, wait, wait"; Defendant regularly played "Elvis" music; (4) around 2:00 p.m. the same day, Garland returned to Defendant's home and saw Defendant wiping his kitchen floor; (5) the residence smelled of bleach and Garland saw a box of bleach; (6) Defendant told Black he killed Welch in his kitchen with a baseball bat; (7) Michelle Black heard Defendant state he beat Welch to death with a baseball bat and took her body to Bragg Boulevard; (8) blood was found on Defendant's kitchen ceiling, the kitchen wall, and the floor in an additional room, which matched Welch's DNA profile; (9) charred pieces of wood with a "very tight grain pattern" and slight curvature were found in Defendant's backyard; (10) an SBI fire and arson expert testified each piece of charred wood could have been portions of a baseball bat.

Defendant has failed to show a reasonable possibility exists that a different result would have been reached by the jury if Black or Detective Sondergaard had not been permitted to testify Defendant stated to him that he told "a preacher in Sanford" about the murder. The admission of Black's testimony was not prejudicial error to warrant a new trial.

IV. Conclusion

The clergy-communicant privilege set forth in N.C. Gen. Stat. § 8-53.2 does not depend upon which party initiates the communication. The privilege does not apply to Defendant's statements to Black, a third party and non-pastor, about his confession to "a preacher in Sanford" regarding the murder. No privilege exists between Defendant and Black to exclude Black's testimony.

Even if the admission of Black's or Detective Sondergaard's testimony was error, Defendant has failed to show prejudice. Defendant received a fair trial, free from prejudicial errors he preserved and argued.

NO PREJUDICIAL ERROR.

Judges BRYANT and GEER concur.

STATE v. GETTYS

[243 N.C. App. 590 (2015)]

STATE OF NORTH CAROLINA
v.
RALPH LEWIS GETTYS

No. COA15-51

Filed 20 October 2015

1. Jury—motion to strike venire—denied—no systematic exclusion

The trial court did not err in a prosecution for second-degree murder and related offenses by denying defendant's motion to strike the jury venire where defendant conceded the absence of the third prong of *Duren v. Missouri*, 439 U.S. 357 (1979), systematic exclusion of a group. A single venire that fails to proportionally represent a cross-section of the community does not constitute systematic exclusion.

2. Evidence—recording of interview—admitted for corroboration and impeachment

The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by admitting a recording of a witness's police interview for both corroboration and impeachment in light of court's abundance of caution.

3. Evidence—recording admitted for corroboration and impeachment—not logically contradictory

Contrary to defendant's contention in a prosecution for second-degree murder and related offenses, admitting a recording of a witness's interview with officers for both corroboration and impeachment was not logically contradictory and counterintuitive. The State did not introduce one statement to serve both purposes; rather, it introduced a recording of a police interview which included both contradictory and impeaching statements.

4. Evidence—transcript of recorded interview—read for clarification—statements made in reader's presence

The trial court did not err in a prosecution for second-degree murder and related offenses by allowing a detective to read from the transcript of an interview with a witness and to clarify portions of the recording. The detective merely read or clarified statements that had been made in her presence; additionally, the trial court gave a limiting instruction to the jury.

5. Criminal Law—special instruction—reviewed for abuse of discretion

Defendant's request for a special instruction on sequestration in a prosecution for second-degree murder was reviewed for abuse of discretion where defendant's initial request was not in writing and his second, written request came after the jury had been charged and had left the courtroom to begin its deliberations.

6. Criminal Law—special instruction refused—no abuse of discretion—not dispositive issue

The trial court did not abuse its discretion in a prosecution for second-degree murder and related offenses by refusing a requested special instruction where the instruction did not relate to a dispositive issue in the case.

7. Constitutional Law—right to presence—sequestration—prosecutor's argument

In a prosecution for second-degree murder and other offenses, it was noted that defendant's constitutional right to presence was not violated by the prosecutor's argument concerning sequestration.

Appeal by defendant from judgments entered on or about 16 January 2014 by Judge Lucy N. Inman in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 6 May 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Brandon L. Truman, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

STROUD, Judge.

Ralph Lewis Gettys ("defendant") appeals from judgments entered after a jury found him guilty of second-degree murder, possession of a firearm by a felon, and simple assault. Defendant contends that the trial court erred in (1) denying his motion to strike the jury venire; (2) admitting a recording of a police interview and allowing a police detective to read from a transcript of that recording; and (3) denying defendant's request for a special jury instruction on sequestration. We find no error.

I. Background

In the early hours of 15 December 2012, defendant worked as a bouncer at a "liquor house" in Charlotte. Defendant patted down customers for firearms, among whom were Joshua Lampkins and Raymona Abraham. Around 5:00 a.m. or 6:00 a.m., defendant told his brother that he wanted to leave the liquor house. Defendant's brother gave him the keys to his car, which he had parked down the street, so that defendant could move the car in front of the liquor house and then they could leave together. Defendant's ex-girlfriend, Teshalla Dunlap, accompanied defendant as he walked down the street to the car. With Dunlap as a passenger, defendant drove the car back up the street and parked it in front of the liquor house. When defendant and Dunlap got out of the car, Lampkins and Abraham confronted them and claimed that defendant had hit Lampkins with the car. Lampkins and Abraham demanded that defendant pay them fifty dollars, and when defendant refused, they threatened to attack him. When the conflict escalated, Dunlap walked toward the liquor house to tell defendant's brother to come outside. During the confrontation, defendant shot and killed Abraham and beat Lampkins unconscious. As part of the investigation of the homicide, Detectives Carter and Greenly interviewed Dunlap and recorded the interview.

On or about 7 January 2013, a grand jury indicted defendant for murder, possession of a firearm by a felon, and simple assault. *See* N.C. Gen. Stat. §§ 14-17, -33(a), -415.1 (2011). At trial, defendant moved to strike the petit jury venire, but the trial court denied his motion. On 16 January 2014, the jury found defendant guilty of second-degree murder, possession of a firearm by a felon, and simple assault. The trial court sentenced defendant to 339 to 419 months' imprisonment for the second-degree murder offense, 21 to 35 months' imprisonment for the possession of a firearm by a felon offense, and 60 days of imprisonment for the simple assault offense. The trial court ordered that defendant serve the second-degree murder sentence and possession of a firearm by a felon sentence consecutively and serve the simple assault sentence concurrently. Defendant gave notice of appeal in open court.

II. Motion to Strike the Jury Venire

[1] Defendant first contends that the trial court erred in denying his motion to strike the jury venire. Defendant alleges that his venire was racially disproportionate to the demographics of Mecklenburg County and therefore deprived him of his constitutional right to a jury of his peers.

A. Standard of Review

We review alleged violations of constitutional rights *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

B. Analysis

> Our state and federal Constitutions protect a criminal defendant's right to be tried by a jury of his peers. This constitutional guarantee assures that members of a defendant's own race have not been systematically and arbitrarily excluded from the jury pool which is to decide his guilt or innocence. However, the Sixth Amendment does not guarantee a defendant the right to a jury composed of members of a certain race or gender.
>
> The burden is upon the defendant to show a *prima facie* case of racial systematic exclusion. In order for a defendant to establish a *prima facie* violation for disproportionate representation in a venire, he must show the following:
>
> > (1) that the group alleged to be excluded is a "distinctive" group in the community;
> >
> > (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; *and*
> >
> > (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Jackson, 215 N.C. App. 339, 341-42, 716 S.E.2d 61, 64 (2011) (emphasis added and citations, quotation marks, and brackets omitted) (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979)).

A single venire that fails to proportionately represent a cross-section of the community does not constitute systematic exclusion. *See State v. Williams*, 355 N.C. 501, 549-50, 565 S.E.2d 609, 638 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). "The fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Equal Protection Clause." *Jackson*, 215 N.C. App. at 343, 716 S.E.2d at 65 (brackets omitted). Systematic exclusion occurs

when a procedure in the venire selection process consistently yields non-representative venires. *See Duren*, 439 U.S. at 366-67, 58 L. Ed. 2d at 588-89 (holding that a venire selection process favoring female exemption from jury duty constituted systematic exclusion).

Defendant argues that Mecklenburg County's computer program, Jury Manager, generated a racially disproportionate venire and thus deprived him of a jury of his peers. Defendant relies on *Turner v. Fouche*, 396 U.S. 346, 359, 24 L. Ed. 2d 567, 578 (1970). But in interpreting *Turner*, our Supreme Court noted:

> [T]he United States Supreme Court did not conclude that the *prima facie* case was solely based upon the disparity of representation of African-Americans in the jury venire. Rather, that Court's conclusion ultimately rested upon the finding that the underrepresentation was the result of the systematic exclusion of African-Americans in the jury-selection process. Under our interpretation of *Turner*, merely showing a disparity under the second prong of the *Duren* test, standing alone, will not establish a *prima facie* case of disproportionate representation.

State v. Bowman, 349 N.C. 459, 469, 509 S.E.2d 428, 434 (1998) (citation omitted), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). Although defendant asserts that there is a disparity under the second prong of *Duren*, he concedes the absence of systematic exclusion under the third prong. Because defendant has failed to satisfy the third *Duren* prong, systematic exclusion, we hold that the trial court did not err in denying defendant's motion to strike the jury venire. *Id.*, 509 S.E.2d at 434-35; *see also Williams*, 355 N.C. at 549-50, 565 S.E.2d at 638; *State v. Avery*, 299 N.C. 126, 134-35, 261 S.E.2d 803, 808-09 (1980).

III. Admission of Evidence

[2] Defendant argues that the trial court erred in admitting the recording of Dunlap's police interview for both corroboration and impeachment. Defendant further contends that the trial court erred in allowing Detective Carter to read portions of the transcript of that recording. We find no error in either circumstance.

A. Standard of Review

> The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have

> been the result of a reasoned decision. The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroboration.

State v. Tellez, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) (citations and quotation marks omitted). We also review for an abuse of discretion a trial court's decision to admit a statement for impeachment. *State v. Banks*, 210 N.C. App. 30, 38, 706 S.E.2d 807, 814 (2011).

Relying on *Sherrod v. Nash General Hospital, Inc.*, defendant argues that the proper standard for reviewing a trial court's decision to admit a statement for corroboration is *de novo*. *See* 126 N.C. App. 755, 762, 487 S.E.2d 151, 155 (1997), *aff'd in part and rev'd in part*, 348 N.C. 526, 500 S.E.2d 708 (1998). But there, this Court did not discuss a trial court's ruling on whether evidence was admissible for corroboration; rather it discussed a trial court's ruling on whether evidence was relevant under N.C. Gen. Stat. § 8C-1, Rule 401. *Id.*, 487 S.E.2d at 155. Accordingly, we hold that *Sherrod* is inapposite.

B. Corroboration and Impeachment

> The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. The trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.

State v. Duffie, ___ N.C. App. ___, ___, 772 S.E.2d 100, 104 (2015) (citations and quotation marks omitted). "Prior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature. Even so, such prior inconsistent statements are admissible for the purpose of impeachment." *State v. Bishop*, 346 N.C. 365, 387, 488 S.E.2d 769, 780 (1997); *see also* N.C. Gen. Stat. § 8C-1, Rule 607 (2013). "[I]mpeachment evidence has been defined as evidence used to undermine a witness's credibility, with any circumstance tending to show a defect in the witness's perception, memory, narration or veracity relevant to this purpose." *State v. Allen*, 222 N.C. App. 707, 721, 731 S.E.2d 510, 520 (citations, quotation

marks, and brackets omitted), *appeal dismissed and disc. review denied*, 366 N.C. 415, 737 S.E.2d 377 (2012), *cert. denied*, ___ U.S. ___, 185 L. Ed. 2d 876 (2013).

A trial court may admit evidence for both corroboration and impeachment. *See State v. Ayudkya*, 96 N.C. App. 606, 610, 386 S.E.2d 604, 606-07 (1989) (holding that a pretrial statement that supported a witness's direct testimony but contradicted his cross-examination testimony was admissible to either corroborate or impeach, "whichever the jury found"). "Where a witness's prior statement contains facts that manifestly contradict his trial testimony, however, such evidence may not be admitted under the guise of corroborating his testimony." *State v. Alexander*, 152 N.C. App. 701, 704, 568 S.E.2d 317, 319 (2002) (quotation marks omitted). Additionally, this Court in *Ayudkya* cautioned that courts must apply carefully this combination of the evidentiary rules of corroboration and impeachment; otherwise, a party could introduce "almost any out-of-court statement made by a witness." *Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606-07.

Here, the trial court admitted the recording of Dunlap's police interview for both corroboration and impeachment. Before admitting the recording, the trial court carefully reviewed the transcript of the recording and addressed defendant's concern that the State had called Dunlap as a witness only to introduce her prior inconsistent statements, which would have been otherwise inadmissible as hearsay:

> Now, as I understand what happened here, the State put on the witness. I would—I don't think the State expected [Dunlap] to not say something consistent. What she said was 90 percent consistent with what she said before. This is not a case where the State has put on a witness the State knows has changed his or her story, that the State doesn't reasonably expect to testify about what the witness said before for the pure purpose of pre-textually getting in that prior statement.
>
> As a matter of fact, here the State has put on a witness who has testified largely consistent[ly] with what she said.

The trial court also gave a limiting instruction to the jury before the recording was played to them:

> Ladies and gentleman, you're going to hear evidence of Ms. Dunlap's earlier statement to the police in the

> interview. I instruct you that you must not consider this earlier statement as evidence of the truth of what was said at that earlier time because the earlier statement was not made under oath at this trial. If you believe that the earlier statement was made and that any portions of the earlier statement conflict with or are consistent with the testimony of Ms. Dunlap at this trial, you may consider these prior statements and all other facts and circumstances bearing upon Ms. Dunlap's truthfulness in deciding whether you will believe or disbelieve Ms. Dunlap's testimony at this trial.

The trial court later included a similar limiting instruction in the jury charge:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you believe the earlier statement was made and that it conflicts or is consistent with the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony.

In light of the trial court's abundance of caution as demonstrated in its conscientious review of the transcript of the recording and its limiting instructions, we hold that under *Ayudkya*, the trial court did not abuse its discretion in admitting the recording for both corroboration and impeachment. *See Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606-07; *Tellez*, 200 N.C. App. at 527-28, 684 S.E.2d at 740-41 (approving of a similar limiting instruction).

[3] Defendant contends that admitting the recording for both corroboration and impeachment is "logically contradictory and counterintuitive." But the State did not introduce a single pretrial statement for both corroboration and impeachment; rather, it introduced a recording of Dunlap's police interview, which included many pretrial statements, some of which tended to corroborate Dunlap's testimony and some of which tended to impeach her testimony.

Defendant relies on *State v. Frogge* for the proposition that prior contradictory statements do not corroborate a witness's testimony and may not be admitted under such a theory. *See* 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997). But *Frogge* is distinguishable, because here, the State proffered and the trial court admitted Dunlap's pretrial statements for both corroboration and impeachment purposes.

Defendant next attempts to distinguish *Ayudkya*. There, the pretrial statement corroborated the witness's direct testimony "although it tended to impeach his cross-examination testimony." *Ayudkya*, 96 N.C. App. at 610, 386 S.E.2d at 606. Defendant argues that *Ayudkya* is distinguishable, because "the State was not offering Ms. Dunlap's previous statement[s] . . . in an attempt to rehabilitate her by corroborating her direct testimony and impeaching her cross-examination testimony." But nothing in *Ayudkya* suggests that its holding is limited to this particular situation. *See id.*, 386 S.E.2d at 606-07. Following *Ayudkya*, we hold that the trial court did not err in admitting the recording of the police interview for both corroboration and impeachment purposes. *See id.*, 386 S.E.2d at 606-07.

C. Reading from Transcript

[4] Defendant also contends that the trial court's decision to allow Detective Carter to read aloud portions of the transcript that the State believed were not clearly audible from the recording intruded upon the province of the jury. But because Detective Carter was one of the detectives who interviewed Dunlap, she had personal knowledge of the interview. An individual who has personal knowledge of a matter may testify directly about that matter at trial. *See* N.C. Gen. Stat. § 8C-1, Rule 602 (2013); *State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001), *appeal dismissed and disc. review denied*, 356 N.C. 169, 568 S.E.2d 619 (2002). Here, Detective Carter merely read or clarified statements that had been made in her presence. Additionally, the trial court gave the following limiting instruction to the jury:

> Ladies and gentleman, I will instruct you that—I will instruct you that you need to listen as carefully as you can and not give any greater weight to those portions of the statement that Detective Carter reads than you give to the portions of the statement that you only hear. I instruct you to treat them all—all without regard to whether you only heard them on the [recording] or also heard the detective say them.

Because Detective Carter had personal knowledge of Dunlap's interview, we hold that the trial court did not err by allowing her to read from the transcript and clarify portions of the recording to the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 602; *Cole*, 147 N.C. App. at 645, 556 S.E.2d at 671.

IV. Jury Instruction Request

[5] Defendant finally contends that the trial court erred by denying his request for a special jury instruction on sequestration. N.C. Gen. Stat § 1-181 provides:

> (a) Requests for special instructions to the jury must be—
>
> (1) In writing,
>
> (2) Entitled in the cause, and
>
> (3) Signed by counsel submitting them.
>
> (b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, *in his discretion*, consider such requests regardless of the time they are made.
>
> (c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same.

N.C. Gen. Stat § 1-181 (2013) (emphasis added).

In closing argument, the prosecutor argued:

> [Defendant is] cherry-picking the best parts of everybody's story after he's had a year to think about it and after he's had a year—or after he's had the entire trial to listen to what everybody else would say. You'll notice that our witnesses didn't sit in here while everybody else was testifying.

In response, defendant made two requests for a special jury instruction on sequestration. Defendant first orally requested an instruction before the trial court read the jury charge, and the trial court responded that it would examine the requested instruction when defendant submitted it in writing. This initial request was not written and thus did not satisfy subsection (a)(1). *See id.* §§ 1-181(a)(1), 15A-1231(a) (2013); *State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) ("[A] trial court's ruling denying requested instructions is not error where the defendant

fails to submit his request for instructions in writing."), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

Defendant later renewed his request in writing after the jury had been charged and had left the courtroom to begin its deliberations. The request was for the following instruction:

> In this case, all witnesses allowed by law were sequestered at the request of the State. These witnesses could not be present in court except to testify until they were released from their subpoenas, or to discuss the matter with other witnesses or observers in court.
>
> By law, the defendant and lead investigator for the State cannot be sequestered.

This written request satisfied N.C. Gen. Stat § 1-181(a)(1), but we analyze the trial court's decision under subsection (b), because defendant made the written request *after* the jury was charged; accordingly, we review for an abuse of discretion. *See* N.C. Gen. Stat § 1-181(b). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Tellez*, 200 N.C. App. at 526, 684 S.E.2d at 739.

[6] In denying defendant's written request, the trial court properly exercised its discretion:

> THE COURT: . . . . I don't think this instruction is required. I don't think this instruction goes to any issue that is going to be dispositive or even close to dispositive in this case. And I agree with [the State] that, you know, sometimes if the Court forgets an instruction or a pattern instruction in something that's given in every case, you have to call the jury back in because you forgot it. But for a special instruction that I was not inclined to give, to call them back in—I do think it would give undue—
>
> [Defendant's counsel]: I had only put this in, to be honest, Your Honor—you had already ruled, in my opinion. I just simply put this in because the rules of procedure say there has to be a copy. And so I did not—to be honest, I hadn't expected you to give it. I simply wanted to put it in the record[.]

Given that the requested instruction did not relate to a dispositive issue in the case, we hold that the trial court did not abuse its discretion in denying defendant's request.[1]

V. Conclusion

For the foregoing reasons, we hold that the trial court committed no error.

NO ERROR.

Judges CALABRIA and TYSON concur.

1. **[7]** We note that the prosecutor's argument did not violate defendant's constitutional right to presence. *See Portuondo v. Agard*, 529 U.S. 61, 73, 146 L. Ed. 2d 47, 59 (2000) ("In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.").

STATE OF NORTH CAROLINA
v.
TAE KWON HAMMONDS

No. COA15-53

Filed 20 October 2015

1. Confessions and Incriminating Statements—involuntarily committed defendant—no Miranda warnings—findings

The trial court did not err in an armed robbery prosecution by not suppressing statements made to officers without *Miranda* warnings while defendant was involuntarily committed to a hospital after a suicide attempt. Defendant only challenged small portions of the trial court's findings, which were supported by the record, and did not demonstrate prejudice.

2. Confessions and Incriminating Statements—involuntary commitment to hospital—not automatically in custody

A defendant who was involuntarily committed to a hospital was not automatically "in custody" for purposes of *Miranda* warnings. While involuntary commitment places a person in custody and his freedom of movement may be restricted, the courts have not considered the fact that the defendant was incarcerated as determinative where the questions concerned questions crimes unrelated to the current imprisonment. While persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration..

3. Confessions and Incriminating Statements—involuntary commitment to hospital—not custodial—totality of circumstances

A defendant who was interviewed by officers without *Miranda* warnings after he was involuntarily committed to a hospital was not in custody based on the totality of the circumstances. A reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation.

4. Confessions and Incriminating Statements—involuntary commitment—statement without Miranda warnings—high degree of care

The trial court correctly concluded, based on the totality of the circumstances, that statements made during a police interview were

voluntary where the interview took place without *Miranda* warnings in the hospital to which defendant was committed after a suicide attempt. A high degree of care should be exercised to ensure that the rights of a person in defendant's condition are protected.

5. Confessions and Incriminating Statements—statements to officers—no threats or promises

Although an armed robbery defendant contended that his confession was not voluntary because police officers made threats, promises, and accusations of lying, the police officers never threatened defendant and promised only that they would tell the district attorney about his cooperation and that he would be in a superior position to others if he told the facts of the of the incident before others. The trial court's findings supported its conclusion that defendant's confession was voluntary.

6. Sentencing—restitution—amount—evidence not sufficient

An order of restitution in an armed robbery prosecution was remanded for a new hearing on the amount where there was some evidence to support the award but the evidence was not specific enough to support the amount.

Judge INMAN dissenting.

Appeal by defendant from judgment entered on or about 2 July 2014 by Judge Tanya T. Wallace in Superior Court, Union County. Heard in the Court of Appeals on 13 August 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Joseph E. Elder, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

STROUD, Judge.

Tae Kwon Hammonds ("defendant") appeals from a judgment entered after a jury found him guilty of robbery with a dangerous weapon. Defendant argues that the trial court erred in (1) denying defendant's motion to suppress statements made to police officers while he was involuntarily committed; and (2) ordering that defendant pay $50 in restitution. We find no error in part, vacate in part, and remand.

I. Background

The following evidence was presented by the State at trial: At approximately 8:30 p.m. on 10 December 2012, Stephanie Gaddy was walking to her car in a Wal-Mart parking lot in Monroe when she noticed three men and a woman leaning against a vehicle about ten parking spaces away. She was about to get into her vehicle when she was approached from behind by a man who said "give me the money" and demanded her purse. Ms. Gaddy noticed that the man was carrying a handgun and realized she was being robbed. The man took her purse and cellphone. At trial, she described the perpetrator as an African-American male with a deep voice but did not identify defendant or any other individual as the perpetrator.

The next day, on 11 December 2012, defendant attempted suicide by taking an overdose of "white pills" and was brought to Carolinas Medical Center Union Hospital ("CMC Union"). At 3:50 p.m., while defendant was being treated at the hospital, a Union County magistrate ordered that defendant be involuntarily committed. Defendant was placed under 24-hour watch, during which a "sitter" was required to continuously observe him and accompany him when he left his room. That night, defendant became agitated and attempted to leave the hospital but was escorted back to his room by hospital security.

At approximately 5:00 p.m. the next day, on 12 December 2012, Detective Jonathan Williams and Lieutenant T.J. Goforth arrived at the hospital to speak with defendant about the robbery of Ms. Gaddy. The police asked Nurse Jan Kinsella, defendant's attending nurse at the time, if they could speak with defendant, which she allowed. The police officers interviewed defendant in his hospital room for approximately one and a half hours and did not inform defendant of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). During the interview, defendant confessed to the robbery, though he denied using a gun.

On or about 4 February 2013, a grand jury indicted defendant for robbery with a dangerous weapon. *See* N.C. Gen. Stat. § 14-87 (2011). On or about 30 June 2014, defendant moved to suppress the statements he made during the police interview on the grounds that he was subjected to a custodial interrogation without having been given *Miranda* warnings, and that his confession was involuntary. The trial court denied defendant's motion to suppress and admitted an audio recording of the interview at trial. The trial court later memorialized its findings of fact

and conclusions of law in a written order. On 2 July 2014, the jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to 60 to 84 months' imprisonment and ordered that defendant pay $50 in restitution. Defendant gave notice of appeal in open court.

II. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress because (1) he was "in custody" for purposes of *Miranda* and did not receive the *Miranda* warnings; and (2) his confession was involuntary.

A. Standard of Review

> The standard of review in determining whether a trial court properly denied a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether its conclusions of law are, in turn, supported by those findings of fact. The trial court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The determination of whether a defendant's statements are voluntary and admissible is a question of law and is fully reviewable on appeal.

State v. Cortes-Serrano, 195 N.C. App. 644, 654-55, 673 S.E.2d 756, 762-63 (citations and quotation marks omitted), *disc. review denied*, 363 N.C. 376, 679 S.E.2d 138 (2009). "Additionally, the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

B. Findings of Fact

Defendant's brief recounts much of the evidence from the hearing on the motion to suppress and notes some findings that the trial court could have made but did not. But our standard of review as to the findings of fact does not allow us to substitute our judgment for that of the trial court; the trial court determines the weight and credibility of the evidence. And this order includes full and detailed findings of fact, so we need not speculate about the basis for the trial court's ruling. Defendant ultimately challenges only small portions of three of the trial court's Findings of Fact 2, 6, and 13 as unsupported or at least partially unsupported by the evidence.

Finding of Fact 2 states as follows:

> That on December 11th, 2012, at approximately 3:50 p.m., Magistrate Sherry Crowder, a Union County Magistrate, issued a custody order for the involuntary commitment of [defendant], and directed the Union County Sheriff's Department to deliver [defendant] to a facility for examination and treatment. That the paper writing introduced into evidence showed that the magistrate found that the defendant was mentally ill and dangerous to himself or others; and the Sheriff's Department was directed to serve such paper writing on the defendant and transport the defendant.

Defendant argues that Finding of Fact 2 was "partially unsupported by the evidence, as the court found that the involuntary commitment order directed the Union County *Sheriff's Department* to deliver [defendant] to a facility [for] treatment." (Emphasis added.) Defendant is correct that the involuntary commitment order, issued in Union County, directs "*any law enforcement officer*" to "take [defendant] into custody within 24 hours after this order is signed and transport [defendant] directly to a 24-hour facility designated by the State for the custody and treatment of involuntary clients and present [defendant] for custody, examination and treatment pending a district court hearing." (Emphasis added and portion of original in all caps.) The evidence also showed that a law enforcement officer from the Union County Sheriff's Office executed this order. The exact wording of Finding of Fact 2 is not strictly supported by the record, but defendant has not demonstrated how the wording of the finding is prejudicial to him, and the substance of the facts is supported by the record. This argument is without merit.

Defendant also argues that Finding of Fact 13, "that nurses were in and out of the room during the interview and that [defendant] 'was never isolated without the ability to contact others,' was unsupported by the evidence." (Quoting Finding of Fact 13.) Finding of Fact 13 in its entirety is as follows:

> The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and [a] half hours. No Miranda Rights were given to the defendant. On at least three occasions, however, the defendant was told that, "there were no arrest warrants

> with the officers," and that they were not here to "lock you up." Indeed the defendant was not arrested and there were no warrants present at the time they spoke with the defendant. It is clear from the conversation that the officers had with the defendant that they knew that he was hospitalized as a result of an overdose, whether accidental or intentional, and had been involuntarily committed, and would be going for further evaluation and treatment. But although the defendant's words seem to be muttered, especially initially, they were appropriate responses to the statements or questions from the officers. The defendant answered the questions or statements coherently and appropriately. Throughout the conversation the defendant never asked the officers to leave or to stop talking. There was actually a sitter watching the interview, and nurses were in and out. The defendant was never isolated without the ability to contact others. The tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful. The officers did not tell the defendant he was being taped. There is no indication that there had been any previous relationship between the defendant and the officers. The nurse was not an agent of the state [or] government. The defendant was not arrested and no warrant issued at the time. The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

(Emphasis added.)

As noted above, only the underlined portion of this finding is challenged by defendant as unsupported by the evidence. Defendant's argument relies heavily upon the hospital records and notations of times that nurses recorded activities in defendant's room, stressing periods of time when a nurse was not physically present in the room. Yet we also note that defendant has not challenged Finding of Fact 8, which states:

> During the defendant's stay in the hospital and before he spoke with Monroe Police Department, he visited with representatives of DayMark, who apparently was the provider for his inpatient or outpatient follow-up from the hospital. He also had others around, specifically his mother, at times during his time in the hospital.

The trial court's characterization of the nurses as being "in and out" of the room is fully supported by the medical records, Nurse Kinsella's testimony, and the transcript of the audio recording of the police interview. The trial court did not need to prepare a detailed log of every moment that each person who visited or treated defendant was in the room. There is no indication in the evidence that defendant was ever isolated or prevented from contacting others, and Finding of Fact 8, which is unchallenged, also addresses his contact with others. This argument is also without merit.

Defendant also challenges Finding of Fact 6, specifically that defendant was "normal." Defendant asserts that the trial court found that he was normal simply because "he scored a 15 on the Glascow Coma Scale, as the scale does not assess a patient's psychiatric or mental state. An alert and conscious patient who says, 'I want to walk now to London, England,' scores 15 on the Glascow Coma Scale." (Citation omitted.) Defendant's argument takes the word "normal" entirely out of context. In context, the relevant portion of Finding of Fact 6 addresses Nurse Kinsella's testimony and states that

> according to her review, a Glascow-Coma Scale was administered when the defendant had arrived at the [emergency room], which is a quick and objective way to determine a patient's physical and mental state. It includes such criteria as the ability of keeping eyes open, whether oriented and can converse, obey commands, vocalize pain. That the defendant registered a fifteen on the Glascow-Coma Scale, (even on admission) and that is termed "normal".

This finding is fully supported by the evidence, and it is not, as defendant implies, a finding that defendant's mental state upon his admission to the emergency room after a suicide attempt and involuntary commitment was entirely "normal." The trial court was addressing defendant's state of consciousness upon arrival at the emergency room, and in other findings the trial court addresses defendant's mental and emotional state, both upon arrival and after treatment, in detail. Defendant does not challenge those findings as unsupported by the evidence.

The trial court's findings of fact which were not challenged on appeal are binding on this court on appeal, and the challenged findings were supported by the record, so all of the trial court's findings of fact are binding on appeal. *See State v. Phillips*, 151 N.C. App. 185, 190-91, 565 S.E.2d 697, 701 (2002); *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983).

C. Custody

i. Automatic Custody

[2] Defendant's argument suggests that a defendant who has been involuntarily committed in the hospital is automatically "in custody" for purposes of *Miranda* warnings. The briefs from both defendant and the State focus on cases which have addressed interrogations in hospital settings where a defendant was voluntarily seeking medical care, while defendant here was in the hospital due to involuntary commitment. The dissent also distinguishes the cases dealing with hospitalized defendants because they deal with persons voluntarily in the hospital for treatment and would require the trial court to apply a new and different analysis to the questioning of an involuntarily committed person. We agree that involuntary commitment is different from a voluntary hospitalization, as there is no doubt that involuntary commitment places a person in custody and his freedom of movement may be restricted by law enforcement officers. But we believe that cases dealing with incarcerated defendants who have been questioned regarding other crimes unrelated to their current imprisonment are instructive on this issue, and our courts have simply not considered the fact that the defendant is incarcerated as determinative. Since involuntary commitment is arguably less restrictive than incarceration, and certainly not more restrictive, we do not adopt a more restrictive rule for involuntary commitment than for incarceration.

In determining whether defendant was "in custody" for purposes of *Miranda*, this situation is closely analogous to cases which address interviews of a prisoner who has been incarcerated for another crime, when law enforcement officers attempt to speak with him about another entirely separate crime. In *State v. Fisher*, this Court held that an inmate is not "automatically in custody for the purposes of *Miranda*[,]" and our Supreme Court affirmed this ruling *per curiam*. 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004). There, we noted:

> It is well established that *Miranda* warnings are required only when a defendant is subjected to custodial

interrogation. Because the determination of whether a defendant was in custody is a question of law, it is fully reviewable here.

> A person is in custody, for purposes of *Miranda*, when he is taken into custody or otherwise deprived of his freedom of action in any significant way, and an inmate who is subject to a custodial interrogation is entitled to *Miranda* warnings. An inmate, however, is not, because of his incarceration, automatically in custody for the purposes of *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation.
>
> Factors which bear on the determination of whether an inmate is in custody for purposes of *Miranda* include: (1) whether the inmate was free to refuse to go to the place of the interrogation; (2) whether the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the inmate was physically restrained from leaving the place of interrogation; and (4) whether the inmate was free to refuse to answer questions.

Id., 580 S.E.2d 415 (citations, quotation marks, and brackets omitted).

This Court has followed this rule in *State v. Briggs*, 137 N.C. App. 125, 129, 526 S.E.2d 678, 680-81 (2000), and *State v. Wright*, 184 N.C. App. 464, 470-71, 646 S.E.2d 625, 629 (2007), *cert. denied*, 362 N.C. 372, 662 S.E.2d 393 (2008). In addition, the Fourth Circuit Court of Appeals agrees:

> [*Mathis v. United States*, 391 U.S. 1, 20 L. Ed. 2d 381 (1968),] clearly holds that the fact that a defendant is imprisoned on an unrelated matter does not necessarily remove the necessity for *Miranda* warnings. Nothing in that opinion, however, suggests that an inmate is automatically "in custody" and therefore entitled to *Miranda* warnings, merely by virtue of his prisoner status. . . .
>
> We also decline to read *Mathis* as compelling the use of *Miranda* warnings prior to all prisoner interrogations and hold that a prison inmate is not automatically always in "custody" within the meaning of *Miranda*. [The

> defendant's] view of the *Mathis* decision would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial. As the Ninth Circuit pointed out, this approach would "torture [*Miranda*] to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart." [*Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978).] Such a result would be directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result. *See Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (qualified sixth amendment rights of inmates in prison disciplinary proceedings); *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (qualified fifth amendment liberty interest of pretrial detainee); *Hudson v. Palmer*, [468 U.S. 517], 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984) (qualified fourth amendment right of inmates).
>
> . . . .
>
> Prisoner interrogation simply does not lend itself easily to analysis under the traditional formulations of the *Miranda* rule. A rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained and that he is never at liberty to leave an interview conducted by prison or other government officials. Evaluation of prisoner interrogations in traditional freedom-to-depart terms would be tantamount to a *per se* finding of "custody," a result we refuse to read into the *Mathis* decision.

United States v. Conley, 779 F.2d 970, 972-73 (4th Cir. 1985), *cert. denied*, 479 U.S. 830, 93 L. Ed. 2d 61 (1986) (third alteration in original).

A person who has been involuntarily committed is certainly a "person[] in government-imposed confinement[,]" just as an incarcerated defendant, and the exigencies of the administration of hospitals and

inpatient facilities which treat patients with psychiatric conditions are quite similar to those of prisons. *See id.* at 973. For example, if every involuntarily committed person held in an emergency room, hospital, or other mental health treatment facility is automatically "in custody" for purposes of *Miranda*, a law enforcement officer who simply needs to ask a patient for information about an altercation or theft which had occurred in the facility would have to first notify the person of his *Miranda* rights, regardless of the other circumstances of the interview. Such a result is "directly at odds with established constitutional doctrine that while persons in government-imposed confinement retain various rights secured by the Bill of Rights, they retain them in forms qualified by the exigencies of prison administration and the special governmental interests that result." *See id.* For these reasons, we hold that defendant was not automatically "in custody" for purposes of *Miranda* based simply upon his involuntary commitment and instead we consider the circumstances of defendant's statements in the same manner as courts have considered interviews of incarcerated defendants.

ii. Totality of the Circumstances

[3] In light of the above discussion, we must address whether the trial court's findings of fact support its conclusion of law that, based on the totality of the circumstances, defendant was not "in custody" for purposes of *Miranda*. Generally, "the appropriate inquiry in determining whether a defendant is 'in custody' for purposes of *Miranda* is, based on the *totality of the circumstances*, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (emphasis added and quotation marks omitted). In the context of a hospitalized defendant, this Court examines "(1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant." *State v. Allen*, 200 N.C. App. 709, 714, 684 S.E.2d 526, 530 (2009). "This Court has also made a distinction between questioning that is accusatory and that which is investigatory." *Id.*, 684 S.E.2d at 530. In *Allen*, this Court held that the defendant was not "in custody" and noted that "[a]ny restraint in movement [the] defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers." *Id.* at 715, 684 S.E.2d at 531.

In *United States v. Jamison*, the Fourth Circuit Court of Appeals also stressed this distinction:

> Analysis of whether [the defendant] was in custody . . . depends on whether a reasonable person would have felt free to decline the officers' requests or otherwise terminate the encounter[.] In dissecting the perceptions of such a reasonable person, however, we must be careful to separate the restrictions on his freedom arising from police interrogation and those incident to his background circumstances. That is, to the extent [the defendant] felt constrained by his injuries, the medical exigencies they created (e.g., the donning of a hospital gown and the insertion of an I.V. line), or the routine police investigation they initiated, such limitations on his freedom should not factor into our reasonable-person analysis. It is this careful differentiation between police-imposed restraint and circumstantial restraint that leads us to conclude that [the defendant] was not in custody[.]

U.S. v. Jamison, 509 F.3d 623, 629 (4th Cir. 2007) (citation, quotation marks, and brackets omitted).

In the context of a prison inmate, this Court examines "(1) whether the inmate was free to refuse to go to the place of the interrogation; (2) whether the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the inmate was physically restrained from leaving the place of interrogation; and (4) whether the inmate was free to refuse to answer questions." *Fisher*, 158 N.C. App. at 145, 580 S.E.2d at 415 (quotation marks omitted). In *Conley*, the Fourth Circuit Court of Appeals, in determining whether a prison inmate was "in custody," examined the "circumstances of the interrogation to determine whether the inmate was subject to *more than the usual restraint* on a prisoner's liberty to depart." *Conley*, 779 F.2d at 973 (emphasis added).

In addressing the issue of custody, we apply an objective test:

> Throughout the years, the United States Supreme Court has stressed that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Unless they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus

> cannot affect the *Miranda* custody inquiry. Nor can an officer's knowledge or beliefs bear upon the custody issue unless they are conveyed, by word or deed, to the individual being questioned. A policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time; *the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.*

Buchanan, 353 N.C. at 341-42, 543 S.E.2d at 829 (emphasis added and citations and quotation marks omitted).

Here, the trial court made Finding of Fact 13, as quoted above. During the interview, the police officers told defendant that he was not being arrested and in fact did not arrest him. The officers never told defendant that he could not stop the conversation or that he could not request that they leave, and the officers never threatened defendant or raised their voices. Defendant was "never isolated without the ability to contact others[,]" a sitter watched the interview, and nurses were "in and out" during the interview. Given that the factors in *Allen* or *Fisher* do not squarely apply to the context of an involuntarily committed defendant, we focus on "how a reasonable man in [defendant's] position would have understood his situation." *See Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829. While the dissent is correct that defendant was not free to leave the hospital, "we must be careful to separate the restrictions on his freedom arising from police interrogation and those incident to his background circumstances." *See Jamison*, 509 F.3d at 629. In other words, we must analyze how a reasonable person, in defendant's position, would have perceived the purpose of the restriction on his movement, whether it be for police interrogation or for medical treatment.

On 11 December 2012, the night before the police approached defendant, defendant "tried to leave the room, but was escorted back by security." Given the fact that defendant's attempt to escape took place *before* the police interview, coupled with the attendant circumstances of the interview, as discussed above, we hold that a reasonable person in defendant's position would understand that the restriction on his movement was due to his involuntary commitment to receive medical treatment, not police interrogation. *See Allen*, 200 N.C. App. at 715, 684 S.E.2d at 531 (holding that the defendant was not "in custody" and noting that "[a]ny restraint in movement [the] defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers"). Additionally, the test in *Conley* accords with this result, as defendant was not subject to "more than the usual restraint[.]" *See Conley*, 779 F.2d at 973.

The dissent correctly cites N.C. Gen. Stat. § 122C-205(a), for the proposition that if an involuntarily committed patient of a 24-hour facility escapes, the responsible professional shall immediately notify law enforcement. *See* N.C. Gen. Stat. § 122C-205(a) (2011). But a prison inmate who attempts to escape prison would also be met with police resistance, and yet as discussed above, numerous courts have held that a prison inmate is not automatically "in custody" for purposes of *Miranda*. We hold that the *purpose* behind a defendant's restraint is much more relevant than the force that can potentially be summoned to thwart a breach of that restraint. In light of *Buchanan*, *Allen*, *Conley*, and *Jamison*, we agree with the trial court that defendant was not "in custody" for purposes of *Miranda*. The trial court properly considered all of the factors to determine if defendant was in custody and did not err in its conclusion of law that based on the totality of the circumstances, defendant was not in custody at the time he was interviewed.

D. Voluntariness

[4] Defendant next challenges the trial court's conclusion of law that his statements during the police interview were voluntary. Under the United States Constitution, the question is whether the totality of the circumstances demonstrates that the statement was "the product of an essentially free and unconstrained choice by its maker[.]" *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057 (1961); *see also State v. Bordeaux*, 207 N.C. App. 645, 647, 701 S.E.2d 272, 274 (2010). In considering whether a statement was voluntary, the court must assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862 (1973). We consider the following 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.

Cortes-Serrano, 195 N.C. App. at 655, 673 S.E.2d at 763. "Admonitions by officers to a suspect to tell the truth, standing alone, do not render a confession inadmissible. . . . [To be improper, an] inducement of hope must promise relief from the criminal charge to which the confession

relates." *State v. McCullers*, 341 N.C. 19, 27, 460 S.E.2d 163, 168 (1995). In *State v. Smith*, a police officer testified that he told the defendant during an interrogation: "I couldn't tell him what would happened [sic], but it will be better for him when he came to court that he would tell—that we would tell the [district attorney] and the judge that he told the truth about it." 328 N.C. 99, 115, 400 S.E.2d 712, 720-21 (1991) (first alteration in original and brackets omitted). Our Supreme Court held that this statement did not constitute an improper promise and that the defendant's confession was voluntary. *Id.* at 115, 118, 400 S.E.2d 721-22.

As relevant to defendant's argument regarding voluntariness, the trial court found as follows:

> 9. That Nurse [Kinsella] checked the defendant for fall risk, that he was alert; he was not confused, he was oriented, he had a quick "get up and go", and he could respond quickly to moving out of the bed, and had no medications to make him confused at the time that she saw him.
>
> 10. That he was actually discharged from the care of the emergency room at 21:00 hours on 12-12. That he had to be medically stable for such to occur. That he actually clothed himself to leave before he actually left.
>
> 11. That when the nurse went off duty, she noted that the defendant's vital signs were within normal limits, his behavior was calm, he had proper emotional support; she had gone over the coping skills with him, and they were effective. She had discussed his concerns and suicide precautions were still in place. Nurse [Kinsella] had been on duty approximately two hours when two detectives arrived from the Monroe Police Department. They checked with her before they went to the defendant's room, and she told them that he was alert, oriented, and they were welcome to talk with him. She did not ask the defendant if he wished to speak with them, and did not tell the officers why the defendant was there, although it is clear from the conversation that they were aware that he was actually involuntarily committed at that time.
>
> . . . .
>
> 13. The defendant was interviewed by Detective Williams of the Monroe Police Department and Detective

T.J. Goforth at approximately five p.m. on December the 12th. They spoke with the defendant for approximately one and [a] half hours. No Miranda Rights were given to the defendant. On at least three occasions, however, the defendant was told that, "there were no arrest warrants with the officers," and that they were not here to "lock you up." Indeed the defendant was not arrested and there were no warrants present at the time they spoke with the defendant. It is clear from the conversation that the officers had with the defendant that they knew that he was hospitalized as a result of an overdose, whether accidental or intentional, and had been involuntarily committed, and would be going for further evaluation and treatment. But although the defendant's words seem to be muttered, especially initially, they were appropriate responses to the statements or questions from the officers. The defendant answered the questions or statements coherently and appropriately. Throughout the conversation the defendant never asked the officers to leave or to stop talking. There was actually a sitter watching the interview, and nurses were in and out. The defendant was never isolated without the ability to contact others. The tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful. The officers did not tell the defendant he was being taped. There is no indication that there had been any previous relationship between the defendant and the officers. The nurse was not an agent of the state [or] government. The defendant was not arrested and no warrant issued at the time. The defendant was unable to leave the hospital. He was not actually at a police station and was not told that he could not stop the conversation or request that the officers leave. He was never threatened, voices were never raised. The only promises made were such that the officers would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart.

14. At the time of the interview the defendant had had no drugs administered by the hospital in more than fourteen hours. The Court has had a chance to review

> the witnesses and listen to the tape, and finds the defendant to be at all times coherent and understanding of the questions, and appropriately responsive in his answers. There appears nothing from the Court listening to the tape that indicates the defendant was under the influence of any medication, and certainly not under the influence of medications that would cause him to be incapable of understanding the context or words that were coming to him and issued by him. The defendant was coherent in thought and speech and not under the influence of drugs or alcohol at the time the statement was made.

The trial court concluded: "Based on the totality of the circumstances, the Court finds the defendant made a knowing, voluntary, and understanding statement to the officers[.]"

The trial court's findings of fact addressed the obvious concerns raised by the evidence in this case. Defendant had been involuntarily committed and had attempted a drug overdose. The trial court's extensive findings of fact, only a portion of which are quoted above, demonstrate that the court carefully considered all of the circumstances and defendant's mental and emotional state. In addition, there was an audio recording of the interview, which the trial court reviewed and was able to hear both the officers' questions and defendant's responses and demeanor. A trial court, and this Court, should exercise a high degree of care to ensure that the rights of a person in defendant's condition, who has been involuntarily committed and may suffer from an impairing mental or emotional condition, are protected. But the trial court did exactly that in this case.

[5] Defendant also contends that his confession was not voluntary because the police officers made threats, promises, and accusations of lying. But we are bound by the findings the trial court actually made, as they are either unchallenged or supported by the evidence. *See Phillips*, 151 N.C. App. at 190-91, 565 S.E.2d at 701; *Jackson*, 308 N.C. at 581, 304 S.E.2d at 152. The trial court found that "the officers would confront the defendant when they believed that he was being less than truthful." The trial court also found that the police officers never threatened defendant and promised only that they "would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart." The police officers' exhortations that defendant tell the truth did not render defendant's confession involuntary. *See McCullers*, 341 N.C. at 27, 460 S.E.2d at 168. Additionally, the police officers' promise

that they would tell the district attorney about defendant's cooperation and that he would be in a "superior position to others" was not improper and did not vitiate the voluntariness of defendant's confession. *See id.*, 460 S.E.2d at 168; *Smith*, 328 N.C. at 115, 118, 400 S.E.2d at 721-22; *State v. Richardson*, 316 N.C. 594, 603-04, 342 S.E.2d 823, 830-31 (1986) (holding that a detective's statement to the defendant that "the district attorney usually responds favorably when a defendant cooperates" did not render the defendant's confession involuntary).

Defendant's reliance on *State v. Pruitt*, where our Supreme Court held that the defendant's confession was involuntary, is misplaced. *See* 286 N.C. 442, 458, 212 S.E.2d 92, 102-03 (1975). There,

> the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.

Id., 212 S.E.2d at 102. In contrast, here, the "tone was conversational between the officers and the defendant, although the officers would confront the defendant when they believed that he was being less than truthful." Accordingly, we distinguish *Pruitt*.

Defendant's reliance on *State v. Flood*, where this Court held that a police officer made an improper promise, is similarly misplaced. *See* ___ N.C. App. ___, ____, 765 S.E.2d 65, 72 (2014), *disc. review denied*, ___ N.C. ___, 768 S.E.2d 854 (2015). There,

> [d]uring the interview, Agent Oaks suggested she would work with and help Defendant if he confessed and that she "would recommend that defendant get treatment" instead of jail time. She also asserted that Detective Schwab "can

> ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them what they do with that but they're going to look for recommendations." Agent Oaks further suggested to Defendant that
>
> > if you admit to what happened here Detective Schwab is going to probably talk to the District Attorney and say, "hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?" and talk about it.
>
> At one point, Agent Oaks asked Defendant directly: "Do you want my help?" Agent Oaks also threatened that any possibility of help from her or Detective Schwab would cease after their conversation with Defendant ended, once even after Defendant asked to speak to his mother on the phone.

Id. at ___, 765 S.E.2d at 72 (brackets and ellipses omitted). In contrast, here, the police officers never threatened defendant and promised only that they "would tell the [district attorney] about his cooperation, and that he would be in a superior position to others if he told, before others did, as to the facts of the circumstances of the incident at Wal-Mart." Accordingly, we also distinguish *Flood* and hold that the trial court's findings of fact support its conclusion of law that defendant's confession was voluntary.[1]

III. Restitution

[6] Defendant's last argument is that the trial court erred in ordering defendant to pay $50 in restitution because Ms. Gaddy did not testify regarding the value of her identity card or medications, which defendant had stolen and had not been returned to her. The State agrees with defendant but argues that the appropriate remedy is to remand the case to the trial court for further consideration.

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1. We also note that this Court in *Flood* held that the defendant's confession was voluntary despite its conclusion that Agent Oaks made an improper promise. *Id.* at ___, 765 S.E.2d at 74.

A. Standard of Review

Although defendant failed to object to this issue, we hold that this issue is preserved for appellate review. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2013); *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010). "[W]e review *de novo* whether the restitution order was supported by evidence adduced at trial or at sentencing." *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (quotation marks omitted), *disc. review denied*, 365 N.C. 351, 717 S.E.2d 743 (2011).

B. Analysis

> [T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing. . . .
>
> Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed.

State v. Moore, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). In *Moore*, our Supreme Court articulated a third approach for cases that fall in the middle ground. *Id.* at 285-86, 715 S.E.2d at 849-50. The Court held that "some evidence" supported an award of restitution but that the evidence was not specific enough to support the amount of the award. *Id.* at 286, 715 S.E.2d at 849. The Court remanded the case to the trial court for a new hearing to determine the appropriate amount of restitution. *Id.*, 715 S.E.2d at 849-50. Because there is some evidence to support an award of restitution but the evidence is not specific enough to support the amount of the award, we vacate the restitution order and remand for a new hearing to determine the appropriate amount of restitution. *See id.*, 715 S.E.2d at 849-50.

IV. Conclusion

For the reasons noted above, we hold that the trial court committed no error during the guilt-innocence phase, vacate the restitution order, and remand the case for a new hearing to determine the appropriate amount of restitution.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judge McCULLOUGH concurs.

Judge INMAN dissents.

INMAN, Judge, dissenting.

I must respectfully dissent to the majority's decision that defendant's statement to police was noncustodial because, in my view, the circumstances of a person who has been involuntarily committed require inquiry and analysis beyond that performed by the trial court here.

The issue of whether and in what circumstances police questioning of an involuntarily committed person is custodial is one of first impression in North Carolina. While I agree with the majority that the nature of involuntary commitment does not render police questioning custodial *per se*, the analysis employed by North Carolina's appellate courts in other settings does not address the circumstances of a person who has been placed in custody involuntarily, who has not been charged with any crime, and whose mental condition merits inpatient treatment. It is incumbent upon trial courts in such cases to apply the factors identified by this Court and the North Carolina Supreme Court in other settings and to consider additional factors that are not at issue in other settings and have not previously been addressed by these courts. The additional factors include whether the involuntarily committed person expressly consented to the police interview and whether the person was told he was free to exit the interview area or to ask the officers to leave his presence.

I acknowledge that the trial court's findings of fact with regard to a motion to suppress are conclusive on appeal if supported by any competent evidence, and I agree that defendant has not managed to refute the few findings he challenged based on this standard of review. I disagree, however, with the majority's review of the trial court's determination of whether defendant was in custody when he was questioned, a conclusion of law fully reviewable on appeal. In my view, the trial court erred by applying a legal analysis inconsistent with this Court's precedent in other settings and by failing to weigh other factors necessary to determine whether police questioning of an involuntarily committed person was custodial.

The facts here – many of them found by the trial court – demonstrate the shortcomings in the analysis and conclusion that defendant was not in custody when questioned. Defendant was confronted without warning by two police detectives in the room where he was confined against his will. Neither the detectives nor any medical provider asked

defendant to consent to an interview. The detectives did not introduce themselves to defendant at the beginning of the interview. Detective Williams simply began questioning defendant about his condition and the circumstances leading to his hospitalization. It appears from the evidence that defendant had no place to retreat to if he wished to avoid questioning, although the trial court made no finding in this regard. It is also unclear whether defendant was free to leave his bed during police questioning; at the end of the interview Detective Goforth offered to swap out an old tray of food from defendant's bedside with a tray elsewhere in the room, "and put the fresh one where you can reach it." The trial court made no finding in this regard.

The circumstances of an involuntarily committed person are not the same as those of a typical hospital patient. In the hospital cases cited by the majority, the defendant was in a medical facility on his own volition, not legally restrained in any way. *See*, *e.g.*, *State v. Allen*, 200 N.C. App. 709, 715, 684 S.E.2d 526, 531 (2009) (the defendant was not in custody where his restraint of movement was due to medical treatment for a cut); *United States v. Jamison*, 509 F.3d 623, 633 (4th Cir. 2007) ("Absent police-imposed restraint, there is no custody.").

I also disagree with the majority that cases addressing questioning of prison and jail inmates are so closely analogous as to obviate the need for additional inquiry where the person subject to questioning has been involuntarily committed. Unlike prison and jail inmates, who necessarily have been advised of their *Miranda* rights in the course of their prior arrests, and who often have had the benefit of counsel in the course of their criminal cases, involuntarily committed patients may have had no prior occasion to be so advised or even to think about their rights if approached by police.

Involuntary commitment, as set out in our General Statutes, is a physical detention executed by government actors against the will of an individual. The General Assembly unequivocally describes involuntary commitment as the taking of a person into "custody." *See* N.C. Gen. Stat. § 122C-252 (2013) (describing facilities to be utilized for "the custody and treatment of involuntary clients"); N.C. Gen. Stat. § 122C-261 (2013) (specifying that the purpose of an involuntary commitment order is "to take the respondent into custody for examination by a physician or eligible psychologist"). Indeed, the order by which the Union County magistrate committed defendant was titled "Custody Order."

The Custody Order served on defendant in this case specified that, after taking defendant into custody, the law enforcement officer was

required to inform him that he "[was] not under arrest and has not committed a crime, but is being transported to receive treatment and for his or her own safety and that of others." The required disclaimer belies the similarity between a formal arrest and the taking of an individual into custody for the purposes of involuntary commitment, a comparison this Court has recognized before. In *In re Zollicoffer*, we reasoned that:

> [T]he requirements for a custody order under N.C. Gen. Stat. § 122C-261 are analogous to those where a criminal suspect is subject to loss of liberty through the issuance of a warrant for arrest. In both instances a magistrate or other approved official must find probable cause (though under N.C. Gen. Stat. § 122C-261 the synonymous term reasonable grounds is used) supporting the issuance of the order or warrant. In both cases the magistrate has the power to deprive a person of his liberty pending a more thorough and demanding determination of the evidence against him.

165 N.C. App. 462, 466, 598 S.E.2d 696, 699 (2004); *see also In re Moore*, __ N.C. App. __, 758 S.E.2d 33, 36 (2014) ("We have drawn [a comparison between involuntary commitment and arrest] because a custody order deprives a person of their liberty and therefore is analogous to a criminal proceeding, like the issuance of an arrest warrant, where a defendant is deprived of his liberty.").

The General Assembly also has recognized that both a formal arrest and involuntary commitment feature substantial loss of liberty, because indigent persons subject to either are constitutionally entitled to appointed counsel. *See* N.C. Gen. Stat. § 7A-451(a)(1),(6) (2013); *see also McBride v. McBride*, 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993) ("[I]n determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty[.]").

Many of the findings entered by the trial court in this case reflect the similarity between a formal arrest and an involuntary commitment custody order. The trial court noted that Custody Order directed "any law enforcement officer" to take defendant into custody and transport him to a 24-hour health facility. When defendant tried to leave the hospital on the night of 11 December, he was escorted back to his room by a uniformed security officer. The trial court found as an uncontested fact that "[defendant] was unable to leave the hospital." Any 24-hour facility

that accepts involuntarily committed clients is required to immediately notify the appropriate law enforcement agency if any such patient leaves the premises, and that law enforcement agency is in turn required to take the client into custody and remit him to the 24-hour facility from which he "escaped." *See* N.C. Gen. Stat. § 122C-205(a) (2013).

Assuming *arguendo* that the cases involving police questioning of inmates, relied upon by the majority, were sufficient to apply in this case, they do not support the trial court's conclusion in this case. This Court in *State v. Fisher* held that "whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation." 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003) *aff'd*, 358 N.C. 215, 593 S.E.2d 583 (2004). In contrast, defendant was not free to leave his hospital room.

Fisher's further holding, which is quoted by the majority and bears repeating, requires the trial court to consider the following specific factors: "(1) whether the [involuntarily committed person] was free to refuse to go to the place of the interrogation; (2) whether the [person] was told that participation in the interrogation was voluntary and that he was free to leave at any time; (3) whether the [person] was physically restrained from leaving the place of interrogation; and (4) whether the [person] was free to refuse to answer questions." *Id.* (citations and quotation marks omitted). The first two factors, applied to the trial court's findings in this case, suggest that defendant was in custody: he was not free to refuse to go to the place of the interrogation and he was not told that his participation was voluntary or that he was free to leave. The trial court's findings do not reflect consideration of the third and fourth factors.

Although the trial court found that defendant "was not told that he could not stop the conversation or request that the officers leave," the double negative reveals an attenuated approach to the facts and misstates the second factor provided in *Fisher*. It appears undisputed that the police detectives did not tell defendant that he *could* stop the conversation or that he *could* ask the officers to leave.

After entering defendant's room and asking about his health condition, detectives first asked defendant about thefts from lockers at his workplace, unrelated to the charges and convictions on appeal here. After defendant denied any involvement, the detectives told him that they were being "lenient" by coming to him without an arrest warrant and that "unless you tell us the truth, then we have to do what we have to do. . . . Because we already know. It's just that we want to hear it from

you." After demonstrating to defendant that he could not avoid culpability by his denials because of their superior knowledge, police detectives then questioned defendant about the robbery of Ms. Gaddy underlying the charges and convictions at issue in this appeal. Detective Goforth repeated her forecast of the consequences without his cooperation: "But the thing is is that, like I said, I mean, that man right there [Detective Williams] needs a warrant. He's already got everything he needs. It's a done deal." The nature of the police detectives' statements to defendant, no matter how softly spoken or conversational in tone, and notwithstanding their assurances that he would not be arrested there on the spot, would seem to suggest to any reasonable person that police already had enough information to bring charges but were giving him a chance to cooperate in hopes of mitigating his exposure. In my view, a reasonable person in defendant's position presented with this information from two police officers at his bedside would hardly consider the conversation an informal one. The trial court's findings of fact did not address these circumstances.

Unlike the defendant in *Fisher*, defendant expressed no consent to speak with police officers and in fact had no warning that they were coming to question him. The officers simply asked the nurse monitoring defendant for permission to enter the room, which she granted without seeking defendant's consent. While the issue has not previously been addressed in North Carolina, courts in other jurisdictions considering police questioning involuntarily committed patients have noted such factors as central to the custody analysis. *Compare United States v. Hallford*, No. 13–0335(RJL), 2015 WL 2128680, at *3 (D.D.C. May 6, 2015) (where defendant, who was questioned in his hospital gown, was not asked if he would submit to an interview and was never told he could refuse to answer questions or suspend the interview at any time, "any reasonable person would have believed that he was not free to leave or terminate the interview") *with State v. Rogers*, 848 N.W.2d 257, 263-64 (N.D. 2014) ("The medical staff did not permit the detectives to speak with Rogers until the staff had his permission. Hospital staff also selected the room where the interview was conducted [outside of the defendant's hospital room].").

Nor were the circumstances of defendant's statements to police analogous to the statements at issue in *Fisher* and decisions following its holding. The defendant in *Fisher* was not sought out by police; he asked to leave his prison cell and met with a guard to confess he had committed a murder years earlier because "he realized he was getting away with murder and it started eating him up inside[.]" 158 N.C. App.

at 138, 580 S.E.2d at 410 (quotation marks and brackets omitted). The defendant in *State v. Briggs* was exiting an interview room when he stopped at the open door, closed the door, returned to sit with the officer and confessed to a crime. 137 N.C. App. 125, 127, 526 S.E.2d 678, 679 (2000). The defendant in *State v. Wright* unexpectedly told officers that he had participated in a fatal shooting, even though one officer had expressly told defendant that the purpose of their meeting was not to interrogate him, was only to advise him of the status of the case, and that " 'if I do ask a question, do not answer.' " 184 N.C. App. 464, 471, 646 S.E.2d 625, 630 (2007).

Defendant's circumstances in this case – like those of most involuntarily committed mental patients – also differed from the prison environment cited by the majority, *supra*, in which federal courts have reasoned that requiring *Miranda* warnings in all prisoner interrogations "would seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards." *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985). A mental patient's constitutional rights should not be "qualified by the exigencies of prison administration and the special governmental interests that result." *Id.*

The trial court made no finding regarding whether there was a formal arrest or restraint on defendant's freedom of movement of the degree associated with a formal arrest. Nor did the trial court make a finding regarding whether a reasonable person in defendant's circumstances would not have felt free to terminate the interview or to ask the officers to leave his room.

The fact noted by the majority that defendant was involuntarily committed based on actions bearing no relation to the criminal activity that officers questioned him about did not, in my view, diminish his constitutional rights with regard to interrogation. Such an approach would leave involuntarily committed patients vulnerable to visits from law enforcement officers seeking information they would be less likely to obtain in another setting. Courts must not place such risk on a population which by definition is comprised of people suspected of not being able to care for themselves.

It is important to note that the trial court may not have been presented with the case law cited or the legal analysis included in this dissent. The extensive findings of fact reflect that the trial court indeed exercised a high degree of care in its decision. Nonetheless, in my view the decision was in error.

In light of the additional factors which I believe must be weighed – whether defendant expressly consented to speak with police and whether defendant was told that he could ask officers to leave his presence – along with other factors previously delineated by this Court as necessary to determining whether a statement is custodial, I would reverse the trial court's order denying defendant's motion to suppress and remand this case for reconsideration of the motion and the entry of findings and conclusions based upon all pertinent factors. Because one factor to be considered in determining whether a statement was voluntary is whether defendant was in custody when questioned, the trial court's conclusion regarding custody also could require it to reconsider the issue of whether defendant's statement was voluntary.

STATE OF NORTH CAROLINA
v.
ERIC DOUGLAS HICKS

No. COA15-491

Filed 20 October 2015

1. Search and Seizure—seizure—items for manufacture of methamphetamine—destruction without court order—good faith of officers

The trial court did not abuse its discretion by denying defendant's motion for discovery sanctions after the State destroyed evidence seized from his home without an order authorizing destruction. The seized evidence—items used for the manufacture of methamphetamine—was destroyed under the officers' good faith belief that a destruction order had been entered.

2. Evidence—business record—database of pseudoephedrine purchases—foundation laid

In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by admitting a law enforcement officer's testimony regarding defendant's alleged pseudoephedrine purchases and an exhibit showing a report from the NPLEx database. The officer's testimony as to his familiarity with the NPLEx database provided a sufficient foundation for admission of the evidence as a business record. Even assuming admission of this evidence was erroneous, any error would have been harmless because the State presented ample other evidence of defendant's guilt.

3. Criminal Law—rejection of plea agreement—motion to continue—waiver of right

In defendant's trial for charges related to the manufacture of methamphetamine, the trial court did not err by denying defendant's motion to continue after rejecting his plea agreement. Defendant waived his right to a continuance pursuant to N.C.G.S. § 15A-1023(b) by (1) expressly consenting to being arraigned and proceeding to trial after the court rejected his plea and (2) failing to assert his right to continuance until jeopardy attached, during the second week of trial. He failed to assert his right in "apt time."

Appeal by defendant from judgment entered 19 August 2014 by Judge Gary M. Gavenus in Avery County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Charlotte Gail Blake for defendant-appellant.

TYSON, Judge.

Eric Douglas Hicks ("Defendant") appeals from judgment entered after a jury convicted him of manufacturing methamphetamine and maintaining a dwelling for the purpose of keeping methamphetamine. We find no error in Defendant's conviction or in the judgment entered thereon.

I. Factual Background

A. State's Evidence

In the fall of 2012, school resource officer Timothy Winters ("Officer Winters") received information from several students, who reported Jennifer McCoury ("McCoury") was making methamphetamine and smoking marijuana with her high-school-aged son. Officer Winters shared this information with Avery County Sheriff's Deputy Casey Lee ("Officer Lee"). Officers verified the tip by conducting a "meth check," which showed McCoury had made multiple purchases of Sudafed, which contains pseudoephedrine, the precursor chemical to methamphetamine.

Officer Lee and others went to McCoury's home to "[c]heck on the safety" of her children on 12 October 2012. No one was present at the residence when officers arrived. Officer Lee testified "[t]here were

signs of a meth lab" outside McCoury's home. Officer Lee and others subsequently went to Defendant's residence to locate McCoury and her children. The officers knew Defendant was the father of McCoury's daughter, who was six or seven years old at the time.

Officers announced themselves and knocked on Defendant's door for approximately fifteen minutes. No one answered. Officer Lee walked around the house to the side door and noticed in plain view a trash can with two plastic bottles "sticking up, [with] a drilled hole in the top of one of them" in plain view. Officer Lee testified he "believed those bottles to be used to manufacture meth[,]" based on his training and experience. He also observed "a white granular substance" was present inside the bottles and stated the substance "[was] consistent with meth manufacture."

Defendant eventually answered the door and allowed the officers to walk through his home to look for his daughter. Defendant also gave his consent for the officers to search his house and property. The officers did not find anything illegal during this initial search. Officer Lee inquired about the two plastic bottles he had observed outside. Defendant "denied any knowledge" about them. Defendant was arrested and transported to jail.

Officer Lee contacted Detective Frank Catalano ("Detective Catalano") and requested a search warrant for Defendant's residence the following day. Detective Catalano's search warrant application sought authorization to destroy any hazardous materials, if found, after the materials were "documented, photographed, and labeled samples obtained for analysis." This request was based on Detective Catalano's sworn search warrant application, which stated:

> The Affiant knows that some or all of these chemicals and substances pose a significant health and safety hazard due to their explosive, flammable, carcinogenic, or otherwise toxic nature. Additionally, the affiant knows that the handling of hazardous clandestine laboratory materials without proper expertise, supervision, and facilities has caused, in the past, explosions[,] fires, and other events that have resulted in injuries and severe health problems.

The trial judge authorized the search warrant later that day. Despite Detective Catalano's request for authorization to destroy hazardous materials within the application, the warrant did not contain a destruction order, nor was a destruction order subsequently entered.

The search warrant was executed the same day it was issued. The following items were seized from Defendant's residence: (1) five bottles with a white substance; (2) two bottles with liquid and a white substance; (3) an ice compress; (4) an empty pack of lithium batteries; (5) a Methadone bottle; (6) an allergy medicine pack (commonly referred to as a "blister pack;" and, (7) a cell phone.

Officer Lee testified, based on his training and experience, plastic bottles, such as the ones found on Defendant's property, are commonly used in a method of methamphetamine manufacture known as the "one pot" method. Officer Lee stated a second plastic bottle is used in the "one pot" method, as the hydrochloric gas, or HCL, generator. A white residue is left behind after an HCL generator is used. Officer Lee testified the white residue he observed in the plastic bottles found on Defendant's property was consistent with the typical white residue left behind after an HCL generator is used to manufacture methamphetamine.

Officer Lee testified he searched for Defendant's name on the National Precursor Log Exchange ("NPLEx") database after he left Defendant's residence. NPLEx is a "federal public registry" used to track an individual's pseudoephedrine purchases. He explained pseudoephedrine is "the main ingredient of methamphetamine." NPLEx was established "to make sure that people don't buy more [pseudoephedrine] than their allowed limits every month."

Officer Lee printed out the log of Defendant's pseudoephedrine purchases from the NPLEx website. The report was offered and admitted into evidence as a business record, over Defendant's hearsay objection. The report indicated Defendant had purchased pseudoephedrine six times at various locations in North Carolina and Tennessee between January and September 2012.

Chip Hughes ("Agent Hughes"), State Bureau of Investigation ("SBI") clandestine laboratory unit site safety officer, arrived on the scene to process the purported methamphetamine lab discovered at Defendant's residence. Agent Hughes testified to the dangers of placing hazardous items seized from a methamphetamine lab into evidence storage, stating:

> [E]ven though the bottle itself is no[t] producing gas at that time, if something were to spill on it in the evidence vault, or decay it may still produce gas even though it is in a Ziploc bag or paper bag . . . and the gas will leak or build up in those things and expose people to gas or in a case of flammables if they become hazardous, they could ignite.

He further stated the destruction of hazardous materials seized from methamphetamine labs is "a common practice across the state because . . . local agencies don't have the facilities or equipment to . . . adequately store these [items] and protect themselves or others."

Mike Piwowar ("Mr. Piwowar"), a forensic scientist with the North Carolina State Crime Lab, was called to Defendant's home after the search warrant was executed to prepare an inventory of possible items used in manufacturing methamphetamine and to take samples back to the lab for analysis. Mr. Piwowar testified the residue in the two plastic bottles recovered from Defendant's trash can both tested positive for an acidic pH. This pH was consistent with residue found inside an HCL generator used to manufacture methamphetamine.

Mr. Piwowar also testified "the bottoms of the [five other] bottles were missing which indicates there was a very strong acid in there that burned the bottoms off." Mr. Piwowar explained this finding was consistent with usage in a methamphetamine lab, because the chemicals used in the methamphetamine manufacturing process are corrosive. Mr. Piwowar stated the other items seized from Defendant's residence were also consistent with items commonly used in manufacturing methamphetamine.

Agent Hughes prepared the items seized, with the exception of the cell phone, for transport and destruction after the bottles were tested for acidic content and subsequent neutralization. On 11 March 2013, a grand jury indicted Defendant for manufacturing methamphetamine, maintaining a dwelling used to keep controlled substances, and possession of an immediate precursor used to manufacture methamphetamine.

B. Defendant's Pre-Trial Motions

A month after the seizure, Defendant filed a motion on 14 November 2012 for preservation of evidence seized. The trial court granted Defendant's motion in open court on 29 November 2012 and entered its order on 6 December 2012.

Defendant also filed a motion for sanctions against the State for destruction of evidence on 12 June 2014, in connection with the items seized pursuant to the search warrant. Defendant alleged his Due Process rights were violated because the State "apparently destroyed the evidence seized without offering Defendant any opportunity to view or test the items," and despite the fact that he had obtained an order to preserve the evidence seized from destruction.

The trial court made the following relevant findings of fact:

> 11. Investigator Catalano drafted an application for a search warrant for the defendant's residence based upon the information provided to him by Deputy Lee and in such application also requested a destruction order for any hazardous materials.
>
> . . . .
>
> 13. Judge Ginn authorized the search warrant . . . .
>
> . . . .
>
> 16. That despite the request for a destruction order contained within the search warrant application[,] a destruction order was not entered by the Honorable C. Phillip Ginn on October 13, 2012[,] and no subsequent destruction order was ever entered.
>
> 17. That with the exception of the cell phone, the destruction process was initiated pursuant to the belief that such a destruction order was actually entered by Judge Ginn on October 13, 2012.
>
> 18. That the court is unable based upon all of the evidence presented by both the State and the Defendant to determine the date upon which the items were destroyed.
>
> . . . .
>
> 22. The SBI agents and the officers of the Avery County Sheriff's Department had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process.
>
> 23. The Defendant filed a Motion for Order Requiring Preservation of Evidence Seized . . . on or about November 14, 2012.
>
> 24. That this Motion was filed some 30 days after the destruction of the evidence seized had been initiated by the SBI.
>
> . . . .
>
> 27. That the filed order was served upon the State by letter dated December 10, 2012, the actual date of service

> being unknown by the court[,] but the court notes that an envelope admitted into evidence in this case indicates a postmark date of December 21, 2012.
>
> 28. HCL generators are not regularly preserved.
>
> 29. The only forensic testing done on the bottles seized was to determine whether the contents were acidic. No further testing could have determined what the generators were used for, unless tubing was located therein. There was no tubing found herein.
>
> 30. That the parties agree and the court finds that the items seized were destroyed at an unknown date prior to December 17, 2012.
>
> 31. That the substances contained in the seven bottles seized represented by their nature significant health and safety hazards in that they are acidic, potentially carcinogenic[,] and potentially toxic.
>
> . . . .
>
> 34. There is no evidence that the seized items were in the possession or control of the State on November 29, 2012[,] the date of the purported preservation order or any date subsequent thereto, and the court finds that these items were not in the possession or control of the State on that date.

Based on the foregoing, the trial court concluded the SBI "had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process." The trial court denied Defendant's motion for sanctions.

C. Defendant's Plea Agreement and Motion to Continue

Defendant's case came on for trial before a jury on 11 August 2014. On 12 August 2014, the State and counsel for Defendant presented their proposed plea agreement to the trial judge. The plea agreement provided for Defendant to enter an *Alford* plea to possession of a methamphetamine precursor and receive a suspended sentence within the presumptive range. The State would dismiss the charges of manufacturing methamphetamine, maintaining a dwelling for controlled substances, and resisting a public officer.

The trial judge began to review the plea transcript with Defendant and asked the attorneys to approach the bench. After an unrecorded bench conference, Defendant told the trial judge he was "not comfortable changing the plea." The trial judge instructed the State to arraign Defendant on all the other charges. The following dialogue occurred between the trial judge, the State, and counsel for Defendant ensued:

> MR. RUPP: Mr. Hedrick, how does your client . . . plead in 12 CRS 050584, Count 1, Manufacturing Methamphetamine. And Count 3, maintaining a dwelling, or place or vehicle for keeping controlled substances.
>
> MR. HEDRICK: Pleads not guilty to those charges.
>
> MR. RUPP: Does he agree to proceed with the bill of information that we have just submitted to the court?
>
> MR. HEDRICK: On those charges?
>
> MR. RUPP: Yes sir.
>
> MR. HEDRICK: We signed that correct?
>
> THE COURT: Yes.
>
> MR. HEDRICK: Yes.
>
> MR. RUPP: Does he waive any sort of notice or requirements and agree to proceed today to trial?
>
> MR. HEDRICK: My question would be what about the remaining charges?
>
> MR. RUPP: The only charges that are on the information are the manufacturing methamphetamine, the possession of methamphetamine precursor and the maintaining a dwelling.
>
> MR. HEDRICK: My understanding you didn't arraign him on all those to my understanding. [sic]
>
> THE COURT: As far as Count 2, Possession of methamphetamine precursor, how does he plead?
>
> MR. HEDRICK: Pleads not guilty.
>
> THE COURT: The resisting is being dismissed?
>
> MR. RUPP: The resisting is not on the information.

THE COURT: It is on the indictment.

MR. RUPP: I will dismiss the resisting.

THE COURT: All right, go ahead and bring in the jury.

On 18 August 2012, after the State had presented its case for two and one-half days, counsel for Defendant moved for a continuance in order to present the plea transcript and agreement to another court. The trial court denied Defendant's motion, stating "[w]e are too far along." The trial court entered an order on Defendant's motion to continue, in which it made the following findings of fact:

> 3. That during the plea discussions, neither the State nor counsel for the defendant advised the Court that the plea was an *Alford* plea.
>
> 4. That when the [c]ourt was presented the plea transcript in open court, the court discovered that the plea was an *Alford* plea and immediately advised the parties that the court would not accept the *Alford* plea.
>
> 5. That the State and the Defendant were given an opportunity to modify the plea arrangement.
>
> 6. That thereafter, after discussing the matter with the defendant, counsel for the defendant advised the court that the defendant would not enter a plea of Guilty, whereupon the defendant was arraigned and entered pleas of Not Guilty to all three charges.
>
> 7. That upon the rejection of the *Alford* plea by the court, the defendant by and through counsel did not move to continue the case and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).
>
> 8. Thereafter jury selection began and a jury of twelve and two alternates was empaneled on August 13, 2014, almost 24 hours after the plea was rejected by the court.
>
> 9. That at no time during jury selection and at no time prior to the jury being empaneled did the defendant move to continue the case and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).

> 10. Evidence was offered by the State from Wednesday, August 13 through Friday August 15, 2014 and at no time during this period did the defendant move to continue this matter and specifically did not move to continue the case pursuant to the provisions of N.C.G.S. [§] 15A-1023(b).

The trial court concluded Defendant "by his silence from the time of the rejection of the plea through jury selection and through approximately 2 ½ days of trial has voluntarily waived his right to a continuance as provided in 15A-1023(b)."

The trial court dismissed the charge of possession of an immediate precursor chemical at the close of all the evidence. The jury returned a verdict finding Defendant guilty of manufacturing methamphetamine and maintaining a dwelling used to keep controlled substances.

The trial court consolidated the convictions and sentenced Defendant to a term of 83 to 112 months imprisonment.

Defendant gave timely notice of appeal to this Court.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion for discovery sanctions; (2) admitting Officer Lee's testimony regarding information he had received from a search on the NPLEx database regarding Defendant's alleged purchases of pseudoephedrine; and, (3) denying his motion to continue after the trial court rejected his plea agreement.

III. Analysis

A. Motion for Sanctions

[1] Defendant argues the trial court erred by denying his motion for discovery sanctions after the State destroyed evidence seized from Defendant's home, without an order authorizing destruction, and despite a court order that the seized evidence be preserved.

1. Standard of Review

"A trial court's imposition of discovery sanctions is within the court's sound discretion and will not be reversed absent a showing of abuse of discretion." *State v. Shedd*, 117 N.C. App. 122, 124, 450 S.E.2d 13, 14 (1994) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *State v. Moore*, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002) (citations and internal quotation marks omitted).

2. Analysis

Defendant filed a motion for an order requiring preservation of evidence seized from his home upon execution of the search warrant. Defendant contends he sought to preserve the items seized in order to have the opportunity to review the items and for his own witnesses to perform testing.

The Supreme Court of the United States held "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 102 L. Ed. 2d 281, 289 (1988).

In its order denying Defendant's motion for sanctions, the trial court found "the destruction process was initiated pursuant to the belief that such a destruction order was actually entered by Judge Ginn on October 13, 2012." The trial court also noted Defendant's motion for an order requiring the preservation of evidence seized "was filed some 30 days after the destruction of the evidence seized had been initiated by the SBI" and "HCL generators are not regularly preserved."

The record and trial testimony contain ample evidence to support the trial court's conclusion that law enforcement "had a good faith belief that the items were to be destroyed and did not act in bad faith when they initiated that destruction process." Defendant has failed to carry his burden to show the trial court abused its discretion in denying his motion for sanctions. This argument is overruled.

B. Officer Lee's Testimony Regarding the NPLEx Database

[2] Defendant argues the trial court erred by admitting Officer Lee's testimony regarding Defendant's alleged pseudoephedrine purchases and State's Exhibit 9. Defendant asserts the State's Exhibit 9 report was not properly authenticated and was inadmissible hearsay.

1. Standard of Review

This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*. *State v. Miller*, 197 N.C. App. 78, 87-88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). "A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) (citation omitted), *disc. review denied*, __ N.C. __, 722 S.E.2d 607 (2012).

"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 internal quotation marks omitted).

2. Analysis

The North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2013). Hearsay is generally inadmissible at trial, unless a recognized exception to the hearsay rule applies. N.C. Gen. Stat. § 8C-1, Rule 802 (2013).

"The erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, and the burden is on the defendant to show prejudice." *State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (citations omitted); *see* N.C. Gen. Stat. § 15A-1443(a) (2013). Prejudicial errors occur when there is a reasonable possibility that a different result would have been reached, had the error not been committed. *Allen*, 127 N.C. App. at 186, 488 S.E.2d at 297.

N.C. Gen. Stat. § 8C-1, Rule 803(6) establishes an exception to the general exclusion of hearsay for business records. A business record includes:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2013).

Our Supreme Court held business records stored on computers are admissible if:

> (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Springer, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). "There is no requirement that the records be authenticated by the person who made them." *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637-38 (citation omitted). "The authenticity of such records may be established by circumstantial evidence." *Id.* at 516, 719 S.E.2d at 637 (citation omitted).

Defendant argues the State failed to lay a proper foundation for admission of the report from the NPLEx database under the business record exception to the hearsay rule. Defendant contends the State was required to present testimony from someone associated with the NPLEx database, or the company responsible for maintaining the database, regarding the methods used to collect, maintain and review the data in the NPLEx database to ensure its accuracy. We disagree.

Officer Lee testified about his knowledge of, and familiarity with, the NPLEx database. He explained: "[Pharmacy employees] are required to long [sic] into the system, CVS for example they scan your ID [and] it goes straight into the system the information does. And then the electronic signature is also put straight into the system."

Officer Lee testified he and other law enforcement officers regularly consult the NPLEx database to look at pseudoephedrine purchases when investigating individuals suspected of manufacturing methamphetamine. During *voir dire*, Officer Lee explained he had attended training sessions on using the NPLEx website. He stated he was unaware of any means or process by which he or any other individual with access to the NPLEx database website could manipulate the electronic data.

Officer Lee thoroughly demonstrated his understanding of the NPLEx database, the method by which the data was gathered, transmitted, and stored, and the underlying basis for the report admitted into evidence. Officer Lee's testimony provided a sufficient foundation for the admission of the computer report from the NPLEx database as a business record. *See State v. Sneed*, 210 N.C. App. 622, 630-31, 709 S.E.2d 455, 461 (2011) (holding detective who routinely used the NCIC database in his regular course of business was sufficiently qualified

to lay necessary foundation for admission of NCIC information as a business record).

Presuming the report from the NPLEx database were not admissible under the business record exception to the hearsay rule, admission of the report was harmless error. The State introduced other ample evidence of guilt against Defendant at trial. Defendant's charge of possession of a precursor to methamphetamine, for which the information contained in the report would have been most damaging, was dismissed by the trial court at the close of all the evidence. Defendant has failed to carry his burden to show a different outcome would have resulted had the report not been admitted into evidence. This argument is overruled.

C. Motion to Continue

[3] Defendant argues the trial court erred by denying his motion to continue after rejecting his plea agreement. We disagree.

1. Standard of Review

"An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *Armstrong v. N.C. State Bd. of Dental Exam'rs*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citations and quotation marks omitted).

"Denial of a motion for a continuance, regardless of its nature, is, nevertheless, grounds for a new trial only upon a showing by defendant that the denial was erroneous and that his case was prejudiced thereby." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981).

2. Analysis

Defendant argues he is entitled to a new trial because the trial court denied his motion to continue after it rejected his plea agreement, in violation of his absolute right to a continuance under N.C. Gen. Stat. § 15A-1023(b). We disagree.

N.C. Gen. Stat. § 15A-1023(b) provides:

> Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must

> so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. *Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court.*

N.C. Gen. Stat. § 15A-1023(b) (2013) (emphasis supplied).

This statute gives a defendant an absolute right "to a continuance until the next session of court" if and after the trial court rejects the proposed plea agreement. *Id.*; *see State v. Tyndall*, 55 N.C. App. 57, 62-63, 284 S.E.2d 575, 578 (1981) ("By adding the fourth sentence of G.S. 15A-1023(b), the legislature has clearly granted to the defendant such an absolute right upon rejection of a proposed plea agreement at arraignment."). This Court held the trial court commits prejudicial error and the defendant is entitled to a new trial where the trial court erroneously denies a motion to continue after rejecting the plea agreement. *Id.*

Our appellate courts have long recognized "it is a general rule that a defendant may waive the benefit of statutory or constitutional provisions by express consent, *failure to assert it in apt time*, or by conduct inconsistent with a purpose to insist upon it." *State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) (citations omitted) (emphasis supplied).

Here, Defendant and the State agreed Defendant would enter an *Alford* plea to possessing a precursor chemical and receive a suspended sentence within the presumptive range and be placed on probation. In exchange, the State would dismiss the charges of manufacturing methamphetamine and maintaining a dwelling for controlled substances.

The parties informed the trial court they had agreed to a plea arrangement, prior to jury selection. The trial judge discovered the plea agreement contained allowance for an *Alford* plea upon reviewing the plea transcript in open court. The trial judge advised the parties he would not accept the *Alford* plea and afforded the State and Defendant the opportunity to modify the plea agreement. *See* N.C. Gen. Stat. § 15A-1023(b). Counsel for Defendant advised the trial court Defendant "[was] not comfortable changing the plea." Defendant failed to move for a continuance.

The trial court advised the State to arraign Defendant on the charges. Defendant pled not guilty and expressly consented to proceed to trial that day. Jury selection began, and Defendant did not move to continue the case prior to the jury being empaneled. The State offered evidence for two and one-half days, and Defendant's trial recessed for the weekend. At no point up to or during this time did Defendant move for a continuance.

The following Monday morning, as the parties entered the second week of trial, counsel for Defendant moved for a continuance pursuant to N.C. Gen. Stat. § 15A-1023(b). The trial court denied Defendant's motion, and the trial resumed.

Defendant's assertion that he had an absolute right to a continuance is a correct interpretation of N.C. Gen. Stat. § 15A-1023(b). The record and trial testimony clearly indicate Defendant voluntarily waived this right by: (1) expressly consenting to being arraigned and proceeding to trial after the trial court rejected the plea agreement; and (2) failing to assert the statutory right until jeopardy attached, during the second week of trial, and after the State presented evidence for two and one-half days. Defendant waived his right to a continuance by his "failure to assert it in apt time." *Gaiten*, 277 N.C. at 239, 176 S.E.2d at 781. This argument is overruled.

IV. Conclusion

The trial court determined law enforcement had a good faith belief the evidence seized was supposed to be destroyed. Defendant has failed to carry his burden to show the trial court abused its discretion in denying his motion for discovery sanctions.

Officer Lee testified concerning his knowledge of and familiarity with the NPLEx database. He stated he regularly used the NPLEx database to assist with investigations into methamphetamine manufacturing. The State provided a sufficient foundation to admit the NPLEx database report. The trial court did not err in admitting into evidence the report under the business record exception to the hearsay rule. Defendant has failed to carry his burden to show how admission of the report, if error, would have prejudiced him.

Defendant had an absolute statutory right to a continuance after the trial court rejected his plea agreement. Defendant waived this right by failing to assert it in a timely manner and expressly consenting to proceed to trial the same day the trial court rejected the plea agreement and jeopardy attached.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction nor the judgment entered thereon.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA
v.
RANDOLPH JOYNER

No. COA14-1289

Filed 20 October 2015

1. Appeal and Error—failure to object—failure to assert plain error

On appeal from defendant's conviction for felony larceny, the Court of Appeals did not review the merits of defendant's argument concerning the admission of some of his prior convictions for impeachment purposes. Even though defendant objected to the State's forecast of the Rule 609(b) evidence, he did not object when the evidence was actually introduced before the jury. Defendant lost his remaining opportunity for appellate review by failing to argue in his appellate brief that the trial court's alleged error amounted to plain error.

2. Evidence—impeachment—conclusory findings—probative value apparent from record

Defendant failed to preserve for appellate review his argument that the trial court erred by admitting some of his prior convictions for impeachment purposes in his trial for felony larceny. The Court of Appeals concluded that, even assuming defendant had preserved the issue, defendant's argument would not prevail. Even though the trial court made conclusory findings on the challenged evidence, the probative value of the evidence was apparent from the record.

Appeal by defendant from judgment entered 23 July 2014 by Judge Phyllis Gorham in Sampson County Superior Court. Heard in the Court of Appeals 3 June 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Jason S. Thomas, for the State.

Mary McCullers Reece, for defendant.

CALABRIA, Judge.

Background

Randolph Joyner ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of felony larceny and his subsequent admission to attaining the status of an habitual felon. We find no error.

George Monk ("Monk"), the owner of eighteen acres located on Taylor Lane in Clinton, NC (the "property"), used his property to store old trucks, farm equipment, spare parts, and other miscellaneous items. Monk also allowed Brady Waters ("Waters") to store roughly one hundred and fifty old lawnmowers and a 1979 Ford Carrier pickup truck ("Ford Carrier") on the property.

On or about 18 April 2012, Monk received word that an on-going theft might be occurring at the property. In response, Monk called Waters and asked him to check out the situation. When Waters arrived, he saw defendant driving out of Taylor Lane with three passengers in a Ford Expedition ("Expedition"). Since his Ford Carrier was being towed by the Expedition, Waters drove up behind defendant and the others near a stop sign. Defendant exited the Expedition, prompting Waters to ask him if he needed "some help or anything?" to which defendant responded, "No. No I got it." Waters followed defendant.

At some point, Waters found that the Expedition had been stopped by a highway patrolman because the Ford Carrier's wheels were creating sparks on the road. Waters stopped and notified the patrolman that he was the owner of the Ford Carrier. The patrolman was joined almost immediately by two sheriffs' deputies who were looking for Waters' Ford Carrier in reference to a larceny in progress. Consequently, defendant and his passengers were transported to the Sampson County Sheriff's Office for questioning.

Subsequent investigation revealed that over the course of two days, defendant and others transported four loads of machinery and equipment from the property to a salvage yard. In addition to the theft of Waters' Ford Carrier, all of his lawn mowers had been removed from

the property. Many of the stolen items owned by Monk—which included diesel engines, dump truck components, an oil pan, and a tar sprayer—were sold as scrap metal. On 22 January 2014, defendant was indicted for felony larceny, felony possession of stolen property, and attaining the status of an habitual felon. His trial began in July 2014 before the Honorable Phyllis Gorham in Sampson County Criminal Superior Court. At trial, Monk testified that he saw defendant on the property a week or two before the thefts occurred. Defendant claimed to be looking for a dog, and he left without incident when Monk informed him that he did not "need to be down [t]here."

Before defendant testified in his own defense, the trial court held a *voir dire* hearing to determine, *inter alia*, whether the State could impeach defendant with five prior convictions, all of which were more than ten years old. As demonstrated by the following exchange, the trial court ruled that defendant could be cross-examined on the convictions at issue and defendant objected to the ruling:

> THE COURT: All right. Well, they do go to his credibility. It's the age of them I'm concerned about because the most recent would be 14 years ago.
>
> [PROSECUTOR]: And the State would not mention anything that does not go to his exact credibility. And he does have other stuff like DWI, public consumption. I'm not asking to get those items in, but the numerous convictions that he has for forgery, uttering, and obtaining property by false pretenses is fair game. I'm not even asking to get the misdemeanor larceny in, but the other items that actually go to his credibility, if he takes the stand, that's what I'm going for, Your Honor.
>
> THE COURT: I think they do go to his credibility, so I'm going to allow him to be cross-examined on those convictions. They do go to his credibility.
>
> [DEFENSE COUNSEL]: And, Your Honor, we would object to that ruling for the record. We believe it would be more prejudicial than probative for him to be cross-examined on those.
>
> THE COURT: All right. So noted.

While testifying, defendant denied knowing the items taken from the property were stolen. According to defendant, his nephew ("Ray")

asked him to haul some junk for two individuals, Thomas Lamb ("Lamb") and Marcette Hines ("Hines"), both of whom lived near the property on Taylor Lane. Defendant agreed to help. On 17 April 2012, defendant drove a truck to the property and waited for the others to load it with the "junk." He then drove the truck to a salvage yard, where Ray received payment for the load's scrap metal value. The group returned the next day and made more "runs" to the salvage yard. Defendant admitted to driving the truck during three of the four occasions on which the junk was sold at the salvage yard; however, he denied ever setting foot on the property before 17 April 2012. On cross-examination, defendant was impeached with five prior convictions, but his trial counsel did not object when the State introduced the evidence.

After the jury returned a verdict finding defendant guilty of felony larceny and felony possession of stolen property, he pled guilty to the habitual felon charge. The trial court then arrested judgment on the possession of stolen property charge, and sentenced defendant to a minimum of 52 and a maximum of 82 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

Analysis

[1] Defendant argues that the trial court erred in allowing the State to cross-examine him on his previous convictions for uttering a forged instrument, forgery, and obtaining property by false pretenses without conducting the mandatory balancing test and entering findings of fact pursuant to Rule 609 of the North Carolina Rules of Evidence. According to defendant, the admission of his prior convictions was error because the trial court "made no findings as to the specific facts and circumstances" that demonstrated the probative value of the evidence outweighed its prejudicial effect. We disagree.

As an initial matter, we note that defendant has no right to raise the Rule 609 issue on appeal. Ordinarily, since balancing "the probative value and prejudicial effect [of prior conviction evidence] necessarily involves some exercise of discretion by the trial court, . . . the . . . court's ultimate determination will not be upset absent a manifest abuse of that discretion." *State v. Harris*, 140 N.C. App. 208, 216, 535 S.E.2d 614, 620 (2000) (citations omitted). For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial. *See State v. Thibodeaux*, 352 N.C. 570, 577, 532 S.E.2d 797, 803 (2000); N.C.R. App. P. 10(a)(1) (2015). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697

S.E.2d 319, 322 (2010) (internal quotation marks omitted). Here, defendant opposed the admission of all prior conviction evidence during a *voir dire* hearing held before his testimony, but he failed to object to the evidence in the presence of the jury when it was actually offered. Unfortunately for defendant, his objection was insufficient to preserve the issue for appellate review. *Id.* at 277, 697 S.E.2d at 322 ("It is insufficient to object only to the presenting party's forecast of the evidence. . . . As such, in order to preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." (quoting *Thibodeaux*, 352 N.C. at 581–82, 532 S.E.2d at 806)). And since defendant failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard. *See* N.C.R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

[2] Nevertheless, even if we assumed that defendant's objection at the *voir dire* hearing was sufficient to preserve his challenge to the admitted prior conviction evidence, we would find no error. Rule 609(b) provides that evidence of a prior conviction

> is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

N.C. Gen. Stat. § 8C-1, Rule 609(b) (2013). "Rule 609(b) is to be used for purposes of impeachment. The use of this rule is necessarily limited by that focus: it is to reveal not the character of the witness, but his credibility." *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165 (1991) (emphasis omitted) (citation omitted).

This Court has interpreted Rule 609(b) "to mean that the trial court *must* make findings as to the specific facts and circumstances which demonstrate the probative value [of the evidence] outweighs [its] prejudicial effect. . . . [A] conclusory finding that the evidence would attack [the] defendant's credibility without prejudicial effect . . . does not satisfy the 'specific facts and circumstances' requirement. . . ." *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985) (emphasis added). This requirement enables the reviewing court to determine

whether the admission of old conviction evidence was properly allowed. "For the trial court to merely state that the probative value of a prior conviction outweighs its prejudicial effect in the interests of justice is insufficient under Rule 609(b)." *State v. Shelly*, 176 N.C. App. 575, 581, 627 S.E.2d 287, 294 (2006).

"[T]he following considerations [are] factors to be addressed by the trial court when determining if conviction evidence more than ten years old should be admitted: (a) the impeachment value of the prior crime, (b) the remoteness of the prior crime, and (c) the centrality of the defendant's credibility." *Id.* at 582–83, 627 S.E.2d at 294 (citing *State v. Holston*, 134 N.C. App. 599, 606, 518 S.E.2d 216, 222 (1999)). In addition, the trial court's findings "should address (a) whether the old convictions involved crimes of dishonesty, (b) whether the old convictions demonstrated a 'continuous pattern of behavior,' and (c) whether the crimes that were the subject of the old convictions were 'of a different type from that for which defendant was being tried.' " *Id.* at 583, 627 S.E.2d at 295 (quoting *Hensley*, 77 N.C. App. at 195, 334 S.E.2d at 785).

Despite the requisite factors espoused in *Shelly* and *Hensley*, a trial court's failure to "satisfy the 'specific facts and circumstances' requirement of Rule 609(b)" does "not [necessarily constitute] reversible error." *State v. Moul*, 95 N.C. App. 644, 646, 383 S.E.2d 429, 431 (1989). "Where there is no material conflict in the evidence, findings and conclusions are not necessary." *Id.* Other than making a general objection, defendant offered no evidence and made no attempt to rebut the State's argument for admitting the prior convictions. Furthermore, our Supreme Court has adopted the principle that a trial court's failure to make the necessary findings is not error when the record demonstrates the probative value of prior conviction evidence to be obvious. *State v. Artis*, 325 N.C. 278, 307, 384 S.E.2d 470, 486 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990) ("The trial court's determination that defendant's [prior] convictions . . . were admissible was erroneous. Specific facts and circumstances supporting the probative value of this evidence are neither apparent from the record nor recounted by the trial court."); *State v. Ross*, 329 N.C. 108, 127, 405 S.E.2d 158, 169 (1991) ("Although the trial judge did not specifically set out the facts and circumstances in support of the probative value of the prior conviction, this alone does not make it error. It is only when the facts and circumstances supporting the probative value of the evidence are not 'apparent from the record' that its admission is error.") (Meyer, J. concurring) (quoting *Artis*, 325 N.C. at 307, 384 S.E.2d at 486)). That principle applies here.

In the instant case, although the trial court's findings were conclusory and would normally be inadequate under Rule 609(b), the record contains facts and circumstances showing the probative value of the evidence. As to the *Shelly* factors, the centrality of defendant's credibility was obvious to all parties—he was on trial for larceny and possession of stolen property, crimes which implicate dishonesty and moral turpitude. Indeed, defendant's trial counsel openly stated that defendant's "knowledge [of whether the property was stolen was] . . . the crux of this case." The prior convictions reflected upon defendant's character and raised doubts about his credibility. Likewise, the impeachment value of the evidence was manifest. In its exchange with the trial court regarding defendant's prior convictions, the State specifically stated that it would not seek to admit evidence of defendant's other convictions for DWI and public consumption. Instead, the State sought to impeach defendant only with prior convictions that went "to his exact credibility." Understandably, in a felony larceny and possession of stolen property trial, the State was keenly interested in using five convictions[1] that involved crimes of dishonesty to impeach defendant on the witness stand. Moreover, although the trial court expressed concerns over the age of defendant's prior convictions—noting that "the most recent would be [fourteen] years ago"—it ultimately found that they had a substantial bearing on defendant's credibility.

As to the *Hensley* factors, we have already established that the prior convictions involved crimes of dishonesty. Further, the five convictions at issue spanned between 1980 and 2000, establishing a continuous pattern of behavior. Finally, the prior convictions were substantially similar to those for which defendant was being tried. Accordingly, the facts and circumstances surrounding the probative value of the evidence were apparent from the record and it was unnecessary for the trial court to make detailed, specific findings on them.

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1. We note that the State filed a motion asking this Court to take judicial notice that one of the convictions it used to impeach defendant did not fall within the ambit of Rule 609(b). Apparently, the trial court, the prosecutor, and defense counsel were not aware of this at the time of defendant's trial. Although it did nothing to change our analysis, we granted the motion. Because less than ten years had elapsed since defendant was released from the confinement imposed for the conviction at issue, the prior conviction would have been automatically admissible under N.C. Gen. Stat. § 8C–1, Rule 609(a).

Conclusion

In sum, because defendant objected to the State's forecast of the Rule 609(b) evidence but did not object when the evidence was actually introduced, he failed to preserve for appellate review the trial court's decision to admit some of his prior convictions for impeachment purposes. Defendant also "lost his remaining opportunity for appellate review when he failed to argue [before this Court] that the trial court's admission of this [evidence] amounted to plain error." *Ray*, 364 N.C. at 277–78, 697 S.E.2d at 322. Even assuming defendant's objection was sufficient to preserve the Rule 609(b) issue on appeal, the trial court did not err by making conclusory findings on the challenged evidence as its probative value was apparent from the record.

NO ERROR.

Judges ELMORE and DILLON concur.

STATE OF NORTH CAROLINA
v.
LESIBA SIMON MATSOAKE

No. COA15-304

Filed 20 October 2015

1. Evidence—confidential spousal communication—husband weeping in presence of wife

In a trial for first-degree rape, the trial court did not err by allowing defendant's ex-wife to testify that she saw him crying while looking at a composite photo of the victim's assailant in a newspaper. The incident was not a confidential spousal communication pursuant to N.C.G.S. § 8-57(c) because no testimony indicated that defendant intended to communicate anything to his then-wife by crying at the sight of the picture.

2. Rape—jury instructions—omission of lesser-included offense—penetration—no conflict in evidence

In a trial for first-degree rape, the trial court did not err by declining to instruct the jury on attempted first-degree rape. The victim's testimony that "I think he had [penetrated] a couple of times but he was choking me so hard that I was losing my breath and I believed

I was going to die" did not create a conflict in the evidence necessitating the instruction on the lesser-included offense. The State presented substantial evidence of penetration—for example, a nurse's testimony that the victim reported penetration and testimony that defendant's semen was recovered from inside of the victim.

Appeal by defendant from judgment entered 20 August 2014 by Judge Wayland J. Sermons in Dare County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

M. Alexander Charns for defendant-appellant.

TYSON, Judge.

Lesiba Simon Matsoake ("Defendant") appeals from a jury verdict finding him guilty of first-degree rape. We find no error.

I. Background

On the evening of 9 June 2003, S.M. ("the victim") and her boyfriend met with friends at the Port O' Call Restaurant in Kill Devil Hills, North Carolina. When Port O' Call closed around 2:00 a.m., Julia Shefcheck ("Shefcheck"), one of the victim's out-of-town friends, wanted to swim in the ocean. The victim and Shefcheck went onto the beach, which was right across the street from Port O' Call. Shefcheck removed her clothes and went swimming The water was a little rough, and the victim decided not to swim, but did remove her pants to wade out into the surf.

While standing in the surf, the victim "felt like [she] was being stared at[.]" She turned and saw a male standing on the beach. The victim was "freaked out" by the man, and told him "[y]ou need to leave, my friends are coming, my friends are coming." The victim described the individual as a black male, around five foot eleven, and stocky. The man grabbed her, threw her on the ground, and got on top of her. He placed his hands around her neck and forced her to open her knees.

During the course of the victim's testimony at trial, the following exchange occurred:

> [Prosecutor]: Did any other parts of [your assailant's] body[, besides his hands,] touch you?

> [The victim]: His penis.
>
> [Prosecutor]: Where did his penis touch you?
>
> [The victim]: My vagina.
>
> [Prosecutor]: Do you know whether or not he penetrated your vagina with his penis?
>
> [The victim]: I think he had a couple of times but he was choking me so hard that I was losing my breath and I believed I was going to die.

The victim did not know whether her assailant wore a condom or if he ejaculated. She was also unable to estimate how long her assailant's penis was inside of her. While attempting to fend him off, the victim threw sand in her assailant's eyes. In response, he bit down on two of her fingers on her left hand. After the attack, the assailant ran away down the beach. The victim was taken to the hospital.

The case was assigned to Detective Gene Johnson, Jr. ("Detective Johnson") of the Kill Devil Hills Police Department. Detective Johnson met the victim at Outer Banks Hospital in Nags Head, North Carolina. At the hospital, the victim was examined by Dr. Brian Baxter ("Dr. Baxter") and Marlene Parker ("Parker"), a sexual assault nurse examiner. The examination revealed bruising on the left side of the victims neck, a bite wound on her left hand, and the presence of semen on her skin in the genital area. An internal pelvic examination revealed a large amount of sand in the victim's vagina, along with punctate erythematous legions on her vagina and cervix, indicating trauma.

Dr. Baxter took swabs and smears from the victim's cervix and vaginal area. The victim told Dr. Baxter she last had sexual relations one week prior to the attack. Parker asked the victim whether her assailant had penetrated her vagina, and Parker testified the victim indicated he had.

The victim worked with a police sketch artist to develop a composite sketch of her assailant. The sketch was circulated among officers and law enforcement agencies, and eventually appeared in the local newspapers.

North Carolina State Bureau of Investigation Special Agent Amanda Thompson ("Agent Thompson") is a forensic scientist manager over the DNA database section at the State Crime Laboratory. Agent Thompson analyzed the vaginal smears taken from the victim, identified and confirmed the presence of sperm.

Shortly after the rape occurred, Defendant and his now ex-wife, Ruth Hart ("Hart"), were traveling from their home in Point Harbor, North Carolina, to a doctor's appointment in Virginia Beach, Virginia. Hart was driving. Defendant was sitting in the passenger seat reading the paper. Over Defendant's objection, Hart testified: "I heard like water, I heard a tear drop hit the paper and I looked over and [Defendant] was crying." Hart stated Defendant was looking at the composite sketch of the victim's assailant as he wept.

Hart knew that around the time of the rape, Defendant would go to bars, including Port O' Call, roughly three or four nights a week. Defendant frequently went by himself, and would stay out until two, three, or four o'clock in the morning. Hart called Crime Stoppers shortly after observing Defendant crying to ascertain whether police had a suspect in the Kill Devil Hills rape. Hart did not disclose Defendant's name as someone who might have been involved in the crime. In 2004, Defendant and Hart moved from Point Harbor to Virginia Beach so Hart could pursue career opportunities. Over the years, Hart would call Crime Stoppers from time to time to ask if police had identified a suspect in the rape. Hart and Defendant divorced in April 2012.

In March 2007, nearly four years after the rape occurred, Hart contacted law enforcement. Hart met with Detective Johnson at the North Carolina/Virginia border. Hart relayed her suspicions about her husband's role in the rape of the victim to Detective Johnson. Hart also told Detective Johnson about a pair of electric hair clippers she had seen Defendant use the morning before. As a result of this conversation, Detective Johnson contacted the Virginia Beach Police Department for assistance on a search warrant to obtain the set of electric hair clippers Hart indicated Defendant used on his head. The search warrant was obtained and executed by the Virginia Beach Police Department. The electric hair clippers were sent to the North Carolina Crime Lab for testing.

The electric hair clippers belonging to Defendant were received and analyzed by Kristin Hughes ("Analyst Hughes"), a North Carolina State Bureau of Investigation forensic DNA analyst. After analyzing the sperm taken from the vaginal swabbing of the victim and a DNA sample recovered from Defendant's hair clippers, Analyst Hughes concluded "[t]he DNA profile obtained from the sperm fraction of the vaginal swab matched [the] DNA profile from [Defendant's] hair clippers."

On 23 June 2008, Defendant was indicted on one count of first-degree rape. At the time of his indictment, Defendant was living in his native country of South Africa. Defendant was extradited to the United States

in January 2012. Following Defendant's return to the United States, a search warrant for a DNA swab of Defendant's cheek was obtained and executed. This swab was analyzed by Analyst Hughes and compared to the vaginal swabs taken from the victim. The DNA from the sperm fraction of the vaginal swab taken from the victim matched the DNA profile obtained from Defendant.

Defendant's trial began on 18 August 2014. Prior to Hart's testimony, the trial court conducted a *voir dire* of her proposed testimony. When the questions addressed the crying incident, Defendant's counsel stated "[t]his will be an objection, Your Honor, non-verbal communication." The trial court responded "[a]ll right. Go ahead." Hart's proposed testimony continued. After Hart's proposed testimony concluded, the trial court asked Defendant's counsel what objections he had regarding Hart's testimony about when "her husband was crying when he looked at the composite picture." Defendant's counsel argued the crying was a communication and Defendant was making "some sort of tacit admission to some sort of involvement" in the attack which was a "form of nonverbal communication [that] shouldn't be allowed."

The trial court ruled the incident was not covered by the spousal confidential communication. The court reasoned that confidential communication "concerns verbal spoken words which were given in a setting of confidentiality that were prompted by the affection, confidence and loyalty engendered by such relationship" and that "it is completely separate and apart from any other type of action and it is an act, not a communication."

In the course of Hart's testimony in front of the jury, she was asked "[w]hat, if anything, did [she] observe [Defendant] do while holding" the newspaper and looking at the composite sketch of the victim's assailant. At this point, Defendant objected, but did not state any grounds for his objection. Defendant's objection was overruled.

Following the conclusion of the evidence, Defendant objected to the trial court's refusal to give an instruction on attempted rape, which was overruled. The jury returned a verdict finding Defendant guilty of first-degree rape on 21 August 2014. The trial court sentenced Defendant to a minimum of 240 months and a maximum of 297 months in prison. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) failing to exclude the testimony of his former wife, Ruth Hart, about Defendant's reaction

upon seeing the composite sketch of the victim's assailant as a confidential marital communication; and (2) failing to give an instruction on the lesser-included offense of attempted rape.

III. Marital Communication

A. Standard of Review

Whether a privileged confidential communication between Defendant and Hart occurred is a question of law. *See Medlin v. N.C. Specialty Hosp., LLC*, ___ N.C. App. ___, ___, 756 S.E.2d 812, 820 (2014) (Noting in the context of attorney-client privilege, "the determination of privilege is a question of law[.]"). Questions of law are reviewed *de novo*. *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

B. Analysis

[1] North Carolina's marital communication statute, N.C. Gen. Stat. § 8-57(c), provides: "[n]o husband or wife shall be compellable in any event to disclose any confidential communication made by one to the other during their marriage." N.C. Gen. Stat. § 8-57(c) (2013). The privilege codified at N.C. Gen. Stat. § 8-57(c) "is an extension of the common-law marital communication privilege that 'allows marriage partners to speak freely to each other in confidence without fear of being thereafter confronted with the confession in litigation.' " *State v. Terry*, 207 N.C. App. 311, 314, 699 S.E.2d 671, 674 (2010) (quoting *State v. Freeman*, 302 N.C. 591, 596, 276 S.E.2d 450, 453-54 (1981)).

Our Supreme Court has ruled the ancient privilege codified in N.C. Gen. Stat. § 8-57(c) "is held by both spouses--meaning that either spouse can prevent the other from testifying to a confidential communication." *State v. Rollins*, 363 N.C. 232, 236, 675 S.E.2d 334, 337 (2009) (citation omitted); *see also State v. Britt*, 320 N.C. 705, 709 n.2, 360 S.E.2d 660, 662 n.2 (1987) (citation omitted) ("[W]e have said that a spouse's testimony is . . . incompetent if the substance of the testimony concerns a confidential communication.").

Whether the crying incident recounted by Hart to the jury was protected by the marital communication privilege turns on whether a privileged confidential communication occurred between Defendant and his then-wife. *See Rollins*, 363 N.C. at 236, 675 S.E.2d at 337. Hart did not testify about any statements or conversations between herself and Defendant. Defendant asserts his crying while looking at the composite sketch in the newspaper was a communication between Defendant and Hart, his then-wife.

"An action may be protected if it is intended to be a communication and is the type of act induced by the marital relationship." *State v. Holmes*, 330 N.C. 826, 835, 412 S.E.2d 660, 665 (1992) (citations omitted); *see also State v. Fulcher*, 294 N.C. 503, 517, 243 S.E.2d 338, 348 (1978) (noting "an act, such as a gesture, can be a declaration within the meaning of [N.C. Gen. Stat. § 8-57].").

The State argues Hart's testimony regarding the crying incident was properly admitted because no spousal communication occurred. The State reasons "[Defendant's] physical reaction upon seeing the composite picture could hardly be defined as a conscious statement, acknowledgment or gesture to his wife[.]" We agree.

The incident occurred as Hart drove to a doctor's appointment with Defendant sitting in the passenger seat. Hart did not observe Defendant looking at the composite sketch of the victim's assailant and weeping until Hart heard a teardrop hit the newspaper. No testimony indicates Defendant intended to communicate anything to Hart by crying at the sight of the composite sketch.

Defendant asserts the crying incident is analogous to an admission by silence. He argues "admissions by silence as well as admissions by words" are covered by the confidential communications privilege. *State v. Wallace*, 162 N.C. 623, 630, 78 S.E. 1, 4 (1913). Defendant did not communicate with his then-wife by crying in the car while looking at the composite sketch of the victim's assailant. Defendant also did not make an admission to his spouse through that act. Defendant's act of crying while riding in a vehicle with his then-wife is not protected confidential communication pursuant to N.C. Gen. Stat. § 8-57(c). Defendant's argument is overruled.

IV. Jury Instruction on Lesser-Included Offense

Defendant argues the trial court erred in failing to instruct the jury on the lesser-included offense of attempted rape. We disagree.

A. Standard of Review

A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal. *State v. Gettys*, 219 N.C. App. 93, 100, 724 S.E.2d 579, 585 (2012) (citing *State v. Debiase*, 211 N.C. App. 497, 503-04, 711 S.E.2d 436, 441, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399, 400 (2011)).

B. Analysis

[2] The trial court "must instruct the jury upon a lesser[-]included offense when there is evidence to support it." *State v. Brown*, 112 N.C. App. 390, 397, 436 S.E.2d 163, 168 (1993) (citing *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)). However, "when the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser[-]included offense, it is not error for the trial judge to refuse to instruct [the jury] on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980).

To determine whether the evidence supports the submission of a lesser-included offense, "courts must consider the evidence in the light most favorable to [the] defendant." *Debiase*, 211 N.C. App at 504, 711 S.E.2d at 441 (citations omitted). "Instructions pertaining to attempted first[-]degree rape as a lesser[-]included offense of first[-]degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences." *State v. Johnson*, 317 N.C. 417, 436, 347 S.E.2d 7, 18 (1986) (citation omitted), *superseded by statute on other grounds by* N.C. Gen. Stat. § 8C-1, Rule 404(b), *as recognized in State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994).

In *Johnson*, the victim first testified the defendant had inserted his penis in her vagina on direct examination. 317 N.C. at 436, 347 S.E.2d at 18. On cross-examination, however, the victim indicated the defendant had attempted to achieve penetration but was unsuccessful. *Id.* There was testimony the victim told a physician she "felt pressure but not penetration" and was uncertain whether penetration had occurred. *Id.* On appeal, our Supreme Court concluded this evidence created "a conflict as to whether penetration occurred which should have been resolved by the jury under appropriate instructions." *Id.*

Here, Defendant contends the trial court should have given an instruction on the lesser-included offense of attempted rape because the evidence regarding penetration was equivocal. Defendant relies on the exchange between the prosecutor and the victim at trial. The prosecutor asked "[d]o you know whether or not [your assailant] penetrated your vagina with his penis" and the victim responded "I think he had a couple of times but he was choking me so hard that I was losing my breath and I believed I was going to die." Defendant asserts this exchange created a conflict in the evidence necessitating an instruction on the lesser-included offense of attempted rape. We disagree.

The State presented substantial evidence of penetration: the sexual assault nurse testified the victim told her she was penetrated by Defendant. The victim told the examining doctor at the hospital immediately after the attack that Defendant had penetrated her. Defendant's semen was recovered from inside the victim's vagina and from her skin. When asked by the prosecutor at trial whether anything other than Defendant's hands had touched her, she replied her assailant had touched "[her] vagina" with his penis. Precedents clearly state that evidence of the penetration can be slight: "penetration, however slight, of the female sex organ by the male sex organ" is sufficient to warrant submission for first-degree rape. *State v. Combs*, 226 N.C. App. 87, 90, 739 S.E.2d 584, 586 (2013) (citations omitted).

The victim also testified she was unsure of how long Defendant was inside of her, but did identify the Defendant in court when asked whether she saw "the person that pulled [her] out of the surf that night and. . . penetrated [her] vagina with his penis." In addition, Dr. Baxter testified the victim's pelvic exam revealed sand in her vagina, and trauma to her vagina and cervix. Swabs taken from inside the victim's vagina and from her skin show the presence of Defendant's semen.

We hold the victim's testimony and other competent evidence, viewed in the light most favorable to Defendant, did not create a conflict in the evidence to require an instruction on attempted first-degree rape. The trial court did not err by declining to give Defendant's requested instruction on attempted first-degree rape.

V. Conclusion

The trial court properly admitted Hart's testimony regarding her former husband crying while looking at a composite sketch of the victim's assailant. The incident was not a confidential spousal communication pursuant to N.C. Gen. Stat. § 8-57(c).

The trial court did not err in declining to give an instruction on attempted first-degree rape. Defendant received a fair trial free from the prejudicial errors he preserved and argued.

NO ERROR.

Judges BRYANT and GEER concur.

STATE v. MILLER

[243 N.C. App. 660 (2015)]

STATE OF NORTH CAROLINA
v.
THOMAS SCOTT MILLER, DEFENDANT

No. COA15-295

Filed 20 October 2015

1. Motor Vehicles—impaired driving—unchallenged evidence sufficient

There was a sufficient unchallenged evidence in an impaired driving prosecution to support the trial court's conclusion that there was a reasonable and articulable suspicion for an officer to stop defendant and probable cause for his arrest.

2. Appeal and Error—appealability—guilty plea

Defendant's right of appeal after a guilty plea was limited by statute and not available in this case. There were no grounds for certiorari, and the appeal was dismissed without prejudice to defendant's pursuit of a motion for appropriate relief.

Appeal by defendant from orders entered 13 August 2014 by Judge H. William Constangy in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 September 2015.

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

Arnold & Smith, PLLC, by Kyle Frost, for defendant-appellant.

ZACHARY, Judge.

Where unchallenged findings of fact supported the trial court's conclusions of law, the trial court did not err in denying defendant's motion to suppress. Where defendant pleaded guilty, defendant does not have a right of appeal from the trial court's denial of his motion to dismiss. Where defendant has not alleged an untimely appeal, an interlocutory appeal, or review of a motion for appropriate relief, this Court may not issue a writ of *certiorari*.

I. Factual and Procedural Background

On 22 June 2011, Officer Anthony Watkins of the Charlotte Mecklenburg Police Department observed Thomas Scott Miller

(defendant) driving south on Park Road. Officer Watkins witnessed defendant hit the center median with his vehicle, fail to stop at a red light at an intersection, and travel 50 mph in a 35 mph zone. Officer Watkins made a U-turn to pursue defendant. While Officer Watkins was in pursuit of defendant, but before a traffic stop was commenced, defendant neglected to stop at a second red light. After this additional failure to stop, Officer Watkins activated his blue lights and initiated a traffic stop.

Officer Watkins found defendant in the driver's seat, and requested his license and registration. Upon detecting a strong odor of alcohol on defendant's breath, and noticing that defendant had red, glassy eyes, Officer Watkins asked defendant to exit the car and perform a series of field sobriety tests, as well as two roadside preliminary breath tests. Defendant admitted to consuming alcohol. Officer Watkins then arrested defendant for impaired driving.

Defendant telephoned his mother to come and observe the intoxilizer test at the station, but she did not arrive within the requisite period of time and thus could not observe the test. Defendant was placed on $2,500 secured bond.

Defendant was charged with driving while impaired. On 16 April 2014, defendant moved to suppress all evidence resulting from his arrest, alleging that it was an unconstitutional seizure. That same day, defendant moved to dismiss the charge, contending that he was denied his right to communicate with counsel and friends and to have them observe him. Defendant filed an amended motion to dismiss on 30 July 2014. On 13 August 2014, the trial court denied these motions. On 13 October 2014, defendant pleaded guilty to driving while impaired, and preserved his right to appeal the denial of his motions.

From the denial of his motions, defendant appeals.

II. Motion to Suppress

[1] In his first argument, defendant contends that the trial court erred in denying his motion to suppress all evidence resulting from his arrest. We disagree.

A. Standard of Review

Appellate review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*,

306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Analysis

At trial, the State elicited testimony from Officer Watkins concerning the events of the date in question. After direct, cross, and redirect examination of Officer Watkins, the State rested its case. Defendant then moved to suppress the evidence, alleging that the stop was an unlawful seizure without probable cause or reasonable suspicion.

On appeal from the trial court's order denying defendant's motion to suppress, defendant contends that the trial court "made numerous Findings of Facts [sic] which were not supported by competent evidence." Specifically, defendant challenges the trial court's Findings of Fact numbers 3, 4, 8, 18, and 21. Defendant does not dispute any other of the trial court's findings. In its order, the trial court made the following Findings of Fact, among others, that are not contested by defendant on appeal:

> 5. While in pursuit, but before a traffic stop was initiated, the Defendant failed to stop at a red light at Park Road and Seneca Place.
>
> . . .
>
> 9. After smelling a strong odor of alcohol, the officer asked the Defendant to exit his vehicle to determine the origin of the odor of alcohol.
>
> 10. The officer determined that the odor of alcohol was coming from the Defendant's breath, and saw that the Defendant had red glassy eyes.
>
> . . .
>
> 14. The Defendant exhibited 6 of 6 clues on the Horizontal Gaze Nystagmus Test.
>
> 15. During the Walk and Turn test, the Defendant started too soon, stepped offline multiple times and held his arms up away from his body for balance throughout the test.
>
> 16. During the One Leg Stand, the Defendant counted improperly, bent his leg, and did not follow the officer's directions.

> 17. That the Defendant admitted to consuming "a beer" prior to driving and was coming from "Bankers," a local bar.
>
> . . .
>
> 19. The officer formed the opinion that the Defendant was appreciably impaired.

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *State v. White*, ___ N.C. App. ___, ___, 753 S.E.2d 698, 701 (citations and quotations omitted), *cert. denied*, *review denied*, 367 N.C. 785, 766 S.E.2d 627 (2014). Accordingly, these findings, unchallenged by defendant on appeal, are binding upon this Court.

Even assuming *arguendo* that there was no evidence to support the challenged findings, we hold that these unchallenged findings are fully sufficient to support the trial court's conclusion that "[t]here was a reasonable and articulable suspicion to stop the Defendant and probable cause for his arrest." Our Supreme Court has previously held that where an officer witnessed a defendant's traffic violation, this personal observation created reasonable suspicion for a traffic stop. *See State v. Styles*, 362 N.C. 412, 417, 665 S.E.2d 438, 441 (2008). We have further held that the testimony of an officer regarding his observations of defendant, and the opinion derived therefrom, is sufficient evidence of defendant's impairment, provided that the opinion was not based solely on the odor of alcohol. *See State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) *aff'd per curiam*, 357 N.C. 242, 580 S.E.2d 693 (2003). In the instant case, Officer Watkins personally watched defendant drive through a red light, creating reasonable suspicion to support a traffic stop. Upon stopping defendant's vehicle and administering field sobriety tests, Officer Watkins formed an opinion of defendant's sobriety, and testified to that effect. These facts were all found by the trial court, and are not challenged on appeal; they support the stop and arrest.

This argument is without merit.

III. Motion to Dismiss

[2] In his second argument, defendant contends that the trial court erred in denying his motion to dismiss. Because defendant pleaded guilty at trial, we are unable to review this argument, and dismiss it without prejudice to defendant's right to file a motion for appropriate relief with the trial court.

A. Standard of Review

It is well established that under North Carolina law "a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings." *State v. Jamerson*, 161 N.C. App. 527, 528, 588 S.E.2d 545, 546 (2003) (quoting *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002)).

Upon a guilty plea, the defendant's right of appeal is restricted to the following issues:

> 1. Whether the sentence "is supported by the evidence." This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
>
> 2. Whether the sentence "[r]esults from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21." N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
>
> 3. Whether the sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
>
> 4. Whether the sentence "[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
>
> 5. Whether the trial court improperly denied defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);
>
> 6. Whether the trial court improperly denied defendant's motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

Id. at 528-29, 588 S.E.2d at 546-47.

If a defendant has no appeal as of right, a defendant may nevertheless petition this Court for review by writ of *certiorari* pursuant

to the provisions of N.C. Gen. Stat. § 15A-1444(e). A petition for writ of *certiorari* may be granted where:

> (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C. R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21. *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002).

Id. at 529, 588 S.E.2d at 547.

B. Analysis

After the State rested its case, defendant moved to dismiss the charge, alleging that he was denied his constitutional right to communicate with counsel and friends and gather evidence on his behalf by allowing friends or family to observe him and form opinions as to his condition at the time. On appeal, defendant contends that the trial court lacked an evidentiary basis for several of its findings and that the denial of his right to gather evidence resulted in substantial prejudice to him.

In that defendant pleaded guilty, his right of appeal is limited by statute. As defendant's motion to dismiss does not fall within any of the six categories listed in N.C. Gen. Stat. § 15A-1444 and quoted above, defendant does not have an appeal as of right from the trial court's denial of defendant's motion.

Furthermore, there are no grounds for *certiorari* to issue. Because defendant does not allege a lack of timely action, the appeal is not interlocutory, and the appeal does not concern a denial of a motion for appropriate relief, as required by Appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court is unable to issue a writ of *certiorari*. As such, we are unable to hear this argument, and must dismiss it.

Although we dismiss this argument, we do so without prejudice to defendant's pursuit of a motion for appropriate relief, pursuant to N.C. Gen. Stat. § 15A-1411 *et seq.*, before the trial court.

AFFIRMED IN PART, DISMISSED IN PART.

Judges STEPHENS and McCULLOUGH concur.

DEWEY WRIGHT WELL AND PUMP COMPANY, INC., PLAINTIFF
v.
TRAVIS WORLOCK AND WIFE, ASHLEY ROSE WORLOCK, DEFENDANTS

No. COA14-1293

Filed 20 October 2015

Appeal and Error—interlocutory orders and appeals—summary judgment denied—res judicata and collateral estoppel—no final determinations on merits

Where the trial court denied defendants' motion for summary judgment based on res judicata and collateral estoppel in a lawsuit for breach of contract and quantum meruit, the Court of Appeals dismissed defendants' interlocutory appeal for lack of appellate jurisdiction. None of plaintiff's claims against any of the parties had been finally determined on the merits, so there was no possibility of a result inconsistent with a prior jury verdict or prior decision on the merits by a judge. An order setting aside a default judgment against another party opened up plaintiff's claims to relitigation; furthermore, the trial court's later determination that it lacked subject matter jurisdiction over that party rendered the default judgment void ab initio.

Appeal by defendants from order entered on 16 September 2014 by Judge Hal Harrison in District Court, Watauga County. Heard in the Court of Appeals on 8 April 2015.

Hedrick Kepley, PLLC, by Jeffery M. Hedrick, for plaintiff-appellee.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for defendant-appellants.

STROUD, Judge.

Travis Worlock and Ashley Rose Worlock ("defendants") appeal from an order denying their motion for summary judgment. They argue that their defenses of *res judicata*, collateral estoppel, judicial estoppel, and election of remedies bar the claims of Dewey Wright Well and Pump Company, Inc. ("plaintiff"). Because we lack appellate jurisdiction, we dismiss this appeal.

I. Background

In October 2010, defendants hired plaintiff to drill a well on their real property in Tennessee; plaintiff drilled a well and billed defendants. Defendants did not pay the bill. On 24 August 2012, plaintiff filed its first lawsuit against defendants and David Taylor[1] for breach of contract and *quantum meruit* and alleged that "[o]n or about 25 October 2010, Defendants, by and through their agent David Taylor, executed a [written] contract with Plaintiff, whereby Plaintiff agreed to drill a well on property of Defendants" and that plaintiff had fully performed but that defendants and Mr. Taylor had failed to pay. Defendants and Mr. Taylor failed to timely answer. On 24 October 2012, plaintiff moved for entry of default and a default judgment against defendants only. *See* N.C. Gen. Stat. § 1A-1, Rule 55 (2011). On 24 October 2012, the Clerk of the Superior Court entered default against defendants and awarded plaintiff a default judgment of $14,642.85 plus pre-judgment interest, post-judgment interest, court costs, and attorneys' fees against defendants. On 1 November 2012, plaintiff voluntarily dismissed its claims against Mr. Taylor without prejudice.

On 7 January 2013, defendants moved to set aside the entry of default and the default judgment against them in the first lawsuit pursuant to North Carolina Rule of Civil Procedure 60(b). *See id.* § 1A-1, Rule 60(b) (2013). On or about 14 January 2013, plaintiff objected to defendants' motion. On 12 August 2013, the trial court allowed defendants' motion and set aside the entry of default and the default judgment against them.

On 3 September 2013, plaintiff filed a second lawsuit (No. 13 CvD 453) to recover for the drilling of the well, but this lawsuit was only against Mr. Taylor for breach of contract and *quantum meruit*.[2] Mr. Taylor again failed to answer. On or about 11 October 2013, plaintiff moved for entry of default and a default judgment against Mr. Taylor. On 16 October 2013, the Clerk of the Superior Court entered default against Mr. Taylor. On 24 October 2013, the Clerk of the Superior Court awarded plaintiff a default judgment of $14,642.85 plus pre-judgment interest, post-judgment interest, court costs, and attorneys' fees against Mr. Taylor.

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1. Mr. Taylor was apparently an acquaintance of defendants. His signature appears as "Agent" of defendants on the contract for the well which was attached to plaintiff's complaint, although his capacity as an agent is disputed by defendants.

2. Plaintiff had voluntarily dismissed its claims against Mr. Taylor in the first lawsuit, but defendants herein remained as defendants in the first lawsuit.

On 22 November 2013, defendants answered the complaint in the first lawsuit and alleged that they and plaintiff had orally agreed that plaintiff would drill a well no deeper than three hundred feet but that plaintiff had drilled beyond this depth. According to defendants, they were liable only for $11,187.00, as this amount reflected the terms of their oral contract. Defendants also alleged:

> David Taylor was never authorized in any capacity to act on behalf of Defendants, and Defendants never informed Plaintiff to the contrary. David Taylor, upon information and belief, conveyed no apparent authority to Plaintiff, but was told that somebody must sign a written contract in order for well digging to begin. [Defendants] were never made aware of any written contract and were justifiabl[y] operating under the oral contract with Plaintiff.

On or about 22 November 2013, plaintiff moved to set aside its own default judgment against Mr. Taylor in the second lawsuit pursuant to North Carolina Rule of Civil Procedure 60(b) and moved to consolidate the two actions alleging that "Defendants Worlock are contending that Plaintiff's Default Judgment against Taylor is a bar to Plaintiff's rights against [defendants.]" *See id.* On 11 March 2014, the trial court allowed plaintiff's motion and set aside the 24 October 2013 default judgment against Mr. Taylor.

On 8 May 2014, Mr. Taylor moved to dismiss plaintiff's action for lack of personal jurisdiction. On 21 May 2014, the trial court entered a consent order to consolidate the two actions. On 23 May 2014, defendants amended their answer to include the defenses of *res judicata*, collateral estoppel, judicial estoppel, and election of remedies. On 14 August 2014, defendants moved for summary judgment. On 8 September 2014, the trial court granted Mr. Taylor's motion to dismiss, concluding that it lacked personal jurisdiction over Mr. Taylor. On 15 September 2014, defendants amended their motion for summary judgment, and the trial court held a hearing on their motion. On 16 September 2014, the trial court concluded that defendants were not entitled to summary judgment on any of their four named defenses, denied defendants' motion, and set the case for trial. On 16 September 2014, defendants gave timely notice of appeal from the summary judgment order.

II. Appellate Jurisdiction

We must first address whether we have jurisdiction to review the trial court's summary judgment order. "The denial of summary judgment

is not a final judgment, but rather is interlocutory in nature." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 626, 727 S.E.2d 311, 314 (2012). "Generally, there is no right of immediate appeal from interlocutory orders and judgments. However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review." *Whitehurst Inv. Prop's v. NewBridge Bank*, ___ N.C. App. ___, ___, 764 S.E.2d 487, 489 (2014) (citation and quotation marks omitted).

> The appellant bears the burden of demonstrating that the order is appealable despite its interlocutory nature. It is not the duty of this Court to construct arguments for or find support for an appellant's right to appeal; the appellant must provide sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.
>
> . . . We take a "restrictive" view of the substantial right exception and adopt a case-by-case approach.

Wells Fargo Bank, N.A. v. Corneal, ___ N.C. App. ___, ___, 767 S.E.2d 374, 376 (2014) (citations omitted).

Defendants argue that the order denying their summary judgment motion affects a substantial right because their motion was based on the defenses of *res judicata* and collateral estoppel.

> The denial of a motion for summary judgment based on the defense of *res judicata may* affect a substantial right, making the order immediately appealable. This rule is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Thus, the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal *only where a possibility of inconsistent verdicts exists if the case proceeds to trial.*
>
> To demonstrate that a second trial will affect a substantial right, [a defendant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Heritage Operating, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15 (emphasis added and citations, quotation marks, brackets, and footnote omitted).

> When a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order can affect a substantial right and may be immediately appealed. Incantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses.
>
> This Court has previously limited interlocutory appeals to the situation when the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts. *See, e.g.*, *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (holding that an order denying a motion based on the defense of res judicata gives rise to a "substantial right" only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000); *Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding that the defense of res judicata gives rise to a "substantial right" only when there is a risk of two actual trials resulting in two different verdicts), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). One panel, however, has held that a "substantial right" was affected when defendants raised defenses of res judicata and collateral estoppel based on a prior federal summary judgment decision rendered on the merits. *See Williams v. City of Jacksonsville Police Dep't*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004).

Foster v. Crandell, 181 N.C. App. 152, 162-63, 638 S.E.2d 526, 533-34 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). In *Foster*, this Court dismissed the defendants' appeal without reconciling *Country Club*, *Northwestern*, and *Williams*, because there was no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *Id.* at 163-64, 638 S.E.2d at 534-35.

Here, none of plaintiff's claims against defendants or Mr. Taylor have been finally determined on their merits, because the trial court set

aside plaintiff's 24 October 2012 default judgment against defendants and plaintiff's 24 October 2013 default judgment against Mr. Taylor. Although the trial court did later make a final determination of plaintiff's claims against Mr. Taylor, this final determination was based on a lack of personal jurisdiction, not on the merits of the underlying claims. Accordingly, we hold that there is no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *See id.* at 163, 638 S.E.2d at 534; *Heritage Operating*, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15.

Defendants argue that plaintiff is barred from continuing to pursue its action against them by *res judicata*, collateral estoppel, judicial estoppel, and election of remedies, based upon the 24 October 2013 default judgment against Mr. Taylor in the second lawsuit, despite the fact that the judgment was set aside and the trial court later determined that it did not have personal jurisdiction over Mr. Taylor. We disagree.

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the parties or their privies. . . . Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

The trial court set aside the default judgment against Mr. Taylor pursuant to Rule 60(b)(6), which provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) Any other reason justifying relief from the operation of the judgment." *See* N.C. Gen. Stat. § 1A-1, Rule 60(b). The trial court's order caused the default judgment against Mr. Taylor to no longer be "a final judgment on the merits" and opened up plaintiff's claims against Mr. Taylor to relitigation. *See Biosignia*, 358 N.C. at 15, 591 S.E.2d at 880. Plaintiff's claims against Mr. Taylor were in fact relitigated and then disposed of in the trial court's order granting Mr. Taylor's motion to dismiss for lack

of personal jurisdiction.[3] Additionally, we note that the trial court set aside the default judgment precisely in order to avoid any *res judicata* or collateral estoppel problems, as is evidenced by its findings of fact and conclusions of law, which provide in part:

> [Finding of Fact] 6. Defendant Taylor has not satisfied the Judgment, in whole or [in] part.
>
> 7. While Defendants Worlock have denied that Defendant Taylor was acting as their agent, they have, in 12 CvD 521, contended that the Default Judgment against Taylor, which is predicated upon agency principles, is a bar to any recovery from them by Plaintiff in 12 CvD 521.
>
> Based upon the foregoing Findings of Fact, the Court concludes as a matter of law that extraordinary circumstances exist and the interests of justice require that the Default Judgment entered herein on 24 October [2013] against Defendant Taylor should be set aside pursuant to Rule 60(b)(6).

(Portion of original in bold and all caps.) We hold that the trial court's order setting aside the default judgment against Mr. Taylor opened up plaintiff's claims against Mr. Taylor, as well as any related issues, to relitigation and that the trial court later disposed of those claims without deciding the merits of any of those claims or issues.

We further hold that the default judgment against Mr. Taylor was void *ab initio* because the trial court later determined that it lacked personal jurisdiction over Mr. Taylor. *See Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 689, 567 S.E.2d 179, 184 (2002) (holding that orders were void *ab initio* for want of personal jurisdiction); *Hamilton v. Johnson*, ___ N.C. App. ___, ___, 747 S.E.2d 158, 164 (2013) (same). Accordingly, there is no possibility of inconsistent verdicts, and defendant has failed to demonstrate how the challenged interlocutory order affects a substantial right. *See Heritage Operating*, 219 N.C. App. at 627-28, 727 S.E.2d at 314-15; *Corneal*, ___ N.C. App. at ___, 767 S.E.2d at 376; *Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d. 449, 453 ("[M]ere avoidance of a trial is not a substantial right entitling an appellant to immediate review.") (quotation marks and ellipsis omitted), *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005). Because defendants

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3. Neither plaintiff nor defendants appealed from this order and have not challenged on appeal the trial court's determination that it had no personal jurisdiction over Mr. Taylor.

have failed to meet this burden, we hold that we lack jurisdiction to review this appeal. *See Corneal*, ___ N.C. App. at ___, 767 S.E.2d at 376.

III. Conclusion

Because we lack appellate jurisdiction, we dismiss this appeal.

DISMISSED.

Judges CALABRIA and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 OCTOBER 2015)

BOST v. HELLER No. 15-362	Iredell (14CVS779)	Dismissed
GAO v. JAIN No. 15-136	Union (13CVD633)	Vacated and Remanded
IN RE I.S. & D.S. No. 15-502	Sampson (08JT42) (08JT97)	Affirmed
IN RE D.M.B. No. 15-315	Buncombe (14SPC1210)	Affirmed
IN RE T.W.B. No. 15-348	Ashe (14JA6) (14JA7) (14JA8) (14JA9)	Affirmed
RIOS v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 15-201	Wayne (14OSP05062)	Affirmed
ROBINSON v. CAIN No. 15-181	Henderson (06CVD2004)	Vacated and Remanded
STATE v. ARTIS No. 15-339	Wake (08CRS22984)	Affirmed
STATE v. AUSTIN No. 15-44	Wake (13CRS211442) (13CRS2345)	No Error
STATE v. BARBER No. 15-396	Forsyth (11CRS61384)	Reversed and Remanded
STATE v. BUNSIE No. 15-111	Buncombe (12CRS061197)	No Error
STATE v. CURRY No. 15-410	Union (12CRS55188)	No Error
STATE v. DAMATO No. 15-469	Wake (12CRS227492)	No Error

STATE v. DARBY No. 15-482	Person (13CRS51076) (13CRS51077) (13CRS51092) (13CRS966)	No Error
STATE v. DAVIS No. 15-222	Wake (09CRS213782)	No Error
STATE v. DIXON No. 15-318	New Hanover (14CRS54061)	Affirmed
STATE v. DUNLAP No. 15-372	Moore (14CRS50248)	Affirmed
STATE v. FOWLER No. 15-239	Person (14CRS1743) (14CRS417) (14CRS50266)	No Error
STATE v. HUDGINS No. 15-345	Madison (13CRS392)	No Error
STATE v. LAWING No. 14-1288	Mecklenburg (12CRS246991)	No Error
STATE v. LUKE No. 15-241	New Hanover (13CRS59316)	Affirmed
STATE v. MANGUM No. 15-86	Durham (13CRS54257)	No Error
STATE v. McCLENNY No. 15-306	Tyrrell (14CRS50056)	Dismissed
STATE v. McCLURE No. 15-273	Cabarrus (12CRS54564) (14CRS600)	Affirmed
STATE v. McCLURE No. 15-266	Mecklenburg (13CRS214471-73) (13CRS30542)	No Error
STATE v. McGRAW No. 15-6	Polk (11CRS50162)	No Error
STATE v. MORGAN No. 15-85	Durham (13CRS50538)	No Error
STATE v. NANNEY No. 15-476	Buncombe (13CRS63595) (14CRS51)	No Error

STATE v. SULLIVAN No. 15-343	Guilford (14CRS24198) (14CRS66022)	No Error
STATE v. TEETER No. 15-176	Mecklenburg (11CRS244958) (11CRS244966) (11CRS244969-72) (11CRS246048-52)	No Error
STATE v. TOOMER No. 14-1246	Alamance (11CRS57237) (11CRS57238) (12CRS4785) (12CRS4786) (12CRS50991)	No Error
STATE v. WALKER No. 15-340	Mecklenburg (13CRS223464)	No Error
STATE v. WILSON No. 15-536	Guilford (13CRS76515-16) (13CRS76518) (13CRS76522) (13CRS76524) (13CRS76526) (13CRS76528-29) (13CRS76530) (13CRS76532-33) (13CRS76538)	Dismissed
TATE v. N.C. DEP'T OF PUB. SAFETY No. 14-1274	N.C. Industrial Commission (TA-23162)	Dismissed

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