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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 23, 2018

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

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OF
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[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 3 NOVEMBER 2015

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ACCOMPLICES AND ACCESSORIES

Accomplices and Accessories—acting in concert—not present or nearby—accessible by telephone—The trial court should have granted defendant's motion to dismiss charges of contaminating a public water system by acting in concert where defendant was not present or nearby when her accomplice damaged the water lines. Defendant, whose company repaired water lines for Pamlico County, was accessible if needed by telephone and was later at the scene to repair the water lines, but one cannot be actively or constructively present for acting in concert simply by being available by telephone. **State v. Hardison, 723.**

APPEAL AND ERROR

Appeal and Error—alimony order—trial recordings unavailable—no issue raised as to sufficiency of findings of fact—briefs and record sufficient for review—Where recordings of the trial court proceedings became unavailable due to the long delay between the proceedings and the entry of the alimony order, the parties' briefs and the record were sufficient to allow the Court of Appeals to review defendant's appeal. The issues raised in defendant's appeal pertained to questions of law and whether the trial court's findings of fact supported its conclusions of law, not the sufficiency of the findings. **Collins v. Collins, 696.**

Appeal and Error—preservation of issues—motion in limine—no evidence offered at trial—The issue of whether medical records should have been excluded from a medical malpractice case was not preserved for appellate review where

APPEAL AND ERROR—Continued

plaintiff filed a motion *in limine* but failed to object when the evidence was offered at trial. **Clarke ex rel. Est. of Bohn v Mikhail, 677.**

Appeal and Error—preservation of issues—plain error—evidentiary and instructional errors—Issues involving instructional and evidentiary errors that defendant failed to preserve at trial were reviewed for plain error. **State v. Harris, 728.**

Appeal and Error—right to appeal after guilty plea—no motion to suppress—Defendant had no statutory right to appeal the trial court's denial of her motion to dismiss after a guilty plea to a misdemeanor (driving while impaired) was entered. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entry of a plea of guilty. **State v. Ledbetter, 746.**

Appeal and Error—writ of certiorari on appeal—outside of Appellate Rules authority—Defendant's appeal from a guilty plea to driving while impaired was dismissed where she contended that the Court of Appeals had the authority to issue a writ of certiorari. Defendant's petition did not invoke any of the three grounds set forth in Appellate Rule 21 to enable the Court of Appeals to issue the writ under that rule, and defendant did not demonstrate the 'exceptional circumstances' necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of her argument by certiorari. **State v. Ledbetter, 746.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—guilty plea—deportation consequences—A green card holder and permanent resident of the U.S. received ineffective assistance of counsel in entering a guilty plea to aiding and abetting common law robbery and conspiracy to commit common law robbery where his counsel informed him only that his plea could (not would) result in deportation. When deportation is unclear or uncertain, counsel need only advise the client of the risk, but that is not sufficient when the deportation consequences of defendant's guilty plea to aggravated felonies are truly clear. Moreover, defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice, taking into account defendant's fear of deportation, and the trial court's denial of defendant's Motion for Appropriate Relief was reversed for a determination of whether defendant had proven prejudice. **State v. Nkiam, 777.**

CONTRACTS

Contracts—indemnity clauses—ambiguous—question for trier of fact—The trial court's order granting defendant-Surgical Care Affiliates' Rule 12(b)(6) motion to dismiss was reversed in a breach of contract action involving contracts providing that defendant would manage the surgical departments at two of plaintiff-WakeMed's facilities. The contentions of both parties regarding the indemnity clauses in the contracts were reasonable, and interpretation of the ambiguity was best left to the trier of fact. **WakeMed v. Surgical Care Affiliates, LLC, 820.**

COURTS

Courts—sessions—recess from Friday to Tuesday—The trial court had jurisdiction to enter judgment where the trial began on a Monday, the State rested on the following Friday, the trial court recessed until the following Tuesday, and defendant

was convicted and sentenced on Wednesday. Defendant had advance notice of the recess and was given ample opportunity to object. **State v. Lewis, 757.**

CRIMINAL LAW

Criminal Law—first-degree felony murder conviction—underlying felony—failure to arrest judgment—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court erred by failing to arrest judgment on the underlying felony. The Court of Appeals accordingly arrested judgment on defendant's felony larceny conviction. **State v. McNeill, 762.**

Criminal Law—jury question—referral to written instructions—The trial court did not abuse its discretion in a prosecution for felony murder and armed robbery where the trial court correctly instructed the jury on the offenses, properly responded to a jury question by instructing the jury to reread the written instructions previously given to them, and gave the jury separate verdict sheets for each count that allowed them to select "not guilty" for each offense. **State v. Hazel, 741.**

DIVORCE

Divorce—alimony—alimony arrearage and attorney fees—reversed based on reversal of alimony order—On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals reversed the trial court's rulings on alimony arrearage and attorney fees because those rulings were predicated on the trial court's erroneous alimony order that the Court of Appeals reversed and remanded. **Collins v. Collins, 696.**

D**ivorce—alimony—alimony for savings—**The trial court abused its discretion in its order awarding alimony to plaintiff by ordering defendant to pay plaintiff an extra $1,241 per month so that she could "have an opportunity at some savings." An alimony award to allow a party to accumulate savings is improper. The order was reversed and remanded. **Collins v. Collins, 696.**

Divorce—alimony—extended duration—no explanation in court's order—The trial court erred in its order awarding alimony to plaintiff by making the award permanent without providing any reason for the extended duration or manner of payment of the award. The order was reversed and remanded. **Collins v. Collins, 696.**

Divorce—alimony—insufficient findings of fact—no findings on dependent spouse's current income—The trial court erred in its order awarding alimony to plaintiff by failing to make any findings of fact on plaintiff's current income from which the court could determine whether plaintiff was a dependent spouse. The trial court's order required defendant to pay alimony based on plaintiff's income five to seven years prior to entry of the order. The order was reversed and remanded. **Collins v. Collins, 696.**

Divorce—alimony—parity of income—no consideration of statutory requirements—The trial court erred in its order awarding alimony to plaintiff by basing the alimony award on a desire for parity of income rather than the statutory requirements of N.C.G.S. § 50-16.3A. The trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. The trial court was ordered on remand to consider evidence of the factors set forth in the statute. **Collins v. Collins, 696.**

DIVORCE—Continued

Divorce—post-separation support—determination of dependent and supporting spouse—comparison of incomes and expenses—On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals rejected defendant's argument that the trial court erred by determining that defendant was a supporting spouse and plaintiff was a dependent spouse entitled to post-separation support. The order, which focused on the parties' comparative incomes and current expenses, sufficiently addressed the parties' accustomed standard of living established during the marriage. **Collins v. Collins, 696.**

EVIDENCE

Evidence—expert witness's testimony—not improper character evidence—Although plaintiff did not object at trial to medical records on the grounds that they presented improper character evidence, the Court of Appeals determined that the evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. An expert witness's opinions do not constitute improper character evidence under N.C.G.S. § 8C-1,Rule 404. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Evidence—pills—analysis of one—visual examination of the rest—The trial court did not err in a prosecution for trafficking in opioids by denying defendant's request to instruct the jury on lesser-included conspiracy charges where the State's expert analyzed one of twenty pills and visually examined the remaining nineteen. It was not necessary to test every tablet, and the State's analyst satisfied the State's evidentiary burden by visually confirming that the remaining pills were similar. **State v. Lewis, 757.**

Evidence—prior medical records—known to defendants at time of treatment—Even if plaintiff had properly objected to medical records introduced at a medical malpractice trial, the information in the records was known to defendants at the time they treated the patient and was relevant to the issues of both damages and causation. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Evidence—sexual abuse of a child—actions following medical evaluation—There was no plain error in a prosecution for sexual abuse of a child in the admission of testimony from a witness from SAFEchild Advocacy Center, which provides medical evaluations for children who may be victims of child abuse or neglect. The witness never asserted that the victim had been abused or explicitly commented on her credibility. The challenged portion of the testimony was nothing more than what the witness did at the conclusion of her examination and was within the permissible range of expert testimony in child sexual abuse cases. **State v. Harris, 728.**

Evidence—sexual abuse of a child—testimony of guidance counselor—The testimony of a school guidance counselor was admitted without plain error where defendant contended that the testimony implied that the Department of Social Services had substantiated the victim's claim. Even assuming the testimony was improper, the jury probably would not have reached a different verdict, in light of defendant's incriminating statements and the evidence corroborating the victim's allegations. **State v. Harris, 728.**

EVIDENCE—Continued

Evidence—sexual abuse of a child—testimony of therapist—There was no plain error in the admission of the testimony of a therapist specializing in children who have been sexually abused where defendant contended that a portion of her testimony constituted impermissible vouching for the victim's credibility. Defendant did not point to any part of the testimony where the witness opined that the abuse had occurred or that defendant was the abuser. The testimony concerned the treatment the therapist used; the victim's symptoms, which were consistent with trauma; and the purpose and process of writing a trauma narrative, which laid the foundation for the State to introduce the victim's narrative. The mere fact that the testimony supported the victim's credibility does not render it inadmissible. **State v. Harris, 728.**

HOMICIDE

Homicide—closing arguments—reference to prior conviction—"cold" person—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err when it did not intervene ex mero motu during the prosecutor's closing arguments. The prosecutor's single reference to defendant's prior conviction, which had already been presented in the evidence with a limiting instruction, and suggestion that defendant was a "cold" person were not grossly improper. **State v. McNeill, 762.**

Homicide—first-degree felony murder—felony larceny—sufficiency of evidence—On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err by denying defendant's motion to dismiss the charge and instructing the jury on felony murder. There was sufficient evidence to show that the glass bottle found at the crime scene was a deadly weapon, that the alleged larceny was committed with the use of the glass bottle, and that the killing occurred in the perpetration of the felonious larceny. The State presented evidence that defendant's DNA was present on the broken glass bottle found at the crime scene and that the victim died from blunt force injuries to his head. A jury could reasonably infer that the bottle was used to incapacitate the victim, facilitating defendant's larceny of the victim's vehicle—and that these events formed one continuous transaction. **State v. McNeill, 762.**

MEDICAL MALPRACTICE

Medical Malpractice—damages—punitive—titration of medicine—directed verdict against plaintiff—The trial court properly granted a directed verdict on the issue of punitive damages in a medical malpractice action where the issue concerned the medicine and the dosing schedule used to treat plaintiff for chronic mental illness. The physician's assistant who prescribed the medicine sought to reach a therapeutic dose sooner in order to benefit the patient and her deteriorating condition. Experts testified they had successfully dosed the medication, Lamictal, at an increased rate and the manufacturer's recommended dosing schedule was a recommendation only, from which medical providers could deviate. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

Medical Malpractice—motion to bifurcate trial—eve of trial—The trial court did not abuse its discretion in a medical malpractice case involving mental health treatment by denying plaintiff's motion to bifurcate the trial into liability and damages phases. Although plaintiff's counsel had earlier declined to move for bifurcation

in response to the trial court's inquiries, he changed his strategy after the trial court admitted plaintiff's prior records. The trial court ruled that it would be improper to bifurcate on the eve of trial. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

NEGLIGENCE

Negligence—instructions—superseding or intervening negligence—The trial court's jury instruction on superseding negligence in a medical malpractice case did not improperly shift the burden of proof to plaintiff to disprove defendants' "affirmative defense." The well-settled principle in North Carolina holds that superseding or intervening negligence is an extension of the element of proximate cause. **Clarke ex rel. Est. of Bohn v. Mikhail, 677.**

REAL PROPERTY

Real Property—condominiums—concierge area—utilities—not common areas—not units—The trial court properly granted summary judgment in favor of plaintiff-homeowner's association's ownership of a disputed concierge area inside the building and electrical, plumbing, and telephone utilities. While the North Carolina Condominium Act permits the declaration creating a condominium to provide special declarant rights, those rights do not include the right to retain ownership of property that is located within a building and not designated as a unit. **Residences at Biltmore Condo. v. Power Dev., LLC, 711.**

Schools and Education—charter schools—underfunding—unrestricted funds—tuition/fees—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "Tuition/Fees" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for CCS's general operating expenses and general K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—indirect costs—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "indirect costs" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds received from federal grants for indirect costs were spent in the normal operations of the school district supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—Medicaid reimbursement—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Medicaid reimbursement funds were not restricted and therefore

were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that CCS used the funds to provide services for students with IEPs in the general K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—E-Rate—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that E-Rate (a federal program that reimburses the school system for a percentage of what it pays for telecommunications and Internet access) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that the funds were used for Internet and telecommunications services for all K-12 CCS students and staff supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—Juvenile Crime Prevention Council—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Juvenile Crime Prevention Council funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for life skills counselors who were available to the entire K-12 population supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—Dropout Prevention Grant—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds designated as the Dropout Prevention Grant were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were intended to benefit the entire K-12 population and that CCS exercised discretion over how to spend the funds supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—Reserved Officers' Training Corps—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Reserved Officers' Training Corps (ROTC) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used to reimburse ROTC instructors'

salaries paid from CCS's current expense fund and that the federal government did not restrict the funds to a specific purpose supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—WorkForce Investment Act—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that WorkForce Investment Act funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were used to pay two employees at the Job Link Center and to pay the students who participated in the program supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

Schools and Education—charter schools—underfunding—unrestricted funds—Gear Up Grant—On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Gear Up Grant funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were spent on programs available to the general K-12 population of CCS supported the trial court's findings and conclusion on this issue. **Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. of Educ., 797.**

SEXUAL OFFENSES

Sexual Offenses—first-degree sexual offense—lesser-included offense of sexual offense with a child by an adult—jury instructions—A conviction for a lesser-included offense, first-degree sexual offense, N.C.G.S. § 14-27.4(a(1), was vacated and remanded for resentencing where defendant was indicted for that offense but the jury was instructed on sexual offense with a child, adult offender, N.C.G.S. § 14-27.4A(d). The difference between the two statutes concerns the defendant's age, and this case cannot be distinguished from *State v. Hicks*, 239 N.C. App. 396 (2015) ("In essence, the trial court submitted to the jury the additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense."). **State v. Harris, 728.**

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.

TIMOTHY CLARKE, PERSONAL REPRESENTATIVE OF THE ESTATE OF ERICA BOHN, PLAINTIFF
v.
ASHRAF GAD BAKHOM MIKHAIL, M.D., JESSICA LYN HARDIN, P.A., AND COASTAL CAROLINA NEUROPSYCHIATRIC CENTER, P.A., DEFENDANTS

No. COA15-235

Filed 3 November 2015

1. Negligence—instructions—superseding or intervening negligence

The trial court's jury instruction on superseding negligence in a medical malpractice case did not improperly shift the burden of proof to plaintiff to disprove defendants' "affirmative defense." The well-settled principle in North Carolina holds that superseding or intervening negligence is an extension of the element of proximate cause.

2. Medical Malpractice—damages—punitive—titration of medicine—directed verdict against plaintiff

The trial court properly granted a directed verdict on the issue of punitive damages in a medical malpractice action where the issue concerned the medicine and the dosing schedule used to treat plaintiff for chronic mental illness. The physician's assistant who prescribed the medicine sought to reach a therapeutic dose sooner in order to benefit the patient and her deteriorating condition. Experts testified they had successfully dosed the medication, Lamictal, at an increased rate and the manufacturer's recommended dosing schedule was a recommendation only, from which medical providers could deviate.

3. Appeal and Error—preservation of issues—motion in limine—no evidence offered at trial

The issue of whether medical records should have been excluded from a medical malpractice case was not preserved for appellate review where plaintiff filed a motion *in limine* but failed to object when the evidence was offered at trial.

4. Evidence—prior medical records—known to defendants at time of treatment

Even if plaintiff had properly objected to medical records introduced at a medical malpractice trial, the information in the records was known to defendants at the time they treated the patient and was relevant to the issues of both damages and causation.

5. Evidence—expert witness's testimony—not improper character evidence

Although plaintiff did not object at trial to medical records on the grounds that they presented improper character evidence, the Court of Appeals determined that the evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. An expert witness's opinions do not constitute improper character evidence under N.C.G.S. § 8C-1,Rule 404.

6. Medical Malpractice—motion to bifurcate trial—eve of trial

The trial court did not abuse its discretion in a medical malpractice case involving mental health treatment by denying plaintiff's motion to bifurcate the trial into liability and damages phases. Although plaintiff's counsel had earlier declined to move for bifurcation in response to the trial court's inquiries, he changed his strategy after the trial court admitted plaintiff's prior records. The trial court ruled that it would be improper to bifurcate on the eve of trial.

Appeal by plaintiff from judgment entered 30 May 2014 and order entered 22 September 2014 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 25 August 2015.

Shipman & Wright, LLP, by Gary K. Shipman and W. Cory Reiss, and Childers, Schlueter & Smith, LLC, by C. Andrew Childers, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by John D. Martin, Colleen N. Shea, and Kara O. Gansmann, for defendants-appellants.

TYSON, Judge.

Timothy Clarke ("Plaintiff"), personal representative of the Estate of Erica Bohn, appeals from judgment entered by the trial court after a jury returned a verdict in favor of Ashraf Gad Bakhom Mikhail, M.D., Jessica Lyn Hardin, P.A., and Coastal Carolina Neuropsychiatric Center, P.A. (collectively, "Defendants"). Plaintiff also appeals from order denying his motion for a new trial. We find no prejudicial error.

I. Factual Background

Plaintiff commenced this wrongful death and medical malpractice action against Dr. Ashraf Gad Bakhom Mikhail ("Dr. Mikhail"), Jessica Hardin ("Ms. Hardin"), and Coastal Carolina Neuropsychiatric Center

("CCNC") on 30 September 2011. Plaintiff alleged Ms. Hardin was negligent in prescribing and dosing a drug, Lamictal, to treat Erica Bohn's ("Ms. Bohn's") severe mental illness. Plaintiff filed an amended complaint seeking punitive damages on 3 December 2013.

A. Erica Bohn's Medical History and Treatment

Ms. Bohn first sought treatment at CCNC, an outpatient psychiatric practice located in Jacksonville, North Carolina, on 26 February 2009. CCNC was the only clinic located in Onslow County with a full-time psychiatric practice in 2009. Prior to receiving treatment at CCNC, Ms. Bohn had been involuntarily committed five times by other healthcare providers between 2006 and 2008. A magistrate and two medical providers all determined Ms. Bohn demonstrated a desire to harm herself or others for each involuntary commitment.

Ms. Bohn was seen and evaluated by Dr. Mikhail, a psychiatrist and owner of CCNC. Ms. Bohn reported a history of diagnosis and treatment for paranoid schizophrenia to Dr. Mikhail. She also reported feelings of sadness, fear, and poor concentration. Dr. Mikhail noted Ms. Bohn displayed depressive symptoms of generalized sadness and poor concentration, and anxiety symptoms of excessive worries, restlessness, muscle tension, specific anxiety, and panic attacks. Dr. Mikhail diagnosed Ms. Bohn with paranoid schizophrenia and generalized anxiety disorder.

Ms. Bohn reported numerous stressors in her life, which affected or resulted from her mental illness. She had been married and divorced twice. Her second husband was abusive. She lost custody of her only son, Eddie, after she held a knife to him and the Department of Social Services ("DSS") intervened.

Eddie also suffered from severe mental illness, and had been involuntarily committed and admitted to residential mental health programs numerous times beginning at nine years old. Ms. Bohn lived with and cared for her aging and ill parents.

Ms. Bohn possessed an increased risk of suicide attributed to her diagnosis, depressive symptoms, lack of financial resources, lack of friends, and lack of family support. She posed an even higher risk of suicide due to her prior history of hospitalizations.

Ms. Hardin, a physician's assistant under Dr. Mikhail's supervision at CCNC, was primarily responsible for Ms. Bohn's direct treatment thereafter. Ms. Bohn engaged in therapy and medication management at CCNC. She admitted past "suicidal ideations" in her therapy sessions

at CCNC. Ms. Bohn had failed all typical and atypical antipsychotic medications her previous two psychiatrists had prescribed. Ms. Hardin's treatment objective was to manage Ms. Bohn's fluctuating symptoms, to help keep her out of the hospital, and to prevent her from hurting herself or others.

In April 2010, Ms. Hardin prescribed Lithium as a mood stabilizer for Ms. Bohn's depression and anxiety. Ms. Bohn reported "she was having increased moments that she wanted to cry and felt very sad since having started the [L]ithium" at her 25 May 2010 appointment with Ms. Hardin. Ms. Hardin testified Ms. Bohn initially responded well to the Lithium, but certain medications intended to decrease depression can increase depressive symptoms instead.

Ms. Hardin was aware of Ms. Bohn's chronic mental illness, history of hospitalizations, lack of family support, lack of friends, multiple stressors in her life, and her general increased risk of suicide. Ms. Hardin's goal was to maintain Ms. Bohn's stability and function, and noted Ms. Bohn was "going downhill" at her 25 May 2010 appointment.

Ms. Hardin prescribed Lamictal to Ms. Bohn at this appointment. Ms. Hardin testified she based her decision, in part, on the fact that Ms. Bohn "was sad . . . [and] was already on or had been on antidepressants, which at times were effective and at times were not effective[,]" and "ha[d] initially responded well to the [L]ithium[.]" Ms. Hardin explained "Lamictal is chemically similar to [L]ithium, but has a more favorable side effect profile[.]" Ms. Hardin also testified she

> was aware of the literature that supports Lamictal as augmentation for depression and the literature that supports it in regards to its mood-stabilizing properties, and [Ms. Bohn] repeatedly throughout her chart was kind of speckled with that sadness, or the ups and downs or irritability, so I thought the Lamictal was appropriate for her.

Lamictal is a prescription drug and carries a "black box" warning, mandated by the United States Food and Drug Administration ("FDA"). The "black box" warning states Lamictal carries the risk of a severe rash, known as Stevens-Johnson Syndrome ("SJS"), in 0.8 out of every 1,000 adult patients. SJS causes blistering of the skin. The outer layer of a patient's skin, the epidermis, dies and separates from the lower layer, the dermis. SJS causes this rash to occur on less than ten percent of a patient's body.

SJS's rash can develop into toxic epidermal necrolysis ("TEN") if left untreated, which affects at least thirty percent of a patient's skin.

The skin is the body's largest organ and plays a major role in the body's immune functions. Patients with TEN are at an increased risk for infection, due to the skin not being intact. A patient can die from complications arising from TEN. Large amounts of fluids, electrolytes, and proteins are lost through the open wounds, which further compromises the body's ability to fight infection because of this malnutrition.

The "black box" warning advises that the risk of developing SJS increases if the drug's titration, or dosing schedule, differs from the titration recommended in the package insert. The manufacturer's suggested titration of Lamictal is: 25 milligrams daily for the first two weeks, 50 milligrams daily for weeks three and four, 100 milligrams daily for week five, and 200 milligrams daily for week six and thereafter.

The record from Ms. Bohn's 25 May 2010 CCNC appointment showed Ms. Hardin instructed Ms. Bohn to take 25 milligrams of Lamictal daily for the first week, and increase the dosage to 50 milligrams daily in the second week. Ms. Hardin and other medical experts testified to achieving success in titrating Lamictal at an increased rate and reaching a therapeutic dose.

Ms. Hardin stated she weighed the potential benefits of Lamictal against the potential, but statistically rare, risk of Ms. Bohn developing SJS. Ms. Hardin testified, in her clinical judgment, the increased titration of Lamictal was the best protocol to reach a therapeutic effect more quickly to manage Ms. Bohn's depressive symptoms.

Ms. Hardin noted Ms. Bohn's improvement at her 8 June 2010 appointment, and instructed her to continue taking 50 milligrams daily for the third week. At this visit, Ms. Bohn told Ms. Hardin her elderly father recently had a stroke, which had increased Ms. Bohn's stress level. Ms. Hardin wrote Ms. Bohn another prescription, which increased the dosage of Lamictal to 100 milligrams daily, and instructed Ms. Bohn to start taking 100 milligrams daily starting the fourth week. Ms. Hardin wrote the prescription for the fourth week during this appointment to ease the stress of returning one week later, so that Ms. Bohn could focus on caring for her ailing father.

Ms. Bohn did not contact or see any provider for treatment at CCNC after her 8 June 2010 appointment. She cancelled her subsequent two appointments at CCNC. Ms. Bohn never reported any issue with her medications to CCNC.

On 23 June 2010, Ms. Bohn presented at Onslow Urgent Care with a sore throat, yeast infection, blisters on her lips, and a rash, which had

been present for two days. Ms. Bohn reported the medications she was currently taking, including Lamictal. Dr. Michael Mosier ("Dr. Mosier"), a burn trauma general surgeon and surgical critical care surgeon at Loyola University Medical Center, located in Chicago, Illinois, testified Ms. Bohn presented at Onslow Urgent Care with all of the "classic," textbook symptoms of SJS on this day.

Onslow Urgent Care did not diagnose Ms. Bohn with SJS, nor did they advise her to stop taking Lamictal. Onslow Urgent Care diagnosed Ms. Bohn with herpes simplex 2, bacterial conjunctivitis, leukoplakia of her oral mucous membrane, yeast infection, and canker sores.

Ms. Bohn's condition had drastically changed on 25 June 2010, two days after she was seen at Onslow Urgent Care. Ms. Bohn called for an ambulance, and emergency responders found her lying in a dark room in her home, unable to walk and having difficulty talking or moving. Ms. Bohn was "covered head to toe" with a blistering rash and sloughing skin.

Ms. Bohn was initially transported to the emergency department at Onslow Memorial Hospital for medical treatment. She informed the medical providers that she had recently started taking Lamictal. Ms. Bohn was transported to the burn center at UNC Hospital, located in Chapel Hill, North Carolina, for treatment of TEN. Ms. Bohn's initial assessment at UNC Hospital showed she had lost the top layer of skin on 57% of her body due to her untreated SJS rash progressing into TEN, leaving her skin raw and blistered.

Ms. Bohn was intubated for mechanical ventilation at UNC Hospital. She remained hospitalized for two months, and died of ventilator-acquired pneumonia on 29 August 2010.

B. Pre-trial Motions and Expert Testimony at Trial

A jury trial began on 21 April 2014 in Onslow County Superior Court. Plaintiff filed various motions *in limine*. Plaintiff's first motion *in limine* sought to exclude medical records, criminal records, social services files, and other evidence Plaintiff deemed irrelevant and unfairly prejudicial to Ms. Bohn. Plaintiff's second motion *in limine* sought to exclude character evidence of Ms. Bohn and her son, Edward Clarke. During the hearing, these motions were denied in part and granted in part. The trial court entered a written order on 4 September 2014. The trial court prohibited Defendants from referencing Ms. Bohn's prior criminal history or her Satanic worship.

At trial, Plaintiff called one expert witness: Dr. Stephen Kramer ("Dr. Kramer"), a forensic psychiatrist who specializes in neuropsychiatry. Dr.

Kramer agreed that patients diagnosed with paranoid schizophrenia are at an increased risk for suicide. He also agreed that depressive symptoms can be a core feature of paranoid schizophrenia, and Ms. Bohn's records from CCNC and other inpatient hospitals contained numerous references to her reporting depression and sadness.

Dr. Kramer admitted he had also prescribed medications outside the FDA label indications, and "[m]ost medications are prescribed outside of the original indication." He explained this is a common practice in medicine because "if the available medications haven't been effective . . . and if it makes any clinical sense, I will consider it even if it's off label [sic]." Although testifying as Plaintiff's sole causation expert, Dr. Kramer admitted a TEN expert would be better equipped to give an opinion about whether Ms. Bohn's SJS and TEN could have been treated or interrupted after its onset.

Psychiatrists Dr. George Corvin ("Dr. Corvin") and Dr. Rick Weisler ("Dr. Weisler") testified as experts for Defendants. Both doctors opined Lamictal was an appropriate medication for Ms. Bohn's condition. Dr. Corvin testified that in his own practice, he had prescribed doses of Lamictal at a faster rate than the manufacturer's guidelines suggest. Dr. Weisler testified he has prescribed Lamictal to treat bipolar disorder and acute depressive symptoms. Dr. Weisler stated he had experience with patients developing SJS after starting Lamictal. He recalled the rash went away after his patients discontinued the Lamictal.

Dr. Corvin testified the records from Ms. Bohn's five previous conditions indicated she was "an individual with a very severe illness, a very fragile illness." He also stated her involuntary hospital admissions placed her at higher risk of suicide than if she had never been admitted. Both Drs. Corvin and Weisler testified Ms. Bohn's risk of suicide was much higher than her risk of developing SJS or TEN.

Defendants called two causation experts to testify at trial: Dr. Gary Goldenberg ("Dr. Goldenberg"), a board-certified dermatologist, and Dr. Mosier. Drs. Goldenberg and Mosier both testified Ms. Bohn presented with the "classic" SJS rash when she was treated at Onslow Urgent Care on 23 June 2010. Dr. Mosier agreed that Onslow Urgent Care's failure to diagnose SJS caused it to progress into TEN, thereby causing Ms. Bohn's condition to worsen to the degree she had to become mechanically ventilated to live, and causing her to ultimately die from pneumonia. Drs. Goldenberg and Mosier stated, in their expert opinion, if Ms. Bohn had been properly diagnosed on the date she sought care at Onslow Urgent Care and had discontinued the Lamictal, more likely than not the rash would have resolved and she would have survived.

At the close of Plaintiff's case on 8 May 2014, Defendants moved for a directed verdict on the issues of punitive damages and Plaintiff's principal negligence claim. The trial court denied Defendants' motion for a directed verdict on the issue of negligence. On 14 May 2014, the trial court granted Defendants' motion for a directed verdict on Plaintiff's amended claim for punitive damages.

The jury returned a unanimous verdict in favor of Defendants. Plaintiff filed a motion for a new trial on 9 June 2014. The trial court entered an order denying Plaintiff's motion on 22 September 2014.

Plaintiff gave timely notice of appeal to this Court.

II. Issues

Plaintiff argues the trial court erred by: (1) submitting the issue of superseding and intervening negligence to the jury; (2) submitting a jury instruction on superseding and intervening negligence, which was unsupported by the evidence and misstated the law; (3) granting a directed verdict in favor of Defendants on the issue of punitive damages; (4) admitting irrelevant and unfairly prejudicial evidence of Ms. Bohn's character; (5) denying Plaintiff's request to bifurcate; and (6) denying Plaintiff's motion for a new trial.

III. Analysis

A. Superseding and Intervening Negligence

Plaintiff argues the trial court erred by denying his motion for summary judgment and submitting the issue of intervening and superseding negligence to the jury. Plaintiff also contends the instruction the trial court gave to the jury was not supported by the evidence and misstates the law.

1. Standard of Review

Plaintiff states this Court's review of an order *granting* summary judgment is *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Plaintiff's proposed standard of review is inapplicable to the facts at bar. Denial of a motion for summary judgment is not reviewable on appeal from a final judgment after a trial on the merits of the case. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Any improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the evidence and merits by the trier of fact. *Id.*

A final judgment on the jury's verdict was entered after the jury heard and weighed the evidence, and reached a verdict on the merits in favor of Defendants. Under these facts, the trial court's denial of Plaintiff's partial motion for summary judgment on the issue of intervening negligence is not subject to appellate review. *Id.* (holding "denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits").

This Court reviews and considers jury instructions "in their entirety." *Estate of Hendrickson v. Genesis Health Venture, Inc.*, 151 N.C. App. 139, 150, 565 S.E.2d 254, 262 (citation omitted), *disc. review denied*, 356 N.C. 299, 570 S.E.2d 503 (2002). The "appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury." *Id.* at 151, 565 S.E.2d at 262 (citation omitted). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation omitted).

2. Analysis

[1] The trial court incorporated the North Carolina Pattern Jury Instructions 102.28 and 102.65, and charged the jury in pertinent part as follows:

> In this case, the defendants contend that if one or more of them was negligent, which the defendants deny, then such negligence was not a proximate cause of the plaintiff's injury because it was insulated by the negligence of Onslow Urgent Care. *You will consider this matter only if you have found that one of the defendants was negligent.* . . . If the negligence of Onslow Urgent Care was such as to have broken the causal connection or sequence between the defendants' negligence and the plaintiff's injury, thereby excluding the defendant's [sic] negligence as a proximate cause, the negligence of Onslow Urgent Care would thus become as between the negligence of the defendants and the Onslow Urgent Care as the sole proximate cause of the plaintiff's injury.
>
> . . . .
>
> The burden is not on the defendants to prove that their negligence in any way was insulated by the negligence of Onslow Urgent Care. Rather, the burden is on

> the plaintiff to prove by the greater weight of the evidence that the negligence of the defendants was a proximate cause of the plaintiff's injury.

(emphasis supplied).

Plaintiff argues the trial court erred by instructing the jury the burden was on Plaintiff to disprove the existence of a superseding, or insulating, cause of Ms. Bohn's injury and resulting death. Plaintiff contends this instruction misstates the law by placing the burden on Plaintiff to disprove the affirmative defense of superseding negligence. Plaintiff's argument misconstrues both the doctrine of insulating or superseding negligence and the instructions given to the jury.

As an established element of negligence, the burden rests upon a plaintiff to prove "by the greater weight of the evidence" that a defendant's conduct was the proximate cause of the injuries alleged in an action for negligence. *Wall v. Stout*, 310 N.C. 184, 201, 311 S.E.2d 571, 581 (1984). Long-established North Carolina case law and the Pattern Jury Instructions clearly state "[t]he doctrine of insulating negligence is an elaboration of a phase of proximate cause." *Childers v. Seay*, 270 N.C. 721, 726, 155 S.E.2d 259, 263 (1967); N.C.P.I.—Civil 102.65. The burden of proof does not shift to the defendant when an instruction on superseding negligence is requested. Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause. *See Childers*, 270 N.C. at 726, 155 S.E.2d at 263; *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914, *disc. review denied*, 349 N.C. 227, 515 S.E.2d 699 (1998); *see also* N.C.P.I.—Civil 102.65 ("The burden is not on the defendant to prove that *his* negligence, if any, was insulated by the negligence of [another party]. Rather, the burden is on the plaintiff to prove, by the greater weight of the evidence, that the negligence of the defendant was a proximate cause of the plaintiff's [injury].") (emphasis in original); N.C.P.I.—Civil 102.28 n.1 ("Insulating negligence . . . is not a separate issue.").

At oral argument, Plaintiff's counsel asserted the burden shifted to Defendants to prove superseding or insulating negligence because Defendants filed a motion to amend their answer, in which they pled superseding negligence as an affirmative defense. We disagree.

Defendants' amended answer to Plaintiff's complaint, filed 6 November 2013, states in pertinent part as follows:

> If Defendants were negligent, which is specifically denied, Defendants' negligence is not a proximate cause

> of Plaintiff's injuries or damages. The superseding and intervening negligence of Onslow Urgent Care and its physicians and healthcare providers was a proximate cause of Plaintiff's injuries and damages in that Onslow Urgent Care failed to recognize, diagnose, and treat the symptoms of Plaintiff's alleged reaction to Lamictal. It was unforeseeable that Onslow Urgent Care would negligently fail to diagnose and treat Plaintiff when she presented at Onslow Urgent Care with known symptoms of a Lamictal reaction and reported to Onslow Urgent Care that she was taking Lamictal. But for Onslow Urgent Care's negligence, Plaintiff would not have contracted TEN and would not have suffered the injuries and death she suffered. Accordingly, Defendants hereby specifically plead the doctrine of insulating and intervening negligence in bar of Plaintiff's claims.

During oral argument, counsel for Defendants stated he asserted insulating and intervening negligence to request and obtain the specific jury instruction. *See* N.C.P.I.—Civil 102.65.

Defendants' superseding negligence averments were asserted beneath the heading "Sixth Defense." However, the text of the averments comports with the well-settled principle in North Carolina, which holds superseding or intervening negligence is an extension of the element of proximate cause. The burden of proof to show proximate cause remained with Plaintiff. *Muteff v. Invacare Corp.*, 218 N.C. App. 558, 565, 721 S.E.2d 379, 384 (2012) (holding contributory negligence is an affirmative defense, for which the burden lies with the defendant asserting it, but "superseding or insulating negligence[] is an elaboration of a phase of proximate cause[]").

The trial court's instruction to the jury did not require Plaintiff to *disprove* superseding or intervening negligence by Onslow Urgent Care. The trial court's jury instruction properly informed the jury of the following: (1) Plaintiff carries the burden "to prove by the greater weight of the evidence" that Defendants' negligence was a proximate cause of Ms. Bohn's injury and death; (2) Defendants did *not* carry the burden of proving their negligence, if any, was insulated by Onslow Urgent Care's negligence; and, (3) the issue of superseding negligence was to be addressed only if the jury first found Defendants were negligent in the course of Ms. Bohn's medical treatment.

The trial court's jury instruction on superseding negligence did not improperly shift the burden of proof to Plaintiff to disprove Defendants'

"affirmative defense." Insulating or superseding negligence is "an elaboration of a phase of proximate cause." *Childers*, 270 N.C. at 726, 155 S.E.2d at 263. The burden of proof remained with Plaintiff to prove Defendants' negligence, if any, was a proximate cause of Ms. Bohn's injury and death. The trial court's jury instruction did not improperly shift the burden of proof or misstate the law. This argument is overruled.

B. Punitive Damages

[2] Plaintiff argues the trial court erred by granting Defendants' motion for a directed verdict on the issue of punitive damages.

1. Standard of Review

This Court reviews a directed verdict to determine whether the nonmoving party presented "sufficient evidence to sustain a jury verdict in [his] favor, or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted).

To determine the sufficiency of the evidence, "all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the nonmovant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

"A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Sheppard v. Zep Mfg. Co.*, 114 N.C. App. 25, 30, 441 S.E.2d 161, 164 (1994) (citation and quotation marks omitted).

A jury instruction on punitive damages is warranted "when more than a *scintilla* of evidence exists from which the jury could find that defendant's tortious conduct was accompanied by a reckless disregard for plaintiff's rights." *Ellison v. Gambill Oil Co., Inc.*, 186 N.C. App. 167, 180, 650 S.E.2d 819, 827 (2007) (citations and internal quotation marks omitted), *aff'd per curiam and disc. review improvidently allowed*, 363 N.C. 364, 677 S.E.2d 452 (2009).

2. Analysis

"Punitive damages may be awarded, in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C. Gen. Stat. § 1D-1 (2013); *see Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004).

Recovery of punitive damages requires a claimant to prove by clear and convincing evidence that the defendant is liable for compensatory damages, and the presence of one of the following aggravating factors: (1) fraud; (2) malice; or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2013). Our General Assembly has statutorily defined "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7) (2013). Willful or wanton conduct requires more than a showing of gross negligence. *Id.*

Plaintiff argues he presented sufficient evidence to raise a genuine issue of whether Defendants acted with conscious and intentional disregard for Ms. Bohn's safety. Plaintiff asserts the evidence, taken as true and viewed in the light most favorable to him, supports an award of punitive damages. We disagree.

In the medical context, a medical provider acts willfully and wantonly when she knowingly, consciously, and deliberately places a patient at risk of harm by acting contrary to known protocols and procedures. *Chambliss v. Health Sciences Found., Inc.*, 176 N.C. App. 388, 393-94, 626 S.E.2d 791, 795, *petition for disc. review withdrawn*, 360 N.C. 532, 633 S.E.2d 677 (2006).

Plaintiff argues Ms. Hardin's titration or dosage of Lamictal at a higher rate than recommended by the manufacturer's guidelines constituted evidence of a "reckless indifference" for Ms. Bohn's safety and warranted the submission of punitive damages to the jury. All expert witnesses testified that the manufacturer's guidelines for a particular titration are recommendations and do not establish the standard of care, or a breach thereof. Plaintiff failed to present any evidence, outside of this assertion, that Ms. Hardin's prescribing and titration of Lamictal was "willful or wanton," as required by N.C. Gen. Stat. § 1D-15.

The evidence presented showed Ms. Hardin used her clinical judgment to weigh the risks and benefits of prescribing and titrating Lamictal to Ms. Bohn. Ms. Bohn consistently reported depressive symptoms while being treated at CCNC. The medical expert testimony showed the prescribing and increased titration of Lamictal was appropriate for Ms. Bohn, in light of her symptoms, her history of failing other drugs, and her increased risk of suicide.

Ms. Hardin testified, and medical expert testimony confirmed, her decision to prescribe Lamictal at an increased titration was based on Ms. Bohn's conditions and medical history, and Ms. Hardin's clinical

judgment, training, and experience. Ms. Hardin sought to reach a therapeutic dose sooner in order to benefit Ms. Bohn and her deteriorating condition. Experts in this case testified they had successfully titrated Lamictal at an increased rate.

The evidence also showed the label indicated any increased risk of rash with an increased titration was unproven. Ms. Hardin stated she believed the probability Ms. Bohn would develop a rash from Lamictal was much lower than Ms. Bohn's risk of suicide. Ms. Hardin testified she also knew from clinical experience that any rare rash would resolve by discontinuing the Lamictal. This experience was consistent with every testifying medical expert's experience with Lamictal.

Contrary to Plaintiff's argument, the manufacturer's recommended titration schedule does not constitute a "policy or protocol," which Ms. Hardin could have violated. The manufacturer's recommended titration schedule is a recommendation only, from which medical providers can and do deviate. Plaintiff did not present any evidence Ms. Hardin's decision violated CCNC's policies or procedures, or breached any established standard of care. *See Chambliss*, 176 N.C. App. at 393, 626 S.E.2d at 794-95 (holding evidence defendant was aware of, but did not follow, safety protocols and procedures was sufficient evidence to submit issue of punitive damages to the jury). The trial court properly granted a directed verdict on the issue of punitive damages. Plaintiff's argument is overruled.

C. Admission of Medical and Other Records

Plaintiff argues the trial court erroneously admitted into evidence the following: (1) Ms. Bohn's medical records; (2) certain Social Security and DSS records; and (3) Eddie's medical records (collectively, "prior records"). Plaintiff contends these records should not have been admitted because they were: (1) irrelevant to the issues of breach, standard of care, and causation; (2) unfairly prejudicial; and (3) not available to Defendants at the time Lamictal was prescribed.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). Whether to admit or exclude evidence under Rule 403 of the Rules of Evidence is a decision which rests within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d. 377 (2008). "[T]he

trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001); see also *State v. Young*, __ N.C. __, __, 775 S.E.2d 291, 306 (2015) ("Thus, the ultimate issue . . . is whether the trial court's decision to allow the admission of the challenged evidence was so arbitrary that it could not have resulted from the making of a reasoned decision.")

2. Analysis

(a) Preservation for Appellate Review

[3] "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1); *see also State v. Jamison*, __ N.C. App. __, __, 758 S.E.2d 666, 671 (2014).

Our appellate courts have consistently held "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the [party] fails to object to that evidence at the time it is offered at trial." *State v. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576 (1998) (citation and quotation marks omitted), *cert. denied*, 525 U.S. 1124, 12 L. Ed. 2d 907 (1999); *see also State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999); *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. E. 2d 153 (1995); *T & T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185 486 S.E.2d 219 (1997). Plaintiff filed a motion *in limine* to exclude Ms. Bohn's medical records from admission into evidence at trial. Plaintiff failed to object when this evidence was offered at trial. Plaintiff has failed to properly preserve this issue for appellate review.

(b) Relevancy

[4] Presuming Plaintiff properly preserved this issue for appellate review, Ms. Bohn's medical records were relevant to the issues of damages and causation. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded under Rule 403 "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).

Communications and records of confidential medical or mental health matters may be relevant and admissible when a party's claims place a person's medical or mental health condition in issue. *See Spangler v. Olchowski*, 187 N.C. App. 684, 691, 654 S.E.2d 507, 512-13 (2007) (holding confidential substance abuse treatment matters were relevant to patient's claims against a physician in a medical malpractice suit in which she alleged pain and emotional distress following gastric bypass surgery).

Here, the information contained in the prior records was relevant to both the issues of damages and causation. This information *was* known to Defendants at the time they treated Ms. Bohn at CCNC. Ms. Bohn reported her medical history, symptoms, and "stressors" to both Dr. Mikhail during her initial intake at CCNC, and to Ms. Hardin during their subsequent appointments.

The prior records illustrated a complete picture of Ms. Bohn's mental health for the jury. The prior records showed Ms. Bohn's mental health affected her ability to work, attend school, and care for her mentally ill son and elderly parents. *See* N.C. Gen. Stat. § 28A-18-2(c) (2013) ("All evidence which reasonably tends to establish any of the elements of damages . . . or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act."); *Hales v. Thompson*, 111 N.C. App. 350, 358, 432 S.E.2d 388, 393 (1993) (holding mother's testimony about decedent son's leukemia and the effect it had on their relationship was relevant, as it had the tendency to prove the extent of damages in wrongful death by motor vehicle action). Even if Plaintiff had properly objected when this evidence was presented at trial, Plaintiff has failed to show these records were not relevant concerning causation and damages, or that the trial court's admission was "manifestly unsupported by reason." *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. Plaintiff's argument is overruled.

(c) Character Evidence

[5] Rule 404(a) provides: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2013).

Plaintiff argues for the first time on appeal that the prior records were admitted as improper propensity or character evidence. Plaintiff did not assert Rules 403, 404, 405, or 608 as the basis for his objection to the admission of this evidence at trial. The North Carolina Rules of Appellate Procedure provide: "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired[.]" N.C.R. App. P. 10(a)(1).

Notwithstanding Plaintiff's failure to object to the admission of this evidence as "character evidence," this evidence was properly admitted because experts for both parties relied on it to form their own opinions of the case, particularly with regard to the issues of proximate cause and damages. Ms. Bohn's prior records and Eddie's medical records were not admitted for any purposes to show "character evidence." *See* N.C. Gen. Stat. § 8C-1, Rule 703 (2013); *State v. Golphin*, 352 N.C. 364, 467-68, 533 S.E.2d 168, 235 (2000) (holding report expert relied upon to support his conclusions relating to co-defendant's character and upbringing, his relationship with his parents, his prior experience with police, his demeanor, and influence defendant had over him was admissible), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

An expert witness's opinions do not constitute improper character evidence under Rule 404. A party may present its own theory of the case by offering an expert. *See State v. Moss*, 139 N.C. App. 106, 111-12, 532 S.E.2d 588, 593 (2000) (concluding two experts' opinions were properly admitted and did not constitute evidence of bad character).

(d) Prejudice

> As a general proposition, appellate decisions holding that a trial court erroneously failed to sustain an objection lodged pursuant to N.C. [Gen. Stat.] § 8C-1, Rule 403, tend to rest on determinations that the admission of the evidence in question served little or no purpose other than to inflame the passions of the jury. . . . For that reason, one of the ultimate questions . . . is whether the evidence in question had *any* significant probative value or, alternatively, whether the *sole effect* of the challenged evidence was to unfairly prejudice the [party] in the eyes of the jury.

Young, __ N.C. at ___, 775 S.E.2d at 306-07 (emphasis supplied).

The admission of the prior records did not prejudice Plaintiff. As stated *supra*, most of the information contained in these records was

known to Defendants through Ms. Bohn's initial intake interview and ongoing reports while being treated at CCNC. The trial court conducted a lengthy *voir dire* hearing to determine what Ms. Hardin had been told, reviewed, and knew while she was treating Ms. Bohn. Experts also used the prior records as a basis for their opinions on causation.

Plaintiff has failed to carry his burden to show how the admission of this evidence was likely to lead the jury to draw negative inferences about Ms. Bohn or to confuse the issues. No evidence shows the trial court's review process or decision to admit the prior records into evidence was "manifestly unsupported by reason." *Hyde*, 352 N.C. at 55, 530 S.E.2d at 293. This argument is overruled.

D. Plaintiff's Motion to Bifurcate

[6] Plaintiff argues the trial court erred by denying his motion to bifurcate the trial into liability and damages phases. We disagree.

1. Standard of Review

"The severance of issues for separate trials is in the trial court's discretion, and its decision will not be reviewed absent an abuse of discretion[.]" *Ashley v. Delp*, 59 N.C. App. 608, 610, 297 S.E.2d 905, 908, *disc. review denied*, 308 N.C. 190, 302 S.E.2d 242 (1982). A motion to bifurcate may be denied "for good cause shown." N.C. Gen. Stat. § 1A-1, Rule 42(b)(3) (2013).

> This Court is not called upon to determine whether the facts of this case support a showing of good cause; instead, we are asked to review the trial court's reasoning to determine whether its finding of good cause in this specific case was manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.

Atkins v. Mortenson, 183 N.C. App. 625, 628, 644 S.E.2d 625, 628 (2007) (citation and internal quotation marks omitted).

2. Analysis

N.C. Gen. Stat. § 1A-1, Rule 42(b) provides: "Upon a motion of any party in an action in tort . . . the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial." N.C. Gen. Stat. § 1A-1, Rule 42(b)(3).

Plaintiff argues because the admission of Ms. Bohn's and her son's prior records was not relevant to the liability issues and was prejudicial

against Plaintiff, the trial court should have granted his motion to bifurcate the trial. Our review confirms these records were both relevant and that the trial court did not abuse it's discretion in determining that the records were not unfairly prejudicial to Plaintiff.

The trial court inquired of counsel about bifurcation on the first day of hearing pre-trial matters. Counsel for Plaintiff stated he had not filed a motion to bifurcate. The trial court raised the possibility of bifurcation on two other occasions. Each time, Plaintiff's counsel did not move for bifurcation.

During oral argument, Plaintiff's counsel stated his change in trial strategy and motion to bifurcate the trial were made in direct response to the trial court's decision to admit Ms. Bohn's prior medical and DSS records into evidence. The trial court denied Plaintiff's motion and ruled it would be improper to bifurcate on the eve of trial, after the parties' trial strategy, schedule of subpoenas, and the order of witnesses were dependent on the case proceeding as a consolidated trial.

Plaintiff has failed to carry his burden to show the trial court's "finding of good cause in this specific case was manifestly unsupported by reason . . . or so arbitrary that it could not have been the result of a reasoned decision." *Atkins*, 183 N.C. at 628, 644 S.E.2d at 628. This argument is overruled.

E. Plaintiff's Motion for a New Trial

Plaintiff argues he should be granted a new trial due to the numerous errors, which occurred at trial. Plaintiff is not entitled to a new trial on any issue properly preserved and asserted, for the reasons discussed *supra*.

IV. Conclusion

The denial of Plaintiff's motion for summary judgment is not reviewable on appeal. The trial court did not improperly shift the burden onto Plaintiff in its jury instruction on superseding and intervening negligence.

Plaintiff failed to present any evidence tending to show Ms. Hardin's decision to prescribe Lamictal was willful or wanton to warrant submission of punitive damages to the jury. The trial court properly granted Defendants' motion for a directed verdict on the issue of punitive damages.

Plaintiff waived appellate review of the denial of his motion *in limine*, because he failed to object when the prior records were proffered at trial. Ms. Bohn's and her son's prior medical and DSS records

were relevant to the issues of causation and damages. Evidence shows Defendants were made aware of Ms. Bohn's medical and mental health history. Medical experts properly relied on these records in forming their opinions. At the pre-trial hearing, the trial court reviewed and exercised its discretion to rule on which information to allow and to exclude.

Plaintiff did not object to the introduction of these records on the basis that they were improper character evidence, and failed to preserve this argument on appeal. Plaintiff failed to carry his burden to show these records were unfairly prejudicial, or that the trial court did not abuse its discretion in admitting the prior records into evidence.

Plaintiff failed to carry his burden to show the trial court's decision to deny his motion to bifurcate was "manifestly unsupported by reason."

The trial court did not abuse its discretion in denying Plaintiff's motion for a new trial. Plaintiff received a fair trial, free from prejudicial errors he preserved and argued.

NO ERROR.

Judges BRYANT and GEER concur.

MARY J.S. COLLINS, Plaintiff
v.
RANDY RAY COLLINS, Defendant

No. COA15-481

Filed 3 November 2015

1. Appeal and Error—alimony order—trial recordings unavailable—no issue raised as to sufficiency of findings of fact—briefs and record sufficient for review

Where recordings of the trial court proceedings became unavailable due to the long delay between the proceedings and the entry of the alimony order, the parties' briefs and the record were sufficient to allow the Court of Appeals to review defendant's appeal. The issues raised in defendant's appeal pertained to questions of law and whether the trial court's findings of fact supported its conclusions of law, not the sufficiency of the findings.

2. Divorce—post-separation support—determination of dependent and supporting spouse—comparison of incomes and expenses

On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals rejected defendant's argument that the trial court erred by determining that defendant was a supporting spouse and plaintiff was a dependent spouse entitled to post-separation support. The order, which focused on the parties' comparative incomes and current expenses, sufficiently addressed the parties' accustomed standard of living established during the marriage.

3. Divorce—alimony—insufficient findings of fact—no findings on dependent spouse's current income

The trial court erred in its order awarding alimony to plaintiff by failing to make any findings of fact on plaintiff's current income from which the court could determine whether plaintiff was a dependent spouse. The trial court's order required defendant to pay alimony based on plaintiff's income five to seven years prior to entry of the order. The order was reversed and remanded.

4. Divorce—alimony—alimony for savings

The trial court abused its discretion in its order awarding alimony to plaintiff by ordering defendant to pay plaintiff an extra $1,241 per month so that she could "have an opportunity at some savings." An alimony award to allow a party to accumulate savings is improper. The order was reversed and remanded.

5. Divorce—alimony—parity of income—no consideration of statutory requirements

The trial court erred in its order awarding alimony to plaintiff by basing the alimony award on a desire for parity of income rather than the statutory requirements of N.C.G.S. § 50-16.3A. The trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. The trial court was ordered on remand to consider evidence of the factors set forth in the statute.

6. Divorce—alimony—extended duration—no explanation in court's order

The trial court erred in its order awarding alimony to plaintiff by making the award permanent without providing any reason for the extended duration or manner of payment of the award. The order was reversed and remanded.

7. Divorce—alimony—alimony arrearage and attorney fees—reversed based on reversal of alimony order

On appeal from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of plaintiff, the Court of Appeals reversed the trial court's rulings on alimony arrearage and attorney fees because those rulings were predicated on the trial court's erroneous alimony order that the Court of Appeals reversed and remanded.

Appeal by defendant from orders entered 6 October 2014, 20 October 2014 and 31 December 2014 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 8 October 2015.

Walker & Bullard, P.A., by Daniel S. Bullard, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for defendant-appellant.

TYSON, Judge.

Randy Ray Collins ("Defendant") appeals from the trial court's orders awarding post-separation support, alimony, an alimony arrearage, and attorney fees in favor of Mary J.S. Collins ("Plaintiff"). We affirm the order on post-separation support. We reverse and remand the orders on alimony, alimony arrearage, and attorney fees.

I. Background

Plaintiff and Defendant married in 1987 and separated on 6 March 2010. Two children were born of the marriage. On 11 October 2010, Plaintiff filed a complaint for post-separation support, alimony, and equitable distribution.

The trial court heard Plaintiff's claim for post-separation support on 25 January 2011 and entered an order on 6 October 2011. The court concluded Plaintiff was a dependent spouse, Defendant was a supporting spouse, and awarded Plaintiff post-separation support in the amount of $2,800.00 per month for thirty months, or until the order was terminated or modified.

The trial court heard Plaintiff's equitable distribution claim in June, July and August 2012 and entered an order on equitable distribution over a year later on 10 September 2013. The court found Plaintiff was entitled to a distributive award in the amount of $119,463.62, and Defendant was

entitled to a distributive award of $62,725.93. Included in the property awarded to Defendant was his interest and personal liability in various real estate companies.

The trial court heard Plaintiff's claim for alimony in August and September 2012. Over two years later, on 20 October 2014, the court entered orders awarding alimony to Plaintiff and setting the amount of alimony arrearage Defendant owed. Defendant was ordered to pay alimony to Plaintiff in the amount of $4,175.00 per month until the death of either party, or until Plaintiff remarries or cohabitates.

On 31 December 2014, the trial court entered an order allowing Plaintiff to recover her attorney fees of $8,000.00 from Defendant. Defendant appeals from the trial court's orders awarding post-separation support, alimony, alimony arrearage, and attorney fees.

II. Issues

Defendant argues the trial court erred by: (1) determining Defendant is a supporting spouse and Plaintiff is a dependent spouse entitled to post-separation support; (2) ordering Defendant to pay alimony without determining Plaintiff's income and entering findings of fact, which do not support the conclusions of law to hold Plaintiff is entitled to alimony; (3) determining the amount of Defendant's alimony obligation to Plaintiff; (4) making the alimony award permanent, without providing any reason for the extended duration or manner of payment of the award; and, (5) awarding alimony arrearages and attorney fees.

III. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (citation omitted). If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence. *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

Whether a spouse is entitled to an award of alimony or post-separation support is a question of law. *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972). This Court reviews questions of law *de novo*. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

The trial court's determination of the amount of alimony is reviewed for an abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). The trial court's decision constitutes an abuse of discretion where it "is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision[.]" *Frost v. Mazda Motor of Am. Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (citations and internal quotation marks omitted).

IV. Missing Portions of Transcript

[1] One result of the two-year delay in length of time, which elapsed between the hearing and entry of the alimony order, is the recordings of the court proceedings became unavailable. Defendant's counsel was only able to procure recordings of the 13 August, 14 August and 20 August 2012 proceedings. These transcripts contain only Plaintiff's evidence.

The issues Defendant has raised on appeal pertain to questions of law and whether the trial court's findings of fact support the conclusions, and not the sufficiency of the findings of fact. The parties' briefs and the record before us are sufficient to permit review of Defendant's issues on appeal. These facts show yet another consequence in long delays between dates of hearings and entry of orders.

V. Entitlement to Post-Separation Support

[2] Defendant argues the trial court erred in determining Defendant is a supporting spouse and Plaintiff is a dependent spouse entitled to post-separation support. We disagree.

An award of post-separation support is governed by N.C. Gen. Stat. § 50-16.2A:

> (b) In ordering postseparation support, the court shall base its award on the financial needs of the parties, *considering the parties' accustomed standard of living*, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.
>
> (c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that

> the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

N.C. Gen. Stat. § 50-162.2A(b) (2013) (emphasis supplied). Subsection (d) of the statute pertains to marital misconduct. N.C. Gen. Stat. § 50-162.2A(d) (2013).

A dependent spouse is defined as one "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2013). "Actually substantially dependent requires that the party seeking alimony would be actually unable to maintain the accustomed standard of living [established before separation] from his or her own means." *Hunt v. Hunt*, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993) (citation and internal quotation marks omitted). A spouse is "substantially in need of maintenance" if the dependent spouse will be unable to meet future needs even if current needs are met. *Id.* at 181-82, 261 S.E.2d at 855. The legal principles, which govern alimony awards, "are equally applicable to awards of post-separation support." *Crocker v. Crocker*, 190 N.C. App. 165, 168, 660 S.E.2d 212, 214 (2008).

An objective determination of the parties' "accustomed standard of living" is central to the trial court's determination on alimony and post-separation support. *Id.* at 169, 660 S.E.2d at 214. Our Supreme Court has explained the phrase "accustomed standard of living of the parties,"

> contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent that it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

The trial court heard Plaintiff's claim for post-separation support on 25 January 2011, less than a year after the parties separated. The order was not entered until 6 October 2011. The court found Defendant's gross income in 2010 was approximately $156,000.00. His net income was $95,869.00, which equals $7,989.00 per month, but the court found this figure is "lower than actual because it does not consider deductions and exemptions." The court found Defendant earned a gross income of

$147,069.00 in 2009 and a gross income of $115,000.00 in 2007. The court did not make any findings of Defendant's income in 2008.

The court found Plaintiff earned a net monthly income of approximately $1,900.00 per month from employment at a retirement center and a restaurant in 2010. The court determined "[t]hat under the circumstances existing at the date of separation, the Defendant was a supporting spouse and the Plaintiff was a dependent spouse. This is also currently the case."

The court found:

> 9. The Plaintiff's current reasonabl[e] monthly needs to live in the lifestyle to which she had become accustomed leading up to the date of separation is approximately $4,000.00 per month. The Defendant's current monthly needs are approximately $4,300.00 per month, not including his payments toward the college education of the parties' emancipated daughter.

The court awarded post-separation support to Plaintiff in the amount of $2,800.00 per month for a period of thirty months, effective November 2010, the month following the filing of her claim for post-separation support.

Defendant argues the order awarding post-separation support is reversible because it fails to: (1) find the parties' accustomed standard of living as a family unit during the marriage; and, (2) reflect how the court determined Plaintiff's living expenses, as measured against the accustomed standard of living. Defendant asserts the trial court focused entirely on the parties' comparative incomes and current expenses, without regard for the economic needs of the parties as a family unit during the marriage.

N.C. Gen. Stat. § 1A-1, Rule 52(a) requires in all non-jury trials, the trial court specially find "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick*, 305 N.C. at 451, 290 S.E.2d at 657. The trial court found that Plaintiff required $4,000.00 per month to continue the lifestyle to which she had become accustomed during marriage. The trial court made no specific findings regarding the parties' marital standard of living, such as their necessary and discretionary expenditures, the type of home they lived in, or the types of activities or vacations shared.

In *Adams v. Adams*, this Court held the trial court sufficiently addressed the parties' standard of living, when the order contained findings of the supporting spouse's "monthly gross income and his reasonable living expenses, coupled with the findings as to [the dependent spouse's] monthly income and her expenses during the last year of the marriage." 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 123 (2000). This Court also held, "[t]he statute does not require a specifically articulated finding on the subject [of accustomed standard of living]." *Id.* at 280, 374 S.E.2d at 453 (citing *Beaman v. Beaman*, 77 N.C. App. 717, 721-22, 336 S.E. 2d 129, 131-32 (1985) (holding the trial court's failure to make a categorical finding about the parties' accustomed standard of living was not fatal to the validity of the judgment)).

The trial court's order on post-separation support sufficiently addresses the issue of the parties' accustomed standard of living established during the marriage. This argument is overruled.

VI. Alimony Award

A. Plaintiff's Current Income

[3] Defendant argues the trial court erred in awarding alimony to Plaintiff. He asserts the findings of fact do not include any determination of Plaintiff's current income from which the court could make a determination of whether Plaintiff is a dependent spouse. We agree.

N.C. Gen. Stat. § 50-16.3A governs awards of alimony. The statute provides, in pertinent part:

> The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section.

N.C. Gen. Stat. § 50-16.3A(a) (2013).

"Alimony is ordinarily determined by a party's *actual* income, from all sources, *at the time of the order*." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (second emphasis supplied and citation omitted); *see also Rhew v. Felton*, 178 N.C. App. 475, 484-85, 631 S.E.2d 859, 866 (2006) ("A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income at

the time of the award.") The burden rests on the party seeking alimony to show the accustomed standard of living and the lack of the means to maintain that standard. *Williams*, 299 N.C. at 181, 261 S.E.2d at 855.

The court heard Plaintiff's claim for alimony on five dates in August and September 2012, but did not enter the order until two years later on 17 October 2014. In the alimony award, the court made findings of fact of both parties' individual gross and net incomes for the years 2007, 2008, and 2009. The court also made findings to the parties' combined joint adjusted gross income and annual net income for 2007, 2008, and 2009. For the years 2007 through 2009, Plaintiff earned an average net income of $16,387.00. Defendant earned an average net income of $99,547.00 for those years.

In 2010, the year of separation, the court found Plaintiff earned a gross income of $28,530.00, and Defendant earned a gross income of $151,610.00. In 2011, Plaintiff earned a gross income of $27,909.00 and Defendant earned a gross income of $197,878.00. The court further found that, beginning in 2012, Defendant received a base salary of $156,000.00. The court made no findings with regard to Plaintiff's 2012 income.

The court determined Plaintiff's "reasonable expenses necessary to maintain the standard of living acquired prior to the date of separation are approximately $4,300.00 per month, before accounting for savings that the parties could have accumulated if Defendant had not overreached and tied up the parties' liquidated funds into his various real estate investments." The court's determination of Plaintiff's expenses was based upon Plaintiff's financial affidavit, which is dated 10 June 2012. The court determined Defendant's personal expenses to be $3,250.00 per month.

The court determined the amount of alimony Defendant was to pay Plaintiff, as follows:

> 33. Plaintiff's monthly net income from 2007 through 2009 was $1,366.00. Plaintiff has a shortfall of $2,934.00 needed to meet her reasonable monthly expenses to allow her to maintain the standard of living she maintained prior to [the] date of separation. Again, this does not include the savings that would have been part of the standard of living of the parties had husband not made the real estate investments he made and used marital funds for those. Considering all the factors involved and the need for a gross income sufficient to provide wife with net funds to meet her shortfall and have an opportunity at some

> savings, the Court sets alimony in the amount of $4,175.00 per month.

The trial court engaged in various comparisons of the parties' incomes for a number of years dating back to 2007. The court based its determination that Plaintiff had a shortfall of income to expenses by comparing her average net income between 2007 and 2009 with the expenses she was incurring in 2012, three to five years later. The court failed to account for and factor Plaintiff's income received in 2010 and 2011, which was substantially higher than her income in 2007, 2008 and 2009. The court also failed to make any findings regarding Plaintiff's income for 2012.

The order was entered over two years later in 2014 and requires Defendant to pay alimony to Plaintiff calculated based upon Plaintiff's income from *five to seven years prior* to entry of the order. *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. The trial court's conclusion that Plaintiff is a dependent spouse is not supported by the findings of fact that *at the time of the order* Plaintiff lacked sufficient *actual* and *current* income to maintain her standard of living established during the marriage. *Id.* The trial court's order is reversed and remanded.

B. Savings Component of Alimony Award

[4] Defendant argues the trial court abused its discretion by ordering Defendant to pay Plaintiff an additional $1,241.00 per month in alimony so that she could "have an opportunity at some savings." We agree.

With regard to the court's consideration of savings as a component of an alimony award, this Court has held:

> Although we agree that the trial court can properly consider the parties' custom of making regular additions to savings plans *as a part of their standard of living* in determining the amount and duration of an alimony award, we conclude the trial court erred in this case when it excluded amounts paid into savings accounts by the parties from their respective incomes. If such an exclusion were allowed, a spouse could reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans. Likewise, a spouse might increase an alimony award by deferring a portion of his or her income to a savings account. *Further, our case law establishes that the purpose of alimony is not to allow a party to accumulate savings.*

Glass v. Glass, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239-40 (1998) (citing *Sguros v. Sguros*, 252 N.C. 408, 114 S.E.2d 79 (1960) (emphasis supplied). *See Roberts v. Roberts*, 30 N.C. App. 242, 226 S.E.2d 400 (1976).

Defendant argues the additional $1,241.00 of the court's alimony award is not based on the parties' custom of making regular additions to savings plans as a part of their standard of living, but is based on the fact that the parties *did not* save this money during their marriage. The court found:

> 31. Defendant used marital funds to finance his real estate investments during the marriage. This is money the parties could have regularly accumulated in a savings account, which accumulation could have been a part of the parties' standard of living. Plaintiff was at least tangentially aware of most of Defendant's investments of this sort, but Defendant seriously obligated and encumbered the parties' regular monthly cash flow, and savings, by overreaching in his investments. Defendant was allocated these investment properties in equitable distribution, along with any financial obligations. Each payment Defendant makes toward the investment properties has the potential of creating equity for his own use.

The court further found that Plaintiff's monthly shortfall of $2,934.00 "does not include the savings that *would have* been part of the standard of living of the parties had husband not made the real estate investments he made and used marital funds for those." (Emphasis supplied). The order specifically added $1,241.00 per month to the alimony award to allow Plaintiff to accumulate savings. This additional allowance is contrary to our well-established precedents, which hold the purpose of alimony is not to allow a party to accumulate savings. *See*, *e.g.*, *Glass*, 131 N.C. App. at 789-90, 509 S.E.2d at 239-40.

The court made the following finding of fact:

> 25. The Court does consider that the accumulation of usable savings on a regular monthly basis is a valid component to this couple's standard of living and should be considered as a reasonable expense necessary to maintain the standard of living at the date of separation.

The court made no findings regarding the amount of money the parties contributed to their savings on a monthly basis to support this award.

Furthermore, the court failed to factor in the savings as a monthly expense of Plaintiff in calculating her reasonable monthly expenses. Instead, the court *sua sponte* added a lump sum figure to the alimony award *after* balancing Plaintiff's income and expenses and specifically stated the $1,241.00 was to allow Plaintiff to accumulate savings. Almost thirty percent of the alimony award was specifically added for Plaintiff's savings. An alimony award to allow a party to accumulate savings is improper. *Id.* at 790, 509 S.E.2d at 240.

If on remand the trial court concludes Plaintiff is a dependent spouse and Defendant is a supporting spouse, the court may consider the issue of a savings component to the alimony award only if the parties' had a habit of regularly contributing money to savings during their marriage. This consideration may only be made in determining the parties' accustomed standard of living during the marriage, and must be factored as an expense when calculating Plaintiff's monthly expenses to determine her monthly shortfall. *Id.* The trial court also wholly failed to make any findings concerning the overall decline in the economy or of the values of the investment property interest since 2007, prior to castigating Defendant for making these investments. No findings show if or how Plaintiff may have benefitted from these investments during the marriage. This portion of the order is reversed and remanded.

C. Statutory Requirements of N.C. Gen. Stat. § 50-16.3A

[5] Defendant argues the trial court erred by basing its alimony award on a desire for "parity of income" and not the statutory requirements of N.C. Gen. Stat. § 50-16.3A. We agree.

The term "alimony" is defined as "an order for payment of the support and maintenance of a spouse or former spouse[.]" N.C. Gen. Stat. 50-16.1A(1). In determining the amount of alimony, the trial court "shall consider all relevant factors," including the sixteen (16) factors set forth in N.C. Gen. Stat. § 50-16.3A(b). *See Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) ("The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.") (citation omitted). "In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings." *Id.* (citation omitted).

The factors set forth in N.C. Gen. Stat. § 50-16.3A are as follows:

> (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
>
> (2) The relative earnings and earning capacities of the spouses;
>
> (3) The ages and the physical, mental, and emotional conditions of the spouses;
>
> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> (5) The duration of the marriage;
>
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
>
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> (8) The standard of living of the spouses established during the marriage;
>
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;

> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A (2013).

Here, the trial court's findings of fact were limited to the parties' incomes and expenses in the various years preceding the hearing. On remand, the court shall consider all competent evidence of all the factors set forth in N.C. Gen. Stat. §50-16.3A and make sufficient findings of fact on each relevant factor to support its conclusions. *See Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860 (reversing alimony award where trial court made findings only as to parties' earnings, and "there were no findings to the parties' estates, earning capacities, conditions, or accustomed standard of living and the record contains no indication that these factors were considered by the trial court.") This portion of the trial court's order is vacated and remanded.

D. Permanent Duration

[6] Defendant argues the trial court erred by making the alimony award permanent without providing any reason for the extended duration or manner of payment of the award. We agree.

The court ordered Defendant's payment of alimony "shall continue until the death of either party, the remarriage of the Plaintiff, or the cohabitation of the Plaintiff, whichever event shall first occur." N.C. Gen. Stat. § 50-16.3A(c) (2013) provides, "[t]he court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment."

This Court has held a failure to set forth reasons for the duration of the alimony award is reversible error and requires remand. *Squires v. Squires*, 178 N.C. App. 251, 263-64, 631 S.E.2d 156, 163 (2006) (rejecting the dependent spouse's argument that the court's findings of a thirty-eight year marriage and the fact that she had no income supported a permanent award); *Crocker*, 190 N.C. App. at 172, 660 S.E.2d at 217 (reversal required where trial court failed to state any reason for amount

of alimony, its duration or manner of payment); *see also Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421-22, 588 S.E.2d 517, 522-23 (2003); *Williamson v. Williamson*, 140 N.C. App. 362, 364-365, 536 S.E.2d 337, 339 (2000). The trial court erred in ordering the alimony award to be permanent without making findings of fact to support its conclusion as required by the statute and our precedents.

VII. Orders Allowing Arrearages and Attorney Fees

[7] By separate order also entered 20 October 2014, also over two years after the conclusion of the hearing, the trial court set an alimony "arrearage." The court determined Defendant owed an alimony arrearage of $40,675.00. This arrearage was calculated based upon the improper calculations in the alimony order, which we reverse and remand. Upon reversal of the underlying alimony order for errors, the order setting the arrearage must also be reversed.

Likewise, the trial court's 31 December 2014 order awarding attorney fees is predicated upon the determination Plaintiff is a dependent spouse entitled to an award of alimony. N.C. Gen. Stat. § 50-16.4 (2013). Reversal of the determination of the trial court's order awarding alimony also necessitates a reversal and remand of the award of attorney fees. The trial court's ruling on arrearages and attorney fees is reversed.

VIII. Conclusion

The trial court did not err in determining Plaintiff is a dependent spouse and Defendant is a supporting spouse in deciding Plaintiff's entitlement to post-separation support. The order sufficiently addresses the parties' accustomed standard of living established during the marriage. *Adams*, 92 N.C. App. at 279-80, 374 S.E.2d at 453.

The trial court's order awarding alimony fails to consider all the statutory factors and to make findings of fact as are set forth in N.C. Gen. Stat. § 50-16.3A.

The trial court's conclusion that Plaintiff is a dependent spouse and Defendant is a supporting spouse is erroneous, where it is based upon Plaintiff's income from 2007 through 2009 and her expenses from 2012 in an order entered more than two years later in 2014.

The trial court erred in ordering the alimony award to be permanent without making sufficient findings of fact to support its conclusions.

The trial court erred in adding a lump sum of $1,241.00 monthly to the alimony award as "savings" for Plaintiff rather than factoring the

amount of money the parties contributed to savings each month into the calculation of Plaintiff's expenses.

We affirm the order on post-separation support, and reverse and vacate the order awarding Plaintiff alimony and attorney fees, and remand this matter to the trial court for a new hearing on alimony and timely entry of an order containing all the statutorily required findings of fact consistent with this decision and prior precedents.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges McCULLOUGH and DIETZ concur.

THE RESIDENCES AT BILTMORE CONDOMINIUM OWNERS' ASSOCIATION, INC., PLAINTIFF

v.

POWER DEVELOPMENT, LLC AND MOUNTAIN MORTGAGE, INC., DEFENDANTS

No. COA14-1222

Filed 3 November 2015

Real Property—condominiums—concierge area—utilities—not common areas—not units

The trial court properly granted summary judgment in favor of plaintiff-homeowner's association's ownership of a disputed concierge area inside the building and electrical, plumbing, and telephone utilities. While the North Carolina Condominium Act permits the declaration creating a condominium to provide special declarant rights, those rights do not include the right to retain ownership of property that is located within a building and not designated as a unit.

Appeal by defendants from order entered 15 May 2014 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 21 April 2015.

Long, Parker, Warren, Anderson & Payne, P.A., by Ronald K. Payne, and Dunnuck Law Firm, PLLC, by Erin Dunnuck, for plaintiff-appellee.

David R. Payne, P.A. by David R. Payne, for defendant-appellant Power Development, LLC.

Asheville Law Group, by Michael G. Wimer and Jake A. Snider, for defendant-appellant Mountain Mortgage, Inc.

DAVIS, Judge.

Plaintiff The Residences at Biltmore Condominium Owners' Association, Inc. ("the Association") filed this action seeking a declaratory judgment that various disputed areas within The Residences at Biltmore Condominium ("the Biltmore Condominium") were common elements of the Biltmore Condominium as opposed to properties retained by Power Development, LLC ("Power Development") in its capacity as the declarant. Power Development and Mountain Mortgage, Inc. ("Mountain Mortgage") (collectively "Defendants") appeal from the trial court's order granting summary judgment in favor of the Association. After careful review, we affirm.

Factual Background

In 2005, Power Development purchased a 6.6 acre tract of real property on Biltmore Avenue in Asheville, North Carolina for the purpose of developing the Biltmore Condominium. On 12 December 2006, Power Development recorded the Declaration of Condominium for The Residences at Biltmore Condominium ("the Declaration") in the Buncombe County Registry in Book 4330, Page 1427 pursuant to N.C. Gen. Stat. § 47C-2-101 of the North Carolina Condominium Act. The Declaration included plat maps illustrating the plans for the Biltmore Condominium and showing the approximately 5.7 acres of the property that Power Development "desire[d] to submit . . . to the terms and provisions of the North Carolina Condominium Act." The Declaration addressed the rights and responsibilities of the Association, which was organized in November of 2006 through the filing of articles of incorporation with the North Carolina Secretary of State.

The Declaration also set forth the definitions of various terms that were contained therein. One such term was "condominium," which the Declaration stated "shall mean and refer to The Residences at Biltmore Condominium as established by the submission of the Property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions, to the terms of the North Carolina Condominium Act by this Declaration."

The Declaration also defined the term " 'Declarant Retained Property' or 'Retained by Developer' " as

> property or other areas which will be retained by Declarant which are reflected on Exhibit "A" or the Plans attached hereto and which are not a part of the Common Elements or Units associated with this condominium and which are, in fact, held in ownership by Declarant. These areas must be built by the Developer but the Developer will keep these properties and may convey the same to the Association but is not required to convey the same.

The plat maps illustrating the Biltmore Condominium plans showed various shaded areas that were labeled "D.R.P." with a note explaining that D.R.P. was an acronym for "Declarant Retained Property." Some of the areas labeled "D.R.P." were inside condominium buildings where residential units were located. The Declaration stated that the Condominium was intended to be a "concierge condominium," meaning one that "has resources in place (i.e., on-staff concierge) to accommodate the *al* [sic] *carte* needs (identified within a concierge menu and individually billed per service requested) of the owner, guest, renter or other occupier of any one unit within the condominium."

On 28 September 2007, Power Development executed and recorded a commercial deed of trust in favor of The Bankers Bank, N.A. to secure a loan of $15,580,000.00. The deed of trust encumbered "Tract B," 2.074 acres of the condominium property that encompassed both the remaining units Power Development owned and the areas at issue in the present litigation.

Power Development defaulted on its loan, and foreclosure proceedings were initiated by the substitute trustee, Raintree Realty and Construction, Inc. While the foreclosure sale was pending, Power Development executed a document entitled "Supplemental Declaration of Condominium for The Residences at Biltmore Condominium" ("the Supplemental Declaration"), which was recorded in the Buncombe County Registry in Book 4854, Page 698. The Supplemental Declaration stated, in pertinent part, that (1) "when Power Development, LLC recorded the Declaration, the Declarant labeled certain portions of the common elements in the Condominium Plans attached to the Declaration as 'Declarant Retained Property' "; (2) these common elements labeled Declarant Retained Property are "critical for the operation of the hotel condominium known as The Residences at Biltmore Condominium and the individual unit owners' use and enjoyment" as they include electrical, plumbing, and telephone utilities; (3) "it was always the Declarant's intention that the property labeled as Declarant Retained Property . . . be a portion of the unit owners' common elements"; and (4) the

original Declaration was "hereby amended for the purpose of clarifying that all of the properties labeled as Declarant Retained Property in the Condominium Plans attached to the Declaration are Residential common elements. As explained in Article III of the Declaration, each residential Unit Owner shall be the owner of an undivided interest as tenant in common of the Residential Common Elements." No vote was held for the unit owners to approve this Supplemental Declaration.[1]

On 31 January 2011, Pios Grande Power Development, L.P. ("Pios Grande") purchased Tract B in a foreclosure sale, and the trustee's deed was recorded in the Buncombe County Registry in Book 4858, Page 1173. Pios Grande subsequently conveyed its interest in Tract B by special warranty deed to Serrus Residences at Biltmore, LLC ("Serrus") on 2 November 2012.

Several months earlier, on 20 June 2012, a document entitled "Agreement to Transfer Declarant Retained Property & Rights" ("the Agreement") was recorded in the Buncombe County Registry in Book 4992, Page 620. The Agreement was dated 7 April 2009 and stated that — contrary to the above-quoted language in the Supplemental Declaration — Power Development had retained the rights to "various common elements of the project known as The Residences at Biltmore" because these rights were not included in the commercial deed of trust securing its outstanding loan. The Agreement then explained that in consideration for an additional loan from Mountain Mortgage, Power Development was transferring to Mountain Mortgage the rights it retained in

> [a]ny and all properties or other rights which were specifically and clearly retained by POWER by virtue of that certain declaration of condominium for The Residences at Biltmore dated 12/12/2006 and recorded in Deed Book 4330 at Pages 1427-1523; including all developer retained or declarant retained properties as identified on those certain plats and within the intention of the subject declarations and all amendments thereto[.]

The Agreement further stated that the properties retained by Power Development as the declarant were "clearly intended to entail . . .

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1. Power Development argues on appeal that the Supplemental Declaration was a legal nullity because (1) it sought to amend the original Declaration; (2) as a result, it required the approval of 67% of the Biltmore Condominium's unit owners; and (3) no vote was held. However, for the reasons discussed below, we do not reach the issue of whether the Supplemental Declaration should be given legal effect.

telephone boards, electrical boards, all communication boards as well as any other boards or areas needed to service the entire condominium. For example, all storage closets etc."

The same day the Agreement was recorded, Mountain Mortgage executed a licensing agreement granting a company called Biltmore Management, LLC ("Biltmore Management") "an exclusive license to use those rights and properties therein defined by [the Agreement]" that would terminate at the option of Mountain Mortgage if Biltmore Management ceased to be the manager of the Biltmore Condominium or its rental program. Following Serrus' acquisition of the Biltmore Condominium, however, the Association engaged a separate company, Southern Resort Group, LLC ("Southern Resort"), to act as the management company for the Biltmore Condominium. In an addendum to the Association Management Agreement, it stated that Southern Resort was intended to be the exclusive management entity for the Biltmore Condominium.

On 16 September 2013, the Association filed the present action in Buncombe County Superior Court seeking a declaratory judgment. The Association's complaint alleged, in part, that the "recordation of the document captioned Agreement to Transfer Declarant Retained Property and Rights creates a cloud on the title of the Association members' common elements" and sought a declaration that (1) "the members of the Plaintiff Association are the owners of the common elements that were labeled 'declarant retained property' or 'retained by Developer' in the Declaration . . . free and clear of any claims of Mountain Mortgage, Inc."; and (2) the Agreement is "null and void and of no effect on the title of the property interests of the members of Plaintiff Association." Power Development and Mountain Mortgage filed answers to the complaint on 7 November 2013 and 15 November 2013, respectively.

On 25 February 2014, the Association filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 15 May 2014, the trial court granted summary judgment in the Association's favor, ruling that (1) "all areas, which had been marked as 'Declarant Retained Property' or 'Declarant Retained Areas' in the plans attached to the Declaration of Condominium for the Residences at Biltmore Condominium recorded in Book 4330 at Page 1427 of the Buncombe County Registry are common elements and therefore owned by the individual members of the Plaintiff Association in their respective percentages"; and (2) the Association members' ownership of these areas was "free and clear of any claims of Defendant Mountain Mortgage,

Inc. and Defendant Power Development, LLC." Defendants gave timely notice of appeal.

Analysis

The entry of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). An order granting summary judgment is reviewed *de novo* on appeal. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

The Association argues that summary judgment was properly granted in its favor for the following reasons: (1) no authority existed under the North Carolina Condominium Act ("the Act") for Power Development — as the declarant — to retain ownership of the areas designated in the Declaration as "declarant retained property"; (2) even assuming *arguendo* that a declarant could retain such ownership interests within a condominium in this manner, the areas within the Biltmore Condominium over which Power Development purported to reserve ownership were not indicated in the Declaration and attached plats with the specificity required under the Act; (3) Power Development's alleged transfer of its ownership rights to the retained property to Mountain Mortgage did not comport with the Act's provisions concerning the transfer of declarant rights; and (4) the Supplemental Declaration clarifying that the areas at issue were actually common elements (rather than declarant retained property) was recorded in the Buncombe County Registry prior to the recording of the Agreement purporting to transfer ownership of those same areas to Mountain Mortgage. Because we believe that the Association's first argument is dispositive of this appeal, we need not address the alternative grounds advanced by the Association for affirming the trial court's entry of summary judgment in its favor.

The Association contends the Act expressly provides that separately owned units and common elements are the two exclusive types of property comprising a condominium. It then asserts that because the areas that were labeled "declarant retained property" in the Declaration and attached plans were not designated as units, they must — by default — be legally classified as common elements in order for the Biltmore Condominium to be consistent with the Act.

Power Development, conversely, argues that the Act does not prohibit "a developer from retaining property or spaces within the

physical boundaries of the Condominium" and that this is precisely what it did here.[2] It therefore asserts that these areas (designated by shading on the plat maps) were excluded in their entirety from the Biltmore Condominium and, in turn, from the requirements of the Act. Thus, according to Power Development, by virtue of the designated shading on the plat map and the inclusion in the Declaration of a definition for the term "declarant retained property" that expressly encompassed the disputed areas, the following propositions are true: (1) the areas at issue were neither individual units nor common elements; (2) Power Development — rather than the individual unit owners —retained ownership of these areas; and (3) by means of the Agreement, Power Development transferred ownership of these areas to Mountain Mortgage.

All of the parties agree that Power Development sought to — and, in fact, did — create a condominium by recording a declaration that subjected the property comprising the Biltmore Condominium to the terms and provisions of Chapter 47C of the North Carolina General Statutes. Thus, there is no disagreement among the parties as to the fact that the Act controls the resolution of this case.

The Act, codified in Chapter 47C of the North Carolina General Statutes, defines a condominium as

> real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

N.C. Gen. Stat. § 47C-1-103(7) (2005).

"A condominium is created pursuant to this Act only by recording a declaration." N.C. Gen. Stat. § 47C-2-101 cmt. 1 (2005). N.C. Gen. Stat. § 47C-2-105 sets out the required contents of the declaration, stating that it must contain "[a] legally sufficient description of the real estate included in the condominium" as well as "[a] description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those

2. Power Development asserts that its ability to retain ownership of these areas was derived entirely from its reservation of these properties in the Declaration and unconnected to its former status as a unit owner (which ended when it defaulted on its loan and the units it had owned were then foreclosed upon).

rights must be exercised[.]" N.C. Gen. Stat. § 47C-2-105 (3), (8) (2005); *see also In re Williamson Village Condos.*, 187 N.C. App. 553, 556-57, 653 S.E.2d 900, 902 (2007) (noting that the Act "lists more than a dozen specific items that must be included in the declaration," including a description of the property and any special declarant rights), *aff'd per curiam*, 362 N.C. 671, 669 S.E.2d 310 (2008).

The fatal flaw with Power Development's position as to the legal classification of the areas at issue is that its interpretation is inconsistent with the terms of the Act. The defining feature of a condominium is that it is comprised of two — *and only two* — types of property: (1) units (defined as the "physical portion[s] of the condominium designated for separate ownership or occupancy, the boundaries of which are described [in the declaration]"); and (2) common elements (meaning "all portions of [the] condominium other than the units"). N.C. Gen. Stat. § 47C-1-103(25), (4).

Power Development correctly notes that the Act permits a declaration to define terms contained therein in a manner that varies from the statutory definitions contained in the Act. *See* N.C. Gen. Stat. § 47C-1-103 (explaining that definitions of terms provided in this subsection apply to Chapter 47C and to declarations and bylaws "unless specifically provided otherwise or the context otherwise requires"). However, variations in defined terms cannot serve to alter the fundamental nature of a condominium pursuant to the Act. *See* N.C. Gen. Stat. § 47C-1-104 cmt. 3 (2005) ("All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.").

Power Development chose to create a condominium under the Act consisting of the property that ultimately formed the Biltmore Condominium. In so doing, it surrendered the right to maintain ownership of certain areas within the condominium property in a manner that was unauthorized under the Act.

Thus, Power Development cannot simultaneously maintain, on the one hand, that the Act applies to the Biltmore Condominium while, on the other hand, contend that, as the declarant, it reserved ownership of areas within the condominium buildings that would otherwise constitute common elements pursuant to the unambiguous language of the Act. *See* N.C. Gen. Stat. § 47C-1-103 cmt. 5 ("[I]f a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would be created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.").

It is true that, as noted above, the Act does recognize the concept of declarant retained rights, thereby permitting declarants to reserve certain rights with regard to a condominium project by expressly reserving such rights in the declaration. N.C. Gen. Stat. § 47C-2-105(8). For this reason, Power Development's alternative argument is that even assuming that the disputed areas were, in fact, part of the Biltmore Condominium, Power Development nevertheless retained ownership of them as a special declarant right that was permitted under N.C. Gen. Stat. § 47C-1-103(23). However, the right to ownership of the disputed areas that Power Development contends it reserved here far exceeds the scope of those special declarant rights permissible under the Act.

The Act defines "special declarant rights" as

> rights reserved for the benefit of the declarant to complete improvements indicated on plats and plans filed with the declaration (G.S. 47C-2-109); to exercise any development right (G.S. 47C-2-110); to maintain sales offices, management offices, signs advertising the condominium, and models (G.S. 47C-2-115); to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (G.S. 47C-2-116); to make the condominium part of a larger condominium (G.S. 47C-2-121); or to appoint or remove any officer of the association or any executive board member during any period of declarant control (G.S. 47C-3-103(d)).

N.C. Gen. Stat. § 47C-1-103(23). In order to properly reserve such rights, a declarant must specifically state in the declaration the rights it wishes to retain "together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised." N.C. Gen. Stat. § 47C-2-105(8).

While acknowledging as a general proposition that the Act permits a declaration to provide for special declarant rights, the Association argues that the special declarant rights recognized in the Act do not include the right to retain ownership of property that is "located within a building in a North Carolina Condominium Project" and not designated as a unit. We agree. Although the official comment to N.C. Gen. Stat. § 47C-1-103 states that the above-quoted list of declarant rights enumerated in subpart (23) of N.C. Gen. Stat. § 47C-1-103 is not exhaustive, *see* N.C. Gen. Stat. § 47C-1-103 cmt. 13 ("The list [of special declarant rights], while short, encompasses *virtually* every significant right which a declarant

might seek in the course of creating or expanding a condominium." (emphasis added)), a holding that the range of special declarant rights permitted by the Act is broad enough to encompass a declarant's right to retain ownership of areas located within a condominium building yet not designated as a unit would be inconsistent with the essential nature of a condominium under the Act.

In reaching this conclusion, we are once again guided by the fundamental and defining features of a condominium: (1) that it is comprised of common elements and units; and (2) that unit owners, in addition to their separate ownership of their individual units, own an undivided interest in *all condominium property that has not been designated as a unit*. *See* N.C. Gen. Stat. § 47C-1-103 (4) (explaining that all portions of a condominium that are not units are common elements); *id.* cmt. 5 (explaining that if a declarant retained title to the common elements, the project would not legally constitute a condominium).

In urging this Court to accept its broad concept of special declarant rights, Power Development notes that a portion of the disputed areas is being used for management offices — a use the Act expressly recognizes as one that may be reserved by the declarant as a special declarant right. The specific statutory provision to which Power Development refers is N.C. Gen. Stat. § 47C-2-115, which provides as follows:

> A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. *Any sales office, management office, or model not designated a unit by the declaration is a common element*, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. . . .

N.C. Gen. Stat. § 47C-2-115 (2005) (emphasis added).

Thus, pursuant to this statutory provision, a declarant desiring to maintain management or leasing offices may reserve the right to keep such offices on site, either in the units it owns or on common elements (for so long as the declarant remains a unit owner). However, this statute does not authorize a declarant to maintain offices on property that is *neither* a unit *nor* a common element. Instead, the statute expressly

states that such an office is a common element in cases where it was not designated a unit in the declaration.

Thus, N.C. Gen. Stat. § 47C-2-115 does not permit a declarant that avails itself of the right to maintain offices on common elements to *own* these portions of the common elements. Rather, the right reserved under N.C. Gen. Stat. § 47C-2-115 is merely that of *use* of the property. *Ownership* of the portion of the common elements on which a management office is maintained — like ownership of all common elements — is vested in the unit owners jointly.

The invalidity of Power Development's argument is further demonstrated by the fact that the areas labeled "Declarant Retained Property" in the Declaration and attached plans not only contain management offices but also house utility boards, power breakers, water systems, fire alarm and sprinkler systems, and emergency lighting systems that service various common elements and units within the condominium. Neither law nor logic supports the proposition that a declarant is permitted to reserve ownership of areas containing such critical safety equipment, thereby retaining the legal right to exclude unit owners and their condominium association from access thereto.

Nor are we persuaded by Power Development's assertion that the resolution of this appeal is affected by the fact that the Biltmore Condominium was created as a "concierge condominium" rather than a traditional condominium. The Act does not distinguish between a condominium that offers concierge services and one that does not. Rather, the Act sets out the fundamental requirements for *all* condominium complexes within the scope of Chapter 47C.

Power Development has not directed this Court to any caselaw from North Carolina or from any other jurisdiction that (like North Carolina) has adopted the Uniform Condominium Act ("UCA") that provides support for its position. Rather, the primary case upon which Power Development attempts to rely does not actually address the issue before us. In *MetroClub Condo. Ass'n v. 201-59 N. Eighth Street Assocs., L.P.*, 2012 PA Super 122, 47 A.3d 137, *appeal denied*, 618 Pa. 689, 57 A.3d 71 (2012), the condominium's declaration authorized the declarant, so long as it owned any units within the condominium, to reserve for itself the power to allocate unassigned parking spaces (which were limited common elements of the condominium) to certain units as it saw fit. *Id.* at 140. The condominium association argued that the declarant, which still owned 17 of the condominium's 130 residential units at the time of the litigation, was no longer entitled to control and allocate these

unassigned parking spaces because the declarant control period had ended. *Id.* at 142-43.

The Superior Court of Pennsylvania disagreed, holding that the declarant's reservation of the right to maintain control over these unallocated parking spaces while it remained a unit owner did not conflict with the provisions of the UCA. *Id.* at 147. In so holding, the court explained that (1) the provisions of the declaration addressing control of the unassigned parking spaces complied with the UCA's requirements concerning the designation of limited common elements and the method of allocating the use of such common elements to certain units; (2) as a unit owner itself, the declarant continued to "pay its proportionate share of common expenses" related to the maintenance of these limited common elements; and (3) the declarant's use of these limited common elements, as articulated in the declaration, was consistent with the UCA because, by definition, "although limited common elements are owned in common, their use is reserved for fewer than all." *Id.* at 147-49.

The court in *MetroClub* did not hold that the declarant in that case had reserved *ownership* over the areas at issue (as Power Development is arguing here), noting instead that these common areas continued to be owned by the unit owners jointly. Thus, we do not believe that *MetroClub* provides any support for Power Development's position in the present case. Indeed, Power Development's reliance on *MetroClub* demonstrates its failure to recognize the crucial distinction between a declarant's reservation of the right to *use* portions of common elements (as was upheld in *MetroClub*) as opposed to a declarant's reservation of the right to retain *ownership* of such areas (for which Power Development has offered no legal authorization).

Because we reject Power Development's arguments regarding its ability to retain ownership of the disputed areas as inconsistent with the Act, we conclude that the trial court properly granted summary judgment in favor of the Association. We therefore need not address the Association's alternative grounds for upholding the trial court's order.

Conclusion

For the reasons stated above, we affirm the trial court's 15 May 2014 order granting summary judgment in favor of the Association.

AFFIRMED.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
JUDY HARDISON

No. COA15-150

Filed 3 November 2015

Accomplices and Accessories—acting in concert—not present or nearby—accessible by telephone

The trial court should have granted defendant's motion to dismiss charges of contaminating a public water system by acting in concert where defendant was not present or nearby when her accomplice damaged the water lines. Defendant, whose company repaired water lines for Pamlico County, was accessible if needed by telephone and was later at the scene to repair the water lines, but one cannot be actively or constructively present for acting in concert simply by being available by telephone.

Appeal by defendant from judgment entered 30 April 2014 by Judge Kenneth F. Crow in Craven County Superior Court. Heard in the Court of Appeals 27 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Torrey D. Dixon, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for the defendant-appellant.

DIETZ, Judge.

Defendant Judy Hardison owns a business that repairs water lines in Pamlico County. In November 2012, a family friend of Hardison mistakenly broke a public water line after driving over it with a heavy truck and then joked with Hardison about "creating a job for her." This gave Hardison an idea: she began paying the same man to break other water lines in the county so that Hardison could repair them at the county's expense.

Law enforcement discovered the scheme and convinced the man working with Hardison to wear a wire. After recording incriminating conversations between the two, the State arrested Hardison and charged her with six counts of contaminating a public water system and one count of obtaining property by false pretenses.

At trial, the State relied solely on the theory of acting in concert to convict Hardison on all counts. During the trial and after the jury convicted her, Hardison moved to dismiss, arguing that the theory of acting in concert requires the defendant to be actually or constructively present during the commission of the crime. Here, it is undisputed that Hardison was not present when the water lines were damaged, although she planned the crimes and was available by telephone if needed.

We agree with Hardison that the evidence does not support acting-in-concert liability with respect to her convictions for contaminating a public water system.[1] Under this Court's precedent, Hardison was not physically close enough to aid or encourage the commission of the crimes and therefore was not actually or constructively present—a necessary element of acting-in-concert liability. To be sure, the evidence in this record easily would have supported Hardison's conviction as an accessory before the fact. But the jury was not instructed on that theory of criminal liability, nor was Hardison charged with other related offenses, such as conspiracy, that apply to those who help plan a criminal act. Because the State relied entirely on a flawed theory of acting in concert, we must reverse Hardison's convictions.

Facts and Procedural History

Defendant Judy Hardison owns Triple H Construction Company. Triple H contracted with Pamlico County to repair water lines, install taps, and do routine water line maintenance throughout the county.

In November 2012, Rodney Brame accidentally cracked a water line in Pamlico County while turning around a large truck. Triple H responded to a call from the county and repaired the cracked water line. Brame knew Hardison and her family, and jokingly apologized to Hardison for "creating a job for her."

The following week, Hardison contacted Brame and offered to pay him $400 in exchange for cracking another water line in Pamlico County. Over the next month, Brame intentionally broke a number of other water lines so that Hardison could repair those lines and be paid by the county. Hardison identified the lines that Brame was to break and, on at least one occasion, Hardison or someone working on her behalf placed a flag at the location of a water line to assist Brame in locating it. Hardison was never present when Brame broke the water lines, but Brame had

1. The trial court arrested judgment on her conviction of obtaining property by false pretenses.

Hardison's phone number and occasionally called Hardison to "let her know" after he broke a line.

Law enforcement ultimately discovered that Brame was intentionally damaging the water lines. Brame began assisting law enforcement by recording a phone call with Hardison and meeting her while wearing a wire. When Brame called Hardison, he said, "I was trying to figure out where I might need to go," to which Hardison responded, "Okay. I can't talk right now." Hardison then agreed to meet Brame the next day. During their in-person meeting, Brame asked Hardison if she could give him money and if she could "get my ass out of jail if they put me in jail." Hardison declined to give him money and stated that she would not be able to bail him out of jail because that might make her look guilty.

Law enforcement later arrested Hardison. The State indicted Hardison in seven separate indictments on six counts of contaminating a public water system and one count of obtaining property by false pretenses. The indictments charged that Hardison willfully damaged portions of public water lines, conduct which falls within the statutory definition of contaminating a public water system. At trial, the State proceeded on a theory that Hardison acted in concert with Brame in damaging the water lines. The trial court instructed the jury on the theory of acting in concert, but not on other similar theories of liability, such as accessory before the fact.

During trial and after the verdict, Hardison moved to dismiss the charges on the ground that the State failed to prove she was either actually or constructively present at the crime—a necessary element of the acting-in-concert theory of criminal liability. The trial court denied Hardison's motions to dismiss and the jury returned a verdict of guilty on all counts. At sentencing, the trial court arrested judgment on the conviction of obtaining property by false pretenses and on one of the counts of contaminating a public water system and sentenced Hardison on the remaining counts. Hardison timely appealed.

Analysis

Hardison argues that the trial court erred by denying her requests to dismiss all charges. Specifically, Hardison argues that for each charge against her the State relied entirely on the theory that Hardison acted in concert with Brame but failed to prove that Hardison was actually or constructively present during the commission of the crimes. For the reasons discussed below, we agree.

In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of each element of the charged offense. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom. *Id.*

Here, Hardison argues there was insufficient evidence to convict her under an acting-in-concert theory of criminal liability. "Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Wade*, 213 N.C. App. 481, 487, 714 S.E.2d 451, 456 (2011). To act in concert, a defendant's presence at the scene of the crime may be actual or constructive. *See State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (1997). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *Id.*

It is undisputed that Hardison was not actually present, nor was she nearby, at the time Brame damaged the water lines. The State nevertheless argues that it proved Hardison was constructively present because she planned the crimes, was accessible if needed by telephone, and later was at the scene of the crime to repair the broken water lines. We disagree.

First, we reject the State's argument that Hardison acted in concert with Brame because she planned the crimes and provided guidance on how Brame could later damage the water lines. One who plans and organizes a crime before the fact is typically charged as a principal under a theory such as accessory before the fact, which is an entirely different theory of liability than acting in concert. *See State v. Woods*, 307 N.C. 213, 218, 297 S.E.2d 574, 577 (1982). Unlike an accessory before the fact, who need not be present during the crime's commission, one who acts in concert must be "close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413. Thus, the fact that Hardison planned the crime before the fact is irrelevant to the acting-in-concert analysis; what matters is Hardison's presence and conduct during the commission of the crime itself.

We likewise reject the State's argument that "by being accessible by telephone Hardison was as close as she needed to be to further aid and encourage the particular crime of contaminating a public water system." This Court previously has held that one cannot be actually or constructively present for purposes of proving acting in concert simply by being available by telephone. *State v. Zamora-Ramos*, 190 N.C. App. 420, 425-26, 660 S.E.2d 151, 155 (2008); *State v. Buie*, 26 N.C. App. 151-53, 215 S.E.2d 403 (1975). We are bound by that precedent whether we agree with it or not. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). If the State believes that accessibility by telephone should be sufficient to prove a defendant acted in concert, it must raise that issue with our Supreme Court. *See id.*

Finally, the State argues that Hardison was present during the repairs of the damaged water lines and that the crime was still ongoing at that point because, during the repairs, the water system could have been exposed to further damage or contamination. But the record does not support this theory. The State did not present any evidence indicating that the repair process further contaminated or damaged the water line. Moreover, the offense of contaminating a public water system is a specific intent crime, meaning the State also would need to show that Hardison *intended* to further damage or contaminate the system during the repairs. *See* N.C. Gen. Stat. § 14-159.1(a)(2). But even the State's own theory of the case depended on evidence that Hardison wanted to repair, not damage, the system once she arrived on the scene. After all, Hardison's scheme depended on successfully repairing the damage so she could charge Pamlico County for doing so.

In sum, we are constrained to reverse Hardison's convictions. The State did not charge Hardison with conspiracy to commit those crimes, nor did it seek an instruction for accessory before the fact. The State's sole theory of criminal liability in this case turned on proving that Hardison acted in concert with Brame to damage the water lines. But the undisputed evidence at trial established that Hardison was not present, either actually or constructively, at the time Brame committed the crime. Accordingly, the trial court should have granted Hardison's motion to dismiss. Because we reverse Hardison's convictions for contaminating a public water system for these reasons, we need not address her remaining arguments challenging those convictions.

We note that the trial court arrested judgment on the charge of obtaining property by false pretenses. This Court recently held that "in the absence of some indication that the trial court's decision to arrest

judgment stemmed from double jeopardy-related concerns, the effect of the decision to arrest judgment is to vacate the underlying conviction and preclude subsequent appellate review." *See State v. Pendergraft*, ___ N.C. App. ___, 767 S.E.2d 674, 684 (2014) *aff'd without precedential value*, ___ N.C. ___, ___ S.E.2d ___ (2015). Accordingly, we do not review the merits of Hardison's arguments concerning her conviction for obtaining property by false pretenses, which the trial court effectively vacated by arresting judgment.

Conclusion

The trial court's judgment of conviction on all counts is reversed.

REVERSED.

Judges HUNTER, JR. and DILLON concur.

STATE OF NORTH CAROLINA
v.
RODERICK DEAN HARRIS, DEFENDANT

No. COA15-214

Filed 3 November 2015

1. Appeal and Error—preservation of issues—plain error—evidentiary and instructional errors

Issues involving instructional and evidentiary errors that defendant failed to preserve at trial were reviewed for plain error.

2. Sexual Offenses—first-degree sexual offense—lesser-included offense of sexual offense with a child by an adult—jury instructions

A conviction for a lesser-included offense, first-degree sexual offense, N.C.G.S. § 14-27.4(a(1), was vacated and remanded for resentencing where defendant was indicted for that offense but the jury was instructed on sexual offense with a child, adult offender, N.C.G.S. § 14-27.4A(d). The difference between the two statutes concerns the defendant's age, and this case cannot be distinguished from *State v. Hicks*, 239 N.C. App. 396 (2015) ("In essence, the trial court submitted to the jury the additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense.").

3. Evidence—sexual abuse of a child—testimony of guidance counselor

The testimony of a school guidance counselor was admitted without plain error where defendant contended that the testimony implied that the Department of Social Services had substantiated the victim's claim. Even assuming the testimony was improper, the jury probably would not have reached a different verdict, in light of defendant's incriminating statements and the evidence corroborating the victim's allegations.

4. Evidence—sexual abuse of a child—testimony of therapist

There was no plain error in the admission of the testimony of a therapist specializing in children who have been sexually abused where defendant contended that a portion of her testimony constituted impermissible vouching for the victim's credibility. Defendant did not point to any part of the testimony where the witness opined that the abuse had occurred or that defendant was the abuser. The testimony concerned the treatment the therapist used; the victim's symptoms, which were consistent with trauma; and the purpose and process of writing a trauma narrative, which laid the foundation for the State to introduce the victim's narrative. The mere fact that the testimony supported the victim's credibility does not render it inadmissible.

5. Evidence—sexual abuse of a child—actions following medical evaluation

There was no plain error in a prosecution for sexual abuse of a child in the admission of testimony from a witness from SAFEchild Advocacy Center, which provides medical evaluations for children who may be victims of child abuse or neglect. The witness never asserted that the victim had been abused or explicitly commented on her credibility. The challenged portion of the testimony was nothing more than what the witness did at the conclusion of her examination and was within the permissible range of expert testimony in child sexual abuse cases.

Appeal by defendant from Judgment and Orders entered 13 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Margaret A. Force, for the State.

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

ELMORE, Judge.

Roderick Dean Harris (defendant) appeals from a judgment of conviction for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a), and from accompanying orders requiring him to register as a sex offender and enroll in satellite-based monitoring (SBM) for life. On appeal, defendant principally argues that the trial court committed plain error by instructing the jury on section 14-27.4A(a) because he was indicted for violating a separate statute, section 14-27.4(a)(1). Therefore, defendant claims, the judgment of his conviction for section 14-27.4A(a) was improperly entered against him. Because we are bound by this Court's decision in *State v. Hicks*, ____, N.C. App. ____, 768 S.E.2d 373 (Feb. 17, 2015) (No. COA14-57), we vacate the judgment and remand for entry of judgment and resentencing on the charge of first-degree sexual offense in violation of section 14-27.4(a)(1). We find no other error.

I. Background

This case arises out of defendant's alleged sexual abuse of his stepdaughter, Kathy.[1] After Kathy's parents separated, defendant became romantically involved with Kathy's mother. He moved in with the family and married Kathy's mother several years later. The family moved around frequently, and Kathy's mother and defendant fought, separated, and reconciled a number of times.

Defendant began sexually abusing Kathy just after her tenth birthday. The first instance of sexual misconduct occurred when the family lived in Raleigh. Defendant came into Kathy's room and "wrestled" with her while they were alone. As Kathy was lying on her bed, defendant got on top of her and touched her vaginal area outside of her clothes, toying with her using his finger. The touching occurred multiple times while they lived there. On later occasions, defendant touched Kathy under her shorts but outside of her underwear.

When the family moved into a larger house in Louisburg, Kathy had her own room and the sexual misconduct happened more often. On more than one occasion, defendant touched Kathy under her underwear, putting his finger inside her vagina, and also touched her breasts. The

1. Kathy is a pseudonym used to protect the identity of the minor.

touching continued after the family moved to Knightdale. When Kathy was in seventh grade, defendant continued to touch her vaginal area and her breasts but did not put his finger inside her vagina.

In October 2012, Kathy reported defendant's misconduct to Jan Gibson, a school guidance counselor. Gibson, in turn, filed a report with Child Protective Services (CPS). Kim Franklin, an investigator with CPS, was assigned to the case and interviewed Kathy. Kathy was also interviewed and examined by Holly Warner at the SAFEchild Advocacy Center, a nonprofit organization that provides medical evaluations for children who are suspected to be victims of child abuse or neglect.

Following the examination at SAFEchild, Kathy was treated by Alison Burke, a therapist who specializes in working with children who have been sexually abused. Burke performed an assessment and used trauma-focused cognitive behavioral therapy (TFCBT) to help treat Kathy. During treatment, Kathy talked about the sexual misconduct, how she felt, and wrote a "trauma narrative" describing what had happened.

The first of three warrants for defendant's arrest was issued on 30 October 2012 in Wake County. Defendant was interviewed by Kim Franklin and Knightdale Police that same day. The Wake County Grand Jury returned two separate bills of indictment: one on 26 November 2012, charging defendant with one count of sexual offense with a child and two counts of indecent liberties with a child; and another on 25 February 2013, charging defendant with one count of first-degree sexual offense and one count of indecent liberties with a child. On 30 September 2013, the Franklin County Grand Jury also returned a bill of indictment against defendant, charging him with first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4(a)(1).[2]

The case out of Franklin County was then transferred to Wake County by agreement, and the three cases were joined and tried before a jury on 11 August 2014 in Wake County Superior Court. The court dismissed the two sex offense charges from Wake County at the close of

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2. The caption on the left side of the indictment lists "14-27.4(a)(1)" as the "Offense in Violation," and on the right side the indictment reads, "INDICTMENT FIRST DEGREE STATUTORY SEXUAL OFFENSE (FEMALE OR MALE CHILD UNDER 13) (1116)." The text in the body of the indictment alleges the following:

> The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex offense with [Kathy], a child under the age of 13 years.

the evidence. The only remaining charges left to be submitted to the jury, therefore, were the sex offense arising out of Franklin County and the three indecent liberty offenses. The jury found defendant guilty of one count of sexual offense with a child in violation of section 14-27.4A(a) and two counts of indecent liberties with a child. The court arrested judgment on the third count of indecent liberties with a child.

Based on his prior record level IV, defendant was sentenced to a minimum of 365 and a maximum of 447 months for his conviction under section 14-27.4A(a). The two indecent liberties offenses were consolidated for sentencing, and the court sentenced defendant to a minimum of 24 and maximum of 29 months, set to begin at the expiration of the first sentence. The court also ordered defendant to register as a sex offender and enroll in SBM for life upon release from imprisonment.

Defendant gave oral notice of appeal in open court. He also filed a petition for writ of *certiorari* to this Court, since the sex offender registration and SBM are civil in nature and thus require written notice of appeal. N.C.R. App. P. 3(a) (2013); *Hicks*, ____ N.C. App. at ____, 768 S.E.2d at 375–76; *State v. White*, 162 N.C. App. 183, 190–98, 590 S.E.2d 448, 453–58 (2004). In our discretion, we allow defendant's petition and review the merits of his appeal.

II. Analysis

A. Standard of Review

[1] We note at the outset that defendant failed to preserve at trial any of the issues he raises on appeal. *See* N.C.R. App. P. 10(a)(1) (2013) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Nevertheless, defendant contends that the alleged instructional and evidentiary errors committed by the trial court amount to plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[P]lain error review in North Carolina is normally limited to instructional and evidentiary error.") (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003)).

We review for plain error those issues now before us on appeal.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334.

B. The Indictment and Charge to the Jury

[2] First, defendant argues that his conviction of sexual offense with a child and accompanying sentence was improperly entered against him. Specifically, defendant contends that the trial court committed plain error by instructing the jury on "sexual offense with a child; adult offender" in violation of N.C. Gen. Stat. § 14-27.4A(a) where the indictment charged defendant pursuant to N.C. Gen. Stat. § 14-27.4(a)(1), "first-degree sexual offense."

"A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, 'and to give authority to the court to render a valid judgment.' " *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). An indictment or other criminal pleading must contain the following:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, assert facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision

> clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2013). "A defendant may not be lawfully convicted of an offense which is not charged in an indictment; if a defendant is found guilty of an offense for which he has not been charged, judgment thereon is properly arrested." *Moses*, 154 N.C. App. at 334, 572 S.E.2d at 226.

N.C. Gen. Stat. § 14-27.4(a)(1) (2013), titled, "First-degree sexual offense," provides in pertinent part as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> > (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim;
>
> . . . .

N.C. Gen. Stat. § 14-27.4A(a) (2013), titled, "Sexual offense with a child; adult offender," provides in pertinent part as follows:

> (a) A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

N.C. Gen. Stat. § 14-27.4(a)(1) is a lesser included offense of section 14-27.4A(a). N.C. Gen. Stat. § 14-27.4A(d) (2013). Both statutes require the State to prove that the defendant engaged in a sexual act with a victim who was a child under the age of thirteen. The difference between the two statutes concerns the defendant's age: section 14 27.4(a)(1) requires the State to prove that the defendant was at least twelve years old and at least four years older than the victim, whereas section 14-27.4A(a) requires the State to prove that the defendant was at least eighteen years old. *See Hicks*, ____ N.C. App. at ____, 768 S.E.2d at 379 (explaining the difference between section 14-27.4(a)(1) and section 14-27.4A(a)); *see also id.* at ____, 768 S.E.2d at 381 (urging the North Carolina General Assembly "to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another"); 2015 N.C. Sess. Laws 2015-181 (H.B. 383). In addition, while each offense is punishable as a Class B1 felony, a conviction under § 14-27.4A(a) carries an active punishment of no less than 300 months' imprisonment. N.C. Gen. Stat. §§ 14-27.4(b), 14-27.4A(b) (2013).

In support of his argument, defendant relies almost exclusively on this Court's decision in *State v. Hicks*. In *Hicks*, the defendant was indicted for violating N.C. Gen. Stat. § 14-27.4(a)(1). *Hicks* ____ N.C. App. at ____, 768 S.E.2d at 379. The trial court, however, instructed the jury on section 14-27.4A(a), the crime for which the defendant was ultimately convicted. *Id.* at ____, ____, 768 S.E.2d at 374, 379. This Court explained, "In essence, the trial court submitted to the jury an additional element that the State was not required to prove: that defendant was at least 18, an adult, at the time he committed the offense." *Id.* at ____, 768 S.E.2d at 379. Because the indictment did not allege that the defendant was at least eighteen years old, an essential element of section 14-27.4A(a), this Court vacated the judgment and remanded for sentencing and entry of judgment of conviction of section 14-27.4(a)(1), the lesser-included offense. *Id.* at ____, 768 S.E.2d at 379–81 (citing *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986); *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002)); *see also State v. Jones*, 317 N.C. 487, 495, 346 S.E.2d 657, 661 (1986) (vacating judgment of conviction for first-degree rape and remanding for entry of judgment of conviction for second-degree rape and resentencing because "[i]n finding the defendant guilty of first-degree rape, the jury necessarily found the existence of all the necessary elements of second-degree rape, a lesser-included offense"); *State v. Miller*, 137 N.C. App. 450, 458–59, 528 S.E.2d 626, 631 (2000) ("[O]ur Supreme Court has held it to be a basic violation of due process, amounting to plain error, where a jury is instructed as to an offense which is not charged in the bill of indictment." (citation omitted)).

Despite the State's position to the contrary, we are unable to distinguish the present case from *Hicks*. We are bound by *Hicks* and apply it here.[3] *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher

3. While it may be implicit in the decision, *Hicks* does not explicitly address whether the text of the short-form indictment is sufficient in law under N.C. Gen. Stat. § 15-144.2(b) (2013) to sustain a conviction under either section 14-27.4A(a) or section 14-27.4(a)(1). We do note, however, that our Supreme Court has previously alluded to this issue. *See State v. Jones*, 317 N.C. 487, 492, 346 S.E.2d 657, 660 (1986) ("[W]hether the fundamental concerns expressed in *Sills* are protected when the caption of a short-form indictment specifies an offense less serious than the maximum offense supported by the indictment and the defendant is nevertheless ultimately convicted of the maximum offense is a question not heretofore addressed by this Court.").

court."). Accordingly, the judgment entered on defendant's conviction under section 14-27.4A(a) is vacated. We remand for entry of judgment of conviction for the lesser-included offense, section 14-27.4(a)(1), and appropriate resentencing.

C. The School Counselor's Testimony

[3] Second, defendant argues that the trial court committed plain error by allowing Jan Gibson's testimony which, according to defendant, implied that DSS had substantiated Kathy's claim that defendant sexually abused her.

"[A] witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009) (citations omitted), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010); *see also* N.C. Gen. Stat. § 8C-1, Rules 608(a), 701–03 (2013). In *Giddens*, this Court concluded that it was plain error for a DSS investigator to testify that DSS had "substantiated" the defendant as the perpetrator and believed the abuse did occur based on the evidence DSS had gathered where, absent the testimony, "the jury would have been left with only the children's testimony and the evidence corroborating their testimony." *Giddens*, 199 N.C. App. at 119–23, 681 S.E.2d at 507–09; *see also State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004) ("Thus, the central issue to be decided by the jury was the credibility of the victim."). In contrast, even where testimony that sexual abuse had occurred was improperly admitted, we have found that the error did not rise to plain error where the evidence against the defendant amounted to something more than just the victim's testimony and corroborating evidence. *State v. Sprouse*, 217 N.C. App. 230, 242, 719 S.E.2d 234, 243 (2011) (finding no plain error because "[u]nlike *Giddens*, absent the challenged testimony, the present case involved more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses"); *State v. Stancil*, 146 N.C. App. 234, 240, 552 S.E.2d 212, 216 (2001) (finding no plain error where the jury had before it evidence of victim's symptoms and two experts' conclusions that victim's actions and statements were consistent with abuse), *modified and aff'd*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

In the present case, even assuming *arguendo* that Gibson's testimony was improper, our review of the record on appeal leads us to conclude that it was not received in plain error. Gibson testified on direct examination that she reported Kathy's allegations to DSS, as mandated by law. Gibson then testified as follows:

Q. Have you had occasion in the past to make reports to the Department of Social Services?

A. Many times.

Q. And to your knowledge, are they required to follow up on all the calls that are made?

A. They are not. They decide at the intake unit if that is a substantiated report, if they can substantiate it or not; and if they do, then they follow up on it.

Q. And with respect at least to the allegations of stepfather and child, did you believe that someone would follow up with [Kathy]?

A. Yes, they told me they would.

Q. Okay.

A. And I received a letter to that effect.

. . . .

Q. Okay. And you said at some point later, you found out that CPS had investigated the case?

A. Yes, they sent me a letter saying that—

MR. KELLY: Objection.

Q. Let me make sure.

THE COURT: Sustained. Go ahead.

Q. They followed up with you that they had done an investigation?

A. Yes, I received a letter saying—

MR. KELLY: Objection.

THE COURT: Sustained.

Although Gibson is not employed by DSS and did not testify directly as to the conclusion reached by DSS investigators, defendant insists that we apply *Giddens* to these facts. Unlike *Giddens*, however, where the sole issue to be decided was the victims' credibility, here the evidence against defendant did not solely consist of Kathy's allegations and corroborative testimony. The jury heard audio from defendant's interview with DSS and Knightdale Police, in which he admitted that he had been

touching Kathy and that "it turned corrupt." In the same interview, defendant told a Knightdale police detective that he had become "aroused by the stimulation." Defendant also said, "We played a lot. You know, and . . . I just don't know how it could turn like this—how I could turn like this." Furthermore, the jury heard audio from a phone call made by defendant to his wife, Kathy's mother, from jail. As he was crying, defendant told her that he was sorry for what he had done and he would "accept the consequences."

In light of defendant's incriminating statements and the evidence corroborating Kathy's allegations, we conclude that Gibson's testimony was not received in plain error. Even if we accept the premise that Gibson's testimony was erroneous, defendant has failed to show that, absent the error, the jury probably would have reached a different verdict.

D. Expert Testimony From Child's Therapist

[4] Third, defendant argues that the trial court committed plain error by admitting Allison Burke's testimony regarding Kathy's placement in TFCBT and the therapy process in general. Defendant claims that this portion of Burke's testimony constituted impermissible vouching for Kathy's credibility.

"Expert opinion testimony is not admissible to establish the credibility of the victim as a witness." *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (citing *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986)), *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002). "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has in fact occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788, 789 (2002) (citations omitted). "However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). "[A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Stancil*, 355 N.C. at 267, 559 S.E.2d at 789 (citations omitted); *see also State v. Hall*, 330 N.C. 808, 821, 412 S.E.2d 883, 890 (1992) (concluding that evidence of PTSD should not be admitted substantively to prove that a rape has in fact occurred, but allowing such evidence for certain corroborative

purposes). "The fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 367 (1987).

Defendant maintains that Burke's testimony amounted to an expert opinion that Kathy was credible and that defendant was guilty as charged, but fails to point to any portion of Burke's testimony where she opined that Kathy was sexually abused by defendant or stated that sexual abuse did in fact occur. Burke explained how TFCBT is used to help treat victims in cases of sexual abuse and described therapeutic techniques that she employs in her treatment. She testified that Kathy had symptoms consistent with trauma, and explained the purpose and process of writing a "trauma narrative." Her explanation laid the foundation for the State to introduce Kathy's "trauma narrative," which included Kathy's written statement about what happened to her. The narrative itself was introduced solely for the purpose of corroborating Kathy's testimony. The mere fact that Burke's testimony supports Kathy's credibility does not render it inadmissible. Accordingly, we find no error—and certainly no plain error—in the trial court's receipt of Burke's testimony.

E. Expert Testimony From Nurse Practitioner

[5] Finally, defendant argues that the trial court committed plain error by permitting Holly Warner to testify that she recommended Kathy for therapy despite finding no physical evidence of abuse, and that she referred to Kathy's mother as the "non-offending" caregiver. Warner's testimony, defendant argues, "impermissibly bolstered Kathy's credibility and constituted opinion evidence as to guilt."

Defendant relies principally on *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012), in support of his argument. In *Towe*, an expert testified at trial that "approximately 70 to 75 percent of children who have been sexually abused have no abnormal findings, meaning that the exams are either completely normal or [sic] very non-specific findings, such as redness." *Id.* at 60, 732 S.E.2d at 566. The expert went on to testify that she would place the victim in that category of children who had been sexually abused but showed no physical symptoms of abuse. *Id.* Our Supreme Court concluded that the expert's testimony was received in plain error:

> In the absence of physical evidence of sexual abuse in this case, the only bases for [the expert's] conclusory assertion that the victim had been sexually abused were the victim's history as relayed to [the expert] by the victim's mother and the victim's statements to [the social worker]

> that were observed by [the expert]—evidence that, standing alone, is insufficient to support an expert opinion that a child was sexually abused.

Id. at 62, 732 S.E.2d at 568.

The facts in *Towe* are easily distinguishable from those in the present case. Most notably, while Warner testified that she recommended Kathy be referred for therapy, Warner never asserted that Kathy had been sexually abused or explicitly commented on Kathy's credibility. Rather, the challenged portion of Warner's testimony was nothing more than a recitation of facts as to what she did at the conclusion of her examination and was within "the permissible range of expert testimony in child sexual abuse cases." *Towe*, 366 N.C. at 64, 732 S.E.2d at 569. In addition, Warner explained that the Center uses the term "non-offending caregiver" in reference to the person with whom the child will be going home, and that "any parent or caregiver who is suspected of being an offending caregiver is not allowed in the center." Warner never testified that defendant was an "offending caregiver" and even if she had, her testimony makes clear that the term does not mean that defendant is guilty. Accordingly, we find no error or plain error in the trial court's admission of Warner's testimony.

III. Conclusion

In accordance with *Hicks*, ____ N.C. App. at ____, 768 S.E.2d at 379–81, we vacate the judgment of defendant's conviction for sexual offense with a child in violation of N.C. Gen. Stat. § 14-27.4A(a). The case is remanded for entry of judgment of conviction for first-degree sexual offense in violation of section 14-27.4(a)(1) and for appropriate resentencing.

NO ERROR in part; VACATED AND REMANDED in part; NEW SENTENCING.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
TARRENCE SHAKIL HAZEL

No. COA15-243

Filed 3 November 2015

Criminal Law—jury question—referral to written instructions

The trial court did not abuse its discretion in a prosecution for felony murder and armed robbery where the trial court correctly instructed the jury on the offenses, properly responded to a jury question by instructing the jury to reread the written instructions previously given to them, and gave the jury separate verdict sheets for each count that allowed them to select "not guilty" for each offense.

Appeal by defendant from judgments entered 1 August 2014 by Judge James Gregory Bell in Columbus County Superior Court. Heard in the Court of Appeals 8 September 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury, for the State.

Paul F. Herzog for defendant-appellant.

BRYANT, Judge.

Tarrence Shakil Hazel ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a firearm and first-degree murder under the felony murder rule. We uphold the verdict of the jury and find no error in the judgment of the trial court.

On 13 April 2012, Marquice Antone shot and killed his uncle by marriage, Keith Gachette, inside Gachette's Columbus County home. Defendant and Kenneth Williams were also present during the shooting. Kenneth Williams testified for the State pursuant to a plea bargain, wherein he pled guilty to accessory after the fact to murder. Williams testified that he, Antone, and defendant had planned to break into the Gachette home and steal Gachette's guns and jewelry on 12 April 2013, provided no one was home. Gachette was a gun collector who owned a number of rifles and handguns. Defendant, who was eighteen years old and had a car, drove Antone and Williams, who were each sixteen years

old, to the Gachette home, where they were all admitted by Gachette. After this visit, Williams testified that the group then went to Williams's home and talked. According to Williams, Antone asked defendant if they could "go back over there tomorrow and try again" to break in and steal Gachette's guns. Williams and defendant agreed.

On 13 April 2013, Williams and Antone walked to defendant's house to get a ride to the Gachette residence. According to Williams, Antone told them that if Gachette was at home, Antone would simply ask his uncle for money, even though the real purpose of the visit was to "get guns." When the group arrived at the Gachette residence, all three were admitted by Gachette, and they all took seats at the dining room table. After about fifteen minutes of conversation, Williams heard Antone ask Gachette if he had any gun oil, at which point Williams looked up to see Antone pull out a gun and fire it. The shot hit Gachette's computer, which was in the living room. Gachette ordered the group to leave. Antone fired again, shooting Gachette in the head, then walked over and fired at Gachette a third time. Antone ordered Williams and defendant to come to him as he stood over Gachette's body, then told them to take the guns. Williams took two rifles from the gun rack and put them in the trunk of defendant's car.

Defendant also took a gun handed to him by Antone while Antone took additional guns from a gun rack in the house. According to Williams, when defendant left the house, he was carrying a pink bag, later determined to contain jewelry, in addition to a handgun. Antone came outside with a rifle and a handgun. The group left the scene in defendant's car and drove toward Bolton.

After arriving in Bolton, they went to a park. According to Williams, Antone had defendant call an individual named Jamal. Antone wanted to know if Jamal could hold the stolen property for them. Jamal apparently refused. After this phone call, Williams testified defendant drove off in his car by himself, leaving Williams and Antone in the park. Defendant returned about ten minutes later and said that he could not find anybody "to hold the guns."

Defendant testified that during this ten-minute interval he drove to Brianna Webb's house. While he was talking to Webb, she saw the pink pouch in the back seat of defendant's car. When she asked to have it, defendant let her take it. Defendant then returned to the park where Antone and Williams were waiting. Defendant testified that he told Williams and Antone that "this stuff [the guns] has to come out of my car."

They all got back into defendant's car and drove off, ending up on a dirt road near Lake Waccamaw. They attempted to hide the guns under an abandoned house but were interrupted by an approaching car. They left that location, heading toward the town of Hallsboro, still in possession of one rifle and some handguns. Antone asked Williams if he wanted the handguns, but Williams declined. Antone said he was going to throw the guns out the window, but Williams did not know if he actually did so.

The three went to Williams's home, where Antone asked Williams for a duffel bag. Antone hid the remaining rifle inside the duffel bag and left Williams's home, having friends pick him up. Defendant then left as well.

Defendant was indicted on charges of first-degree murder and robbery with a dangerous weapon on 9 May 2012, and arrested shortly thereafter. Defendant was tried during a late July 2014 term of court in Columbus County, the Honorable James Gregory Bell, judge presiding.

At trial, once the jurors began deliberations, they requested a written copy of the trial court's instructions. The trial court provided the jury with written instructions on "all the substantive charges." Later that day, the jury sent a note containing the following question: "To clarify . . . can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" Defense counsel indicated that the question should be answered "yes," and the prosecutor thought it should be answered "no." After the parties were given an opportunity to research the issue, and after the trial court had conducted independent legal research as well, the trial court indicated it would tell the jury to read the instructions and would not answer the question yes or no. Defense counsel responded:

> [Defense counsel]: I'm not denying the Court has the discretion to do that, I'm not suggesting that you must answer the question, but I think that is a matter the Appellate Courts of North Carolina have clearly said is within your discretion. But technically the answer is yes.
>
> . . .
>
> THE COURT: All right. . . . I'm not going to answer yes or no, I am going to give you the written copies of the instructions, they can go back and read the instructions. Anybody want to say anything about that?

The following day, the jurors, using separate verdict sheets, convicted defendant of robbery with a firearm and first-degree murder based on the felony murder rule. Defendant appeals.

On appeal, defendant raises only one issue: whether the trial court committed prejudicial error in failing to answer "yes" or "no" to the following question from the jury: "Can this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" We conclude the trial court acted within its discretion.

This Court recognizes that "the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Thus, whether to give additional instructions to the jury is within the trial court's discretion:

> (a) After the jury retires for deliberation, the judge *may* give appropriate additional instructions to:
>
> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an error;
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.
>
> (b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.
>
> (c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard.

N.C. Gen. Stat. § 15A-1234 (2013) (emphasis added). "[T]he trial court is not required to repeat instructions which have been previously given absent an error in the charge." *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994).

Defendant argues that the trial court's response to the jury's question should either have been (1) a "yes" response, as requested by defendant, or (2) at least a response instructing the jury to consider each charge against defendant separately. Either of these responses, defendant argues, would have properly conveyed to the jury that its finding on the robbery charge did not automatically dictate the verdict on the murder charge. Defendant nonetheless conceded at trial that the trial court's choice of response was "a matter that the Appellate Courts of North Carolina have clearly said is within [the trial court's] discretion." Thus, the trial court's response instructing the jury to reread the instructions, without answering the specific question, was well within its discretion.

Defendant cites *State v. Bromfield*, 332 N.C. 24, 418 S.E.2d 491 (1992), in support of his contention that the trial court erred. In *Bromfield*, the jury asked the trial court a question almost identical to the one asked in defendant's trial: " 'If [defendant is] found guilty of robbery with a dangerous weapon, must [the jury] automatically find him guilty of felony murder?' " *Id.* at 332 N.C. at 45, 418 S.E.2d at 503. After soliciting comment from both defense counsel and the prosecutor, the trial court clarified the instruction, stating that the jury was "to consider each case separately on its own merits . . . . You're to consider each count in each case separately, independently." *Id.* at 46, 418 S.E.2d at 503. The North Carolina Supreme Court held that the trial court's choice to repeat the instructions substantially in accordance with defense counsel's suggestion "was carefully designed to prevent confusion by the jury." *Id.*

Here, it is undisputed that the trial court correctly instructed the jury on the separate offenses of robbery with a firearm and first-degree murder in perpetration of a felony. Additionally, like the trial court in *Bromfield*, the trial court in the instant case solicited comment and advice from defense counsel and the prosecutor with regard to an appropriate response to the jury's question. In its discretion, the trial court then decided that it would instruct the jurors to reread their written copies of the instructions previously given and that the court would not answer "yes" or "no" to the jury's question.

While the trial court here did not clarify the instructions by telling the jury to "treat each count separately," as the trial judge did in *Bromfield*, failure to do so in the instant case could not be error where the trial court has discretion in its response to the jury's request. *See Prevette*, 317 N.C. at 164, 345 S.E.2d at 169. Further, the jury was handed separate and distinct verdict sheets with which they were to enter individual verdicts of either guilty or not guilty as to each charge. Therefore,

the trial court's action in response to the jury's question was well within its discretion and proper as a matter of law. *See id.*

Defendant's argument is overruled where: (1) it is undisputed that the trial court correctly instructed the jury on the separate offenses of robbery with a firearm and first-degree murder in perpetration of a felony; (2) the court properly responded to the jury's question by instructing the jury to reread the written instructions previously given to them; and (3) the jury was given separate verdict sheets for each count that allowed them to select "not guilty" for each offense. Accordingly, defendant's trial was free from error.

NO ERROR.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. COA15-414

Filed 3 November 2015

1. Appeal and Error—right to appeal after guilty plea—no motion to suppress

Defendant had no statutory right to appeal the trial court's denial of her motion to dismiss after a guilty plea to a misdemeanor (driving while impaired) was entered. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entry of a plea of guilty.

2. Appeal and Error—writ of certiorari on appeal—outside of Appellate Rules authority

Defendant's appeal from a guilty plea to driving while impaired was dismissed where she contended that the Court of Appeals had the authority to issue a writ of certiorari. Defendant's petition did not invoke any of the three grounds set forth in Appellate Rule 21 to enable the Court of Appeals to issue the writ under that rule, and defendant did not demonstrate the 'exceptional circumstances' necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of her argument by certiorari.

STATE v. LEDBETTER

[243 N.C. App. 746 (2015)]

Appeal by defendant from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Heard in the Court of Appeals 8 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Ashleigh P. Dunston, for the State.

Meghan A. Jones, for defendant-appellant.

TYSON, Judge.

Donna Helms Ledbetter ("Defendant") appeals from judgment entered after she pleaded guilty to driving while impaired. Defendant does not have a statutory right to appeal the issue she raised. Rule 21 of the North Carolina Rules of Appellate Procedure does not set forth the grounds Defendant asserts to issue the requested writ. We decline to suspend the Rules of Appellate Procedure to exercise our jurisdiction under N.C. Gen. Stat. § 1444(e) to issue the writ. We deny Defendant's petition for writ of certiorari and dismiss the appeal.

I. Background

Around 7:30 p.m. on 1 January 2013, Rowan County Sheriff's Deputy Daniel Myers ("Deputy Myers") was called to the Enochville Food Center in Kannapolis, North Carolina. Upon arrival, Deputy Myers observed Defendant seated behind the wheel of the car, "slumped over," and apparently unconscious. The keys were in the ignition. Deputy Myers knocked on the window and instructed Defendant to exit the vehicle. Deputy Myers never observed Defendant drive the vehicle.

Deputy Myers conducted three separate field sobriety tests on Defendant: (1) the Horizontal Gaze Nystagmus test (HGN test); (2) the one-leg stand test; and (3) the walk-and-turn test. During the HGN test, Deputy Myers had to remind Defendant to keep her head still several times. The HGN test revealed five out of six indicators for impairment. During the one-leg stand test, Deputy Myers had to twice tell Defendant to not start before being told to do so, and to keep her hands by her side.

During the walk-and-turn test, Defendant lost her balance a couple of times, used her arms to balance repeatedly, and missed the heel-to-toe twice. Defendant made a 560-degree turn, rather than a 360-degree turn, and proceeded to walk backwards towards Deputy Myers. Deputy Myers administered an Alco-Sensor portable breath test to Defendant, which registered a negative reading for alcohol.

Defendant admitted she had taken Xanax and Oxymorphone about an hour prior to her encounter with Deputy Myers. Based upon his interactions with Defendant, Deputy Myers concluded Defendant was appreciably impaired and placed her under arrest for driving while impaired.

Defendant was transported to the Rowan Regional Medical Center for a blood test. Following the blood test, Defendant was transported to the Rowan County Magistrate's Office, where she appeared before Magistrate Todd Wyrick ("Magistrate Wyrick"). After speaking with Deputy Myers, Magistrate Wyrick found probable cause to believe Defendant was a danger to herself or others.

The detention order contains a findings of fact section, where the magistrate enters why Defendant posed a danger to herself or others. Magistrate Wyrick simply typed "BLOOD TEST" in this section. Magistrate Wyrick found probable cause to detain Defendant as an impaired driver.

The detention order required Defendant remain in custody for a 12-hour period or until released into the custody of a sober adult. Magistrate Wyrick failed to instruct Defendant to fill out an "implied consent offense notice" form ("Form AOC-271"), which advises a defendant of her right to have "other persons appear at the jail to observe [her] condition."

After her appearance before Magistrate Wyrick, Defendant was transported to the Rowan County Jail. Defendant used a phone at the jail to call several friends and acquaintances and asked them to come to the jail to allow her to be released into their custody. Defendant was released into the custody of Kenneth Paxton at 12:24 a.m. on 2 January 2013.

Defendant filed a motion to dismiss the charges on 23 December 2013. She argued the State violated N.C. Gen. Stat. § 20-38.4 and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), when Magistrate Wyrick: (1) failed to provide sufficient findings of fact to show Defendant was a danger to herself and others; and (2) failed to provide Defendant a copy of Form AOC-271 advising of her right to have witnesses observe her demeanor at the jail. The trial court denied Defendant's motion on 20 October 2014.

Following the court's denial of her motion, Defendant entered a plea of guilty. The plea arrangement states "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" Defendant appeals.

II. Issue

Defendant asserts the trial court erred in denying her motion to dismiss. She argues a substantial violation occurred during the crucial period in which she could have gathered witnesses on her behalf and she was deprived of her statutory and constitutional rights of access to witnesses.

III. Right to Appeal

[1] The State filed a motion to dismiss Defendant's appeal. It argues Defendant has no statutory right to appeal the trial court's denial of her motion to dismiss when a plea of guilty has been entered. We agree.

A defendant's right to appeal in a criminal proceeding in North Carolina "is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. rev. denied*, 356 N.C. 442, 573 S.E.2d 163 (2002) (citations omitted); N.C. Gen. Stat. § 15A-1444 (2013). Absent express statutory authority, a criminal defendant does not have a state right to appeal from a judgment entered upon her conviction under N.C. Gen. Stat. § 15A-1444. *Id.*; *see also State v. Ahern*, 307 N.C. 584, 605, 300 S.E.2d 689, 702 (1989) (quoting N.C. Gen. Stat. § 15A-1444(e)) (noting that except as provided in N.C. Gen. Stat. §§ 15A-1444 and 15A-979, a defendant has no right of appeal from the entry of a guilty plea). No federal constitutional right obligates state courts to hear appeals in criminal proceedings. *E.g.*, *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977).

A. N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b)

The circumstances under which a defendant may appeal a guilty plea and conviction are found in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). A defendant who has pleaded guilty to a misdemeanor, as here, is entitled to appeal as a matter of right whether the sentence imposed:

> (1) Results 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;
>
> (2) Contains 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; or
>
> (3) Contains 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) (2013).

Defendant attempts to appeal as a matter of right from an order denying her motion to dismiss prior to her guilty plea. This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant contends that an appeal of right is proper pursuant to N.C. Gen. Stat. § 15A-979(b), which provides:

> An order finally denying a *motion to suppress* evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.

N.C. Gen. Stat. § 15A-979(b) (2013) (emphasis supplied). We disagree.

In this case, Defendant filed a "MOTION TO DISMISS DWI CHARGE." In her motion to dismiss, Defendant stated "pursuant to N.C. Gen. Stat. § 15A-954, [Defendant] moves the Court for an Order dismissing" the charge of DWI.

While the trial court's order denying Defendant's motion was styled "order on motion to suppress Defendant's DWI Charge," and Defendant's transcript of plea purported to reserve a right to appeal the Court's denial of her "motion to dismiss/suppress," a review of the record and the transcripts of Defendant's motion hearing and plea hearing reveals the only motion filed by Defendant was the motion to dismiss. Defendant's motion specifically cited N.C. Gen. Stat. § 15A-954, North Carolina's motion to dismiss statute. Defendant did not file a motion to suppress and has no right of appeal after denial of her motion to dismiss and entering a plea of guilty. N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b).

The facts of this case are substantially similar to the circumstances presented in *State v. Rinehart*, 195 N.C. App 774, 673 S.E.2d 769 (2009). In *Rinehart*, the defendant made two pre-trial motions to dismiss. 195 N.C. App at 775, 673 S.E.2d at 770. Both were denied. *Id.* Following the denial of the motions to dismiss, the defendant entered a plea of guilty, while reserving the right to appeal the denial of his motions to dismiss. *Id.* On appeal, the defendant argued the trial court erred in denying his motions to dismiss. *Id.*

Our Court held the defendant did not have a right to appeal from a denial of his motions to dismiss after his plea of guilty was entered. *See id.* at 776, 673 S.E.2d at 770-71; *see also id.* at 776 n.1, 673 S.E.2d at

771 n.1. The holding in *Rinehart* was later characterized, in relevant part, as follows:

> The defendant in *Rinehart* appealed only from motions to dismiss; he did not additionally attempt to appeal from any order for which an appeal of right existed. Since the *Rinehart* defendant did not attempt to appeal from any order for which an appeal of right existed, his appeal was appropriately dismissed.

State v. White, 213 N.C. App. 181, 185-86, 711 S.E.2d 862, 865 (2011).

B. *State v. Chavez* and *State v. Labinski*

Our Court has long held a defendant is limited to a right to appeal from a judgment entered following a guilty plea as prescribed in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). *See, e.g.*, *State v. Carter*, 167 N.C. App. 582, 584, 605 S.E.2d 676, 678 (2004); *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004); *State v. Jamerson*, 161 N.C. App. 527, 528-29, 588 S.E.2d 545, 546-47 (2003).

Defendant argues the State's motion to dismiss her appeal should be denied. She cites two cases in which this Court reviewed the trial court's denial of a defendant's motion to dismiss based on a *Knoll* violation following a plea of guilty. *See State v. Chavez*, ___ N.C. App. ___, 767 S.E.2d 581 (2014); *State v. Labinski*, 188 N.C. App. 120, 654 S.E.2d 740 (2008). The Court in both the *Chavez* and *Labinski* cases reached the merits of the respective defendant's appeals without any discussion of, or citation to, N.C. Gen. Stat. §§ 15A-1444, 15A-979(b), or our precedents in *Carter*, *Jeffery*, or *Jamerson*.

We are bound by the decisions of our Supreme Court and by prior decisions of another panel of our Court addressing the same question, unless overturned by an intervening decision from a higher court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Where apparent inconsistency exists between precedents of this Court, the oldest controlling case prevails. *State v. Harris*, ___ N.C. App. ___, ___, 776 S.E.2d 554, 556 (2015).

We are required to follow longstanding precedents, which hold a defendant's right to appeal from a judgment following a plea of guilty is limited to the grounds enumerated in N.C. Gen. Stat. §§ 15A-1444 and 15A-979(b). *Carter*, 167 N.C. App. at 584, 605 S.E.2d at 678; *Jeffery*, 167 N.C. App at 578, 605 S.E.2d at 674; *Jamerson*, 161 N.C. App. at 528-29, 588 S.E.2d at 546-47. Under these facts, Defendant does not have a statutory

right to appeal from the trial court's denial of her motion to dismiss followed by a plea of guilty. Defendant's appeal is dismissed.

IV. Writ of Certiorari

[2] Defendant petitioned this Court for a writ of certiorari to review the trial court's denial of her motion to dismiss. Defendant contends this Court has authority to issue the writ of certiorari pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). The Rules of Appellate Procedure do not allow us to issue the requested writ under these facts. We decline to invoke Appellate Rule 2 to suspend Appellate Rule 21 to exercise our discretion pursuant to N.C. Gen. Stat. § 15A-1444(e) to grant the writ.

Although N.C. Gen. Stat. § 15A-1444(e) states a defendant who pleads guilty to a criminal offense "may petition the appellate division for review by writ of certiorari," this Court's authority to issue writs of certiorari is circumscribed by the North Carolina Rules of Appellate Procedure. Appellate Rule 21(a)(1) limits the Court's ability to grant petitions for writ of certiorari to the following situations: (1) "when the right to prosecute an appeal has been lost by failure to take timely action;" (2) "when no right of appeal from an interlocutory order exists;" or (3) to "review pursuant to [N.C. Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief." N.C. R. App. P. 21(a)(1) (2015); *see State v. Stubbs*, ___ N.C. ___, ___, 770 S.E.2d 74, 76 (2015) (noting a writ of certiorari is appropriate to review the State's appeal of a trial court's grant of the defendant's motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1422(c)(3)). Here, Defendant's petition under N.C. Gen. Stat. § 15A-1444(e) does not invoke any of the three grounds set forth in Appellate Rule 21 to enable this Court to issue the writ under this rule. N.C. R. App. P. 21(a)(1).

"In considering [A]ppellate 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 [Appellate] Rule 21." *State v. Smith*, 193 N.C. App. 739, 742, 668 S.E.2d 612, 614 (2008); *see also State v. Nance*, 155 N.C. App. 773, 774, 574 S.E.2d 692, 693 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 137-38, 564 S.E.2d 640, 640-41 (2002).

These holdings are rooted in precedents from our Supreme Court. *See State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (noting because rules of practice and procedure are "promulgated

by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2)," where a statute is in conflict with an appellate rule, "the statute must fail."); *see also State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (striking down Rule of Evidence 103(a)(2) "to the extent it conflicts with Rule of Appellate Procedure 10(b)(1)").

A. Suspension of Rule 21(a)(1)

Precedents from our Supreme Court and this Court issued a writ of certiorari in circumstances not set forth by Appellate Rule 21(a)(1). *See Ahern*, 307 N.C. at 605, 300 S.E.2d at 702; *State v. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987); *State v. O'Neal*, 116 N.C. App. 390, 394-95, 448 S.E.2d 306, 310, *disc. rev. denied*, 338 N.C. 522, 452 S.E.2d 821 (1994); *see also State v. Demaio*, 216 N.C. App. 558, 563-64, 716 S.E.2d 863, 866-67 (2011); *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011); *State v. Keller*, 198 N.C. App. 639, 641-42, 680 S.E.2d 212, 213-14 (2009); *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 678 (2004); *State v. Rhodes*, 163 N.C. App. 191, 193-94, 592 S.E.2d 731, 732-33 (2004).

In *Ahearn*, the defendant pleaded guilty to felonious child abuse and voluntary manslaughter and filed an appeal. *Ahearn*, 307 N.C. at 601, 300 S.E.2d at 699. Ahearn argued no factual basis was shown to support his plea of guilty to felonious child abuse. *Id.* at 605, 300 S.E.2d at 702.

Our Supreme Court cited N.C. Gen. Stat. § 15A-1444(e), and recognized a defendant who has pleaded guilty has no right of appeal, except as provided in N.C. Gen. Stat. §§ 15A-1444 and 15A-979. *Id.* Defendant's argument was not a ground enumerated in either N.C. Gen. Stat. §§ 15A-1444 or 15A-979. *Id.* The Court reasoned "if we are to consider this assignment of error, we must treat it as a petition for writ of certiorari, which we do." *Id.*

The Court then reviewed the merits of the defendant's argument through a writ of certiorari. *Id.* at 605-07, 300 S.E.2d at 702-03. The Supreme Court in *Ahearn* did not cite nor discuss Appellate Rule 21. *See id.* at 593-608, 300 S.E.2d at 695-704.

In *Bolinger*, the defendant contended the trial judge violated N.C. Gen. Stat. § 15A-1022 by accepting his guilty plea. *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462. Our Supreme Court held "defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea." *Id.* The Court further held

that "[d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari." *Id.* Defendant Bolinger failed to petition the Court for a writ of certiorari, and the Court nonetheless elected to review the merits of the defendant's argument. *Id.* at 601-02, 359 S.E.2d at 462.

Our Supreme Court did not cite nor address Appellate Rule 21 in either *Ahern* or *Bolinger*. The Court stated: "Neither party to this appeal appears to have recognized the limited bases for appellate review of judgments entered upon pleas of guilty. For this reason we nevertheless choose to review the merits of defendant's contention." *Id.* In cases which precede *Bolinger*, our Supreme Court has specifically stated where a conflict exists between the General Statutes and the Appellate Rules, the Appellate Rules control. *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *State v. Elam*, 302 N.C. 157, 160-61, 273 S.E.2d 661, 664 (1981).

In *O'Neal*, defendant pleaded guilty to second-degree murder and received a life sentence. *O'Neal*, 116 N.C. App. at 391, 448 S.E.2d at 308. Defendant argued, *inter alia*, the trial court erred in denying his pretrial motion for further mental evaluation. *Id.* at 394, 448 S.E.2d at 310. This Court in *O'Neal* stated: "[g]enerally, a defendant who has entered a plea of guilty to a felony is not entitled to appellate review as a matter of right." *Id.* at 394-95, 448 S.E.2d at 310 (citing *Ahearn*, 307 N.C. at 605, 300 S.E.2d at 702; N.C. Gen. Stat. § 15A-1444).

After recognizing defendant did not have a right to appeal the issue he argued, the Court stated defendant "may petition the appellate division for review by writ of certiorari." *Id.* at 395, 448 S.E.2d at 310 (quoting N.C. Gen. Stat. § 15A-1444(e)). The Court stated:

> [I]n the present case where defendant pled guilty, we may not consider this assignment of error unless we treat his appeal as a writ of certiorari with respect to this assignment of error. Given the life sentence imposed upon defendant, we elect to treat the appeal as a petition for a writ of certiorari.

Id. This Court issued the writ of certiorari and reviewed the merits of the defendant's appeal. *Id.* As in *Ahearn* and *Bolinger*, this Court in *O'Neal* did not cite nor discuss Appellate Rule 21. *Id.* at 391-96, 488 S.E.2d at 308-11.

N.C. Gen. Stat. § 15A-1444(e) clearly grants jurisdiction to the appellate courts to issue writs of certiorari to review the merits of defendant's argument, when no right of appeal exists following a plea of guilty

pursuant to N.C. Gen. Stat. §§ 15A-1444(a1)-(a2). We recognize an apparent tension when comparing N.C. Gen. Stat. § 15A-1444(e), which grants appellate courts' jurisdiction to issue writs of certiorari, and Appellate Rule 21, which limits this Court's ability to grant such writs under the three specific grounds, none of which are applicable here. N.C. R. App. P. 21.

In neither *Ahearn* nor *Bolinger* did our Supreme Court cite to or address the requirements of Appellate Rule 21. In cases where this Court has issued the writ of certiorari to review issues surrounding guilty pleas under N.C. Gen. Stat. § 15A-1444(e), this Court also did not cite nor analyze the three grounds to issue the writ set forth in Appellate Rule 21 to determine whether they applied to the facts of the case. *See e.g.*, *O'Neal*, 116 N.C. App. at 395, 448 S.E.2d at 310.

Other panels of this Court allowed certiorari by citing *Bolinger* and reached the merits of the defendants' arguments pursuant to N.C. Gen. Stat § 15A-1444(e) for grounds not set forth in N.C. Gen. Stat. § 15A-1444(a) or Appellate Rule 21. S*ee*, *e.g.*, *Rhodes*, 163 N.C. App. at 193, 592 S.E.2d at 732-33 (holding this Court could issue the writ of certiorari to review the defendant's challenge to the trial court's procedures employed in accepting his guilty plea); *Demaio*, 216 N.C. App. at 563-64, 716 S.E.2d at 866-67 (holding this Court could issue the writ of certiorari to review the defendant's argument that his plea was not the product of informed choice); *see also Keller*, 198 N.C. App. at 641, 680 S.E.2d at 213; *Carter*, 167 N.C. App. at 585, 605 S.E.2d at 678.

B. Appellate Rule 2

Although the aforementioned cases do not cite nor discuss Appellate Rule 2, Rule 2 gives this Court the authority to suspend the limits of the Rules of Appellate Procedure:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. The Appellate Rules may be suspended as long as such suspension does not enlarge the jurisdiction of the Court. N.C. R. App. P. 1(c) (noting the Rules of Appellate Procedure "shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as

that is established by law"); *see also Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000) (citations omitted) (noting "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns").

The plain language of Appellate Rule 2 "grants this Court the discretion to suspend appellate rules either 'upon application of a party' or 'upon its own initiative.' " *Bailey*, 353 N.C. at 157, 540 S.E.2d at 323. Appellate Rule 2 "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). This Court's discretionary exercise to invoke Rule 2 is "intended to be limited to occasions in which a 'fundamental purpose' of the appellate rules is at stake, which will necessarily be 'rare occasions.' " *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citations omitted).

On the record before us, Defendant has not demonstrated, and we do not find, the exceptional circumstances necessary to invoke Appellate Rule 2. We decline to suspend Appellate Rule 21(a)(1) pursuant to Appellate Rule 2 to exercise our discretionary review of Defendant's petition for writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e).

We are bound by decisions of the Supreme Court of North Carolina. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (holding the Court of Appeals has a "responsibility to follow" decisions of the Supreme Court, "until otherwise ordered" by our Supreme Court). Likewise, a subsequent panel of this Court has no authority to overrule a previous panel on the same issue. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. We must follow our Supreme Court's holdings in *Bennett* and *Oglesby* that the appellate rules promulgated by our Supreme Court under constitutional authority prevail over conflicting general statutes, *Bennett*, 308 N.C. at 535, 302 S.E.2d at 790; *Oglesby*, 361 N.C. at 554, 648 S.E.2d at 821, and this Court's oldest precedent ruling on the issue. *E.g.*, *Smith*, 193 N.C. App. at 742, 668 S.E.2d at 614; *Nance*, 155 N.C. App. at 774, 574 S.E.2d at 693; *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *Dickson*, 151 N.C. App. at 137-38, 564 S.E.2d at 640-41.

On the record before us, Defendant has not demonstrated, and we do not find, the 'exceptional circumstances' necessary to invoke Rule 2 and suspend the requirements of Rule 21 to review the merits of Defendant's argument by certiorari.

V. Conclusion

Under these facts, Defendant does not have a statutory right to appeal from the trial court's denial of her motion to dismiss prior to her plea of guilty. Defendant's petition to issue a writ of certiorari does not assert grounds which are included in or permitted by Appellate Rule 21(a)(1). In the exercise of our discretion, we decline to invoke Appellate Rule 2 to suspend the requirements of the appellate rules to grant the writ of certiorari pursuant to N.C. Gen. Stat. § 15A-1444(e) to review Defendant's argument. Defendant's petition is denied. Defendant's appeal is dismissed.

DENIED AND DISMISSED.

Judges McCULLOUGH and DIETZ concur.

STATE OF NORTH CAROLINA
v.
MARTY ALLAN LEWIS, DEFENDANT

No. COA15-408

Filed 3 November 2015

1. Evidence—pills—analysis of one—visual examination of the rest

The trial court did not err in a prosecution for trafficking in opioids by denying defendant's request to instruct the jury on lesser-included conspiracy charges where the State's expert analyzed one of twenty pills and visually examined the remaining nineteen. It was not necessary to test every tablet, and the State's analyst satisfied the State's evidentiary burden by visually confirming that the remaining pills were similar.

2. Courts—sessions—recess from Friday to Tuesday

The trial court had jurisdiction to enter judgment where the trial began on a Monday, the State rested on the following Friday, the trial court recessed until the following Tuesday, and defendant was convicted and sentenced on Wednesday. Defendant had advance notice of the recess and was given ample opportunity to object.

STATE v. LEWIS

[243 N.C. App. 757 (2015)]

Appeal by defendant from judgment entered 1 October 2014 by Judge Thomas H. Lock in Columbus County Superior Court. Heard in the Court of Appeals 6 October 2015.

Roy Cooper, *Attorney General*, *by Zachary Padget*, *Associate Attorney General*, *for the State.*

Staples Hughes, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellant.*

ZACHARY, Judge.

Where the analysis of one pill, and visual comparison of the others, constituted sufficient evidence of their contents, the trial court did not err in declining to instruct the jury on lesser included conspiracy charges. Where the trial court substantially complied with N.C. Gen. Stat. § 15-167, it properly extended the court session and had jurisdiction to enter judgment upon defendant.

I. Factual and Procedural Background

In late 2011, Tamika Packer approached Marty Allan Lewis (defendant),Chief of Police of Fair Bluff, North Carolina, and asked him if he could get her twenty pain pills. Defendant received $160 from Packer and contacted James Scott, a drug dealer, from whom he purchased the pills. Defendant then delivered them to Packer. Defendant was involved in multiple such transactions.

On 8 May 2012, Packer was confronted by SBI agents Adrienne Harvey and Kellie Farrell, who claimed to know everything about defendant and the pills. Through Packer, the agents set up a controlled purchase. Packer met with defendant and gave him money. Later that afternoon, they met again and defendant gave Packer twenty pills. Investigators arrested defendant and Scott and executed search warrants of their persons at the Fair Bluff police station and of defendant's and Scott's residences.

On 9 May 2012, defendant was indicted for conspiracy to traffic an opiate derivative and/or compound, conspiracy to traffic cocaine, sale and delivery of a Schedule II substance, possession with intent to sell and deliver a Schedule II substance, and possession of cocaine. Prior to trial, the State dismissed the conspiracy to traffic cocaine charge.

On 1 October 2014, the jury found defendant guilty of conspiracy to traffic 14 grams or more but less than 28 grams of opiates, sale or

delivery of oxycodone, and possession with intent to sell or deliver oxycodone, and not guilty of possession of cocaine. The trial court arrested judgment on the convictions for sale or delivery of oxycodone and possession with intent to sell or deliver oxycodone. The trial court sentenced defendant to an active term of 90-117 months of imprisonment.

Defendant entered oral notice of appeal.

II. Lesser Included Charges

[1] In his first argument, defendant contends that the trial court erred in denying his request to instruct the jury on all lesser included conspiracy charges. We disagree.

A. Standard of Review

It is well established that "[arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.*

B. Analysis

Defendant was found guilty of, among other charges, conspiracy to traffic 14 grams or more but less than 28 grams of opiates. Police seized twenty pills during the controlled purchase from defendant, weighing 17.63 grams total. The State's expert analyzed one of these pills, and determined that it contained oxycodone, a Schedule II opium derivative, with a net weight of 0.88 grams. The expert visually examined the remaining nineteen pills, with a net weight of 16.75 grams, and found them to have "the same similar size, shape and form as well as the same imprint on each of them." In short, the expert visually determined that the remaining nineteen pills were consistent with the one that was tested.

At trial, defense counsel requested instructions on all lesser included conspiracy to traffic charges, alleging that the visual examination was insufficient to establish precisely how much opium derivative was present in the seized pills. The trial court denied this request. On appeal, defendant contends that because the evidence did not clearly establish the amount of opium derivative present in the pills, the jury was entitled to instructions on all lesser included conspiracy charges.

Our courts have consistently held that a trial court is not required to instruct the jury on all lesser included charges when the evidence clearly demonstrates that defendant committed the crime charged. *See State v. Summit*, 301 N.C. 591, 596, 273 S.E.2d 425, 427, *cert. denied*, 451 U.S. 970, 68 L.Ed.2d 349 (1981); *State v. Myers*, 61 N.C. App. 554, 556, 301 S.E.2d 401, 403 (1983) *cert. denied*, 311 N.C. 767, 321 S.E.2d 153 (1984). In the instant case, defendant does not challenge the evidence supporting the fact that he was trafficking in opium derivative; rather, defendant challenges the sufficiency of the expert's analysis as to precisely how much opium derivative was present.

We find that the facts of this case parallel those of *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E.2d 664 (1982). In *Wilhelm*, the defendant was convicted of trafficking in methaqualone. On appeal, defendant challenged the trial court's decision to allow evidence that the defendant possessed more than five thousand tablets of methaqualone, when the State's analyst tested only three of the pills. *Id.* at 303, 326 S.E.2d at 667. We upheld the lower court's decision, holding that "[w]hen a random sample from a quantity of tablets or capsules identical in appearance is analyzed and found to contain contraband, the entire quantity may be introduced as the contraband." *Id.*

Our Supreme Court has since held that, in trafficking cases, "[a] chemical analysis of each individual tablet is not necessary. . . . A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *State v. Ward*, 364 N.C. 133, 148, 694 S.E.2d 738, 747 (2010).

In *Wilhelm*, this Court held that testing three out of five thousand tablets – a sample size approximately 0.06% of the whole – was sufficient to establish the chemical composition of the entire batch. In the instant case, one of the twenty – 5%, by comparison – was tested. In accordance with the precedent established in *Wilhelm* and *Ward*, we conclude that it was not necessary to test every tablet, and that, upon establishing the chemical composition of a sufficient sample, and visually confirming that the remaining pills were similar, the State's analyst satisfied the evidentiary burden upon the State to determine the quantity of opium derivative in the pills. As such, the evidence was sufficient to support the charge of conspiracy to traffic 14 grams or more but less than 28 grams of opiates, and the trial court did not err in declining to instruct on lesser included conspiracy charges.

This argument is overruled.

III. Failure to Extend Session

[2] In his second argument, defendant contends that the trial court lacked jurisdiction to enter judgment because the court failed to properly extend its session to the following week. We disagree.

A. Standard of Review

"This Court also reviews challenges to the jurisdiction of the trial court under a *de novo* standard." *State v. Wainwright*, ___ N.C. App. ___, ___, 770 S.E.2d 99, 102 (2015) (citing *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)).

B. Analysis

This trial began on a Monday. After the State rested on the following Friday, the trial court announced that it would be in recess until the following Tuesday. Court resumed on Tuesday, and defendant was convicted and sentenced the following Wednesday.

Defendant contends, however, that N.C. Gen. Stat. § 15-167 only permits the trial court to extend a felony trial from one session of court to a succeeding Sunday or Monday. N.C. Gen. Stat. § 15-167 provides that, if it appears that a trial will not be complete by the end of Friday afternoon, the trial judge "may recess court on Friday or Saturday . . . to such time on the succeeding Sunday or Monday as, in his discretion, he deems wise." N.C. Gen. Stat. § 15-167 (2013). The statute further provides that, when the trial court extends the session, the judge "shall cause an order to such effect to be entered in the minutes, which order may be entered at such time as the judge directs, either before or after he has extended the session." *Id.*

In *State v. Hunt*, 198 N.C. App. 488, 680 S.E.2d 720 (2009), the defendant appealed from a conviction, asserting that the trial court failed to enter the requisite formal written order extending the session. In that case, the trial judge advised the parties that he doubted the matter would be resolved by Friday and that he might have to extend the session. On Friday, the trial judge verbally announced that the court would be in recess until Monday morning. *Id.* at 494, 680 S.E.2d at 724. On appeal, we held that, given that "the trial court repeatedly announced that it was recessing court, with no objection by Defendant[,]" the argument lacked merit, and "the [lower] court sufficiently complied with N.C. Gen. Stat. § 15-167." *Id.* at 495, 680 S.E.2d at 724-25. Similarly, in *State v. Locklear*, we held that, despite not strictly complying with the statute, the trial court's numerous announcements in open court about extending the

session, without objection from defendant, sufficiently complied with N.C. Gen. Stat. § 15-167. *State v. Locklear*, 174 N.C. App. 547, 551, 621 S.E.2d 254, 257 (2005).

In the instant case, prior to the beginning of trial, the trial judge informed the jury that he would be recessing trial on Monday due to a prior obligation. Defendant did not object to this announcement. Prior to dismissing the jurors after the Friday afternoon session, the trial judge again informed them, in the presence of defendant and defense counsel, that court would be in recess until Tuesday, due to his Monday obligation. Again, defendant offered no objection. When the court reconvened on Tuesday, defendant again raised no objection.

As did the defendants in *Hunt* and *Locklear*, defendant had advance notice of the recess and was given ample opportunity to object. We find this case analogous to *Hunt* and *Locklear*, and hold that the trial court in the instant case sufficiently complied with N.C. Gen. Stat. § 15-167 and properly extended the court session. As such, the trial court had jurisdiction to enter judgment upon defendant.

This argument is without merit.

NO ERROR.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
JAMES CORNELIUS McNEILL

No. COA15-94

Filed 3 November 2015

1. Homicide—first-degree felony murder—felony larceny—sufficiency of evidence

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err by denying defendant's motion to dismiss the charge and instructing the jury on felony murder. There was sufficient evidence to show that the glass bottle found at the crime scene was a deadly weapon, that the alleged larceny was committed with the use of the glass

bottle, and that the killing occurred in the perpetration of the felonious larceny. The State presented evidence that defendant's DNA was present on the broken glass bottle found at the crime scene and that the victim died from blunt force injuries to his head. A jury could reasonably infer that the bottle was used to incapacitate the victim, facilitating defendant's larceny of the victim's vehicle—and that these events formed one continuous transaction.

2. Homicide—closing arguments—reference to prior conviction—"cold" person

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court did not err when it did not intervene ex mero motu during the prosecutor's closing arguments. The prosecutor's single reference to defendant's prior conviction, which had already been presented in the evidence with a limiting instruction, and suggestion that defendant was a "cold" person were not grossly improper.

3. Criminal Law—first-degree felony murder conviction—underlying felony—failure to arrest judgment

On appeal from defendant's conviction for first-degree felony murder, the Court of Appeals held that the trial court erred by failing to arrest judgment on the underlying felony. The Court of Appeals accordingly arrested judgment on defendant's felony larceny conviction.

Appeal by defendant from judgment entered 24 February 2014 by Judge Douglas B. Sasser in Cumberland County Superior Court. Heard in the Court of Appeals 13 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Peter A. Regulski, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

McCULLOUGH, Judge.

Defendant James Cornelius McNeill appeals from judgment entered upon his conviction for first degree felony murder. For the reasons stated herein, we hold no error.

I. Background

On 25 April 2011 defendant was indicted for first degree murder in violation of N.C. Gen. Stat. § 14-17, common law robbery in violation of N.C. Gen. Stat. § 14-87.1, and felony larceny in violation of N.C. Gen. Stat. §§ 14-72(a) and 14-70.

Defendant's trial commenced at the 10 February 2014 criminal session of Cumberland County Superior Court, the Honorable Douglas B. Sasser, presiding. The State's evidence tended to show the following: Robert Farmer testified that he met Jeremy Dixon in early 2009. Farmer lived in Raleigh and Dixon lived in Fayetteville. After learning that Dixon was a homosexual, Farmer testified that he "took him under my wing" and because Farmer was older than Dixon, and "a little bit more experienced in the lifestyle, I was the mother-figure as far as in the gay community with him." They both worked in the nursing field and would call each other often. Farmer testified that he would visit with Dixon in Fayetteville "[a]lmost every weekend."

On 30 July 2010, a Friday, Farmer headed to Fayetteville to visit Dixon. He had a key to Dixon's apartment and Dixon told Farmer that "if he wasn't home when I got there, you know, just to go on in and make myself at home, like he always did, and he would be there when he got off of work." When he arrived at Dixon's apartment that night, Farmer let himself in and testified that he did not notice anything unusual about Dixon's apartment. The next morning, on Saturday, Farmer saw Dixon around 8:00 a.m. They talked and spent some time together until the afternoon. Dixon attended a party with his church that afternoon. Farmer testified that he returned to Raleigh.

Farmer spoke with Dixon to let him know that he was going to come back to Fayetteville that Saturday night, 31 July 2010. Dixon told Farmer to "call him back when I got to Fayetteville, because he had company, and he would unlock the door for me." Farmer arrived somewhere between 11:00 p.m. and midnight with a guest at Dixon's apartment. When Farmer arrived, Dixon came to his bedroom door, stuck his head out and told Farmer "he wanted to make sure that it was me coming in; and, I told him yeah, and okay, well, you know make yourself comfortable or whatever, and he went back in." That night, Farmer slept in the living room of Dixon's apartment with his guest. During the night, Farmer could hear noises – "sexual in nature" – coming from Dixon's bedroom made by a male voice.

The next morning at 5:00 a.m., 1 August 2010, Farmer left Dixon's apartment to attend a funeral in Roanoke Rapids. Farmer's guest also left

Dixon's apartment at that time. On the evening of 1 August 2010, after the funeral, Farmer spoke with Dixon over the phone. Dixon informed Farmer that "he was at a store with the friend that he had at the house." Dixon also stated that "the other guy was in the store" and that he was "frightened."

On 2 August 2010, Farmer tried to call Dixon several times throughout the day, beginning at 7:00 a.m. but did not get an answer. Once Farmer got off of work at 5:00 p.m., he drove to Fayetteville and went straight to Dixon's apartment. He did not see Dixon's vehicle, a 2006 black Chevy Cobalt with rear tinted windows and Maryland license plates. Farmer drove around town and spoke to several individuals, searching for Dixon. He learned that Dixon was scheduled to work, but had failed to appear.

Officer Aubry Raymond of the Fayetteville Police Department testified that on Wednesday, 3 August 2010, she was dispatched to the Summertime Apartments in reference to a well-being check. Farmer informed Officer Raymond that he had not been able to make contact with Dixon since Sunday. Officer Raymond approached the door to Dixon's apartment, cracked it open, and saw Dixon lying dead on the living room floor.

At the scene, police found blood splatter on the walls, a bloody comforter, a bloody inflatable mattress, and part of a broken glass bottle on the living room floor. Zachary Kallenbach, a forensic scientist supervisor in the DNA section of the North Carolina State Crime Lab, testified regarding the broken glass bottle found shattered on the floor of Dixon's living room. The partial DNA profile obtained from a swabbing of the top of the broken bottle matched the DNA profile obtained from defendant and did not match the DNA profile of Dixon. A white tank top was found on the floor of Dixon's living room within a foot away from Dixon's body. An analysis of the neck area of the tank top revealed a mixture of DNA, the predominant profile matching defendant. A white hooded sweatshirt was also found lying across Dixon's body. The sweatshirt had blood on the cuffs and on the sleeve. Kallenbach testified that the DNA profile obtained from the neck area of the hooded sweatshirt was consistent with a mixture and neither defendant nor Dixon could be excluded as a contributor. A DNA analysis of the sleeves, chest, and inside, bottom of the sweatshirt matched Dixon and did not match defendant.

Brittany McLaughlin, a forensic technician with the Fayetteville Police Department, testified that she collected 17 latent fingerprints from Dixon's apartment. Trudy Wood, a latent examiner with the

Fayetteville Police Department, testified that she reviewed the 17 latent prints collected by McLaughlin. Two latent fingerprints, collected from the exterior door surface of a fuse box located on Dixon's bedroom wall and collected from the exterior surface of a drinking glass in Dixon's kitchen, matched defendant.

Jonathan Privette, a forensic pathologist that was employed at the Office of the Chief Medical Examiner in Chapel Hill, North Carolina in 2010, testified that he performed an autopsy of Dixon on 4 August 2010. Privette testified that in his opinion, the cause of death for Dixon was blunt-force injuries to his head. Privette testified that Dixon had injuries to his lips, face, eyes, head, and neck. Dixon had lacerations on his head and suffered from a subdural hemorrhage and swelling of the brain, but his skull was not fractured. Privette testified that Dixon's injuries were consistent with being beaten to death with feet or hands. In reference to the lacerations Dixon suffered on his skull, Privette testified that "[a] bottle could cause those injuries."

Jacqueline Samuel testified that in August and September of 2010, she met and dated defendant in Lumberton, North Carolina. They lived together at her apartment in Lumberton for approximately two months. During the time they lived together, defendant had injuries on his chest and back. The injuries "had glass in them [demonstrating]. They was deep. He should have had stitches." Samuel believed the injuries, which continued to bleed, were "a couple weeks" old. Defendant "kept picking at them." Samuel also observed fresh scars on the knuckles of defendant's hands. When asked whether defendant indicated why he had left Fayetteville, Samuel testified that defendant said because he "like [sic] to beat a man to death."

Samuel further testified that during their time together, defendant used a black, 4-door vehicle with Maryland license plates. The rear windows of the vehicle were tinted and it had a spare tire on it. Defendant would not allow anyone else to drive the vehicle. When Samuel's landlord requested the registration and insurance of the vehicle, defendant was unable to provide it. Defendant continuously moved the location of where he parked the vehicle and Samuel testified to hearing defendant inquire about obtaining tags for the vehicle, as well as the location of a salvage yard to dispose of the vehicle. Dixon's vehicle, which was valued in excess of $9,000, was never recovered.

Defendant was arrested in Lumberton, North Carolina. In his possession was a wallet and cell phone at the time of arrest. Defendant's wallet contained a piece of paper with Dixon's mother's name written

on it, the name of her bank, and her checking account number. Dixon's mother identified the writing on the paper as Dixon's handwriting.

Defendant testified on his own behalf. Defendant testified that he met Dixon on 1 August 2010 at a convenience store. Defendant was buying some cigars and as he was leaving, a man behind him "said he wanted to holler at me." The man, who defendant identified as named "Black," was purchasing a 40 ounce bottle of beer and asked defendant if had any marijuana for sale. Continuing their conversation outside of the store, defendant told Black that he had "a little bit" and that he was "going to get some more." Black was interested in trying the marijuana before he purchased any from defendant. Black told defendant that he was riding with his cousin, Dixon, and defendant testified that Dixon was driving a black vehicle. Defendant rode with Dixon and Black and arrived at Dixon's apartment.

Defendant testified that before he sat on Dixon's sofa, he remembered moving an object out of the way before he sat down and stated that it could have possibly been the hooded sweatshirt. Defendant finished rolling a blunt in the living room of Dixon's apartment while Dixon and Black stepped into Dixon's bedroom to talk. When they came out of the bedroom, Black asked defendant if he wanted something to drink and brought defendant a drinking glass. Defendant poured himself some beer and testified that he touched the top of the beer bottle.

Defendant lit a blunt and started smoking marijuana. He passed it to Black, who also smoked the blunt. Black was "talking about how good it was. He said he got to have some" and stated that he wanted to purchase an ounce from defendant. While defendant and Black smoked in the living room, Dixon was watching television. Defendant got up to use Dixon's bathroom. As he was exiting the bathroom, he tripped, stumbled, and in order to break his fall, grabbed onto the wall. Defendant testified that he could have touched the fuse box with his hand during his attempt to break his fall. Defendant returned to the living room and discussed how he would go to get the ounce of marijuana. Black stated that defendant could use Dixon's car if he would "come straight back." Defendant agreed to this and "gave [Black his] word." Black and Dixon went into the bedroom for a couple of minutes to talk. Black returned and said "it was a go." Dixon handed Black $120 and Black gave the money to defendant. Defendant testified that at that point, "as [Dixon and Black] were coming out, you know, the vibe I picked up . . . it was like a homosexual – just two – it was touching, you know; and, when they went back and sat down, they was sitting close up on each other." Dixon gave defendant the keys to his car and defendant left, telling Dixon and

Black that it would take him five to ten minutes. Defendant testified that although he initially planned to return to Dixon's apartment, he changed his mind upon realizing that Black and Dixon were homosexuals and decided not to return with Dixon's vehicle.

Defendant headed to Lumberton because he "had a probation violation, number one; and, I had planned on turning myself in on the probation violation." He met with Samuel in Lumberton a couple of days later. Defendant admitted that he knew he had a probation violation and a warrant out for his arrest based on a fight that he was involved in – "around July 15, I remember I got in a fight." Defendant planned on finishing out the summer with Samuel and then turning himself in to serve a six to eight month sentence. On cross-examination, defendant admitted to a prior conviction for assault with a deadly weapon which occurred on 15 July 2010. The name of the victim in that fight was Dwayne Anderson and the fight occurred at a boardinghouse. Defendant testified that Anderson pulled a gun on him and they wrestled, throwing furniture at each other. Defendant admitted that he hit Anderson with a box-cutter, resulting in serious injury.

Defendant testified that two weeks after having Dixon's vehicle in his possession, he noticed the piece of paper with Dixon's mother's checking account information. He put it in his pocket because he knew the vehicle "might have been reported – probably – reported to the cops stolen." Defendant then parked Dixon's vehicle and abandoned it with the keys inside.

At the close of all the evidence, defendant moved to dismiss the charge of common law robbery and the trial court granted his motion. On 24 February 2014, a jury found defendant guilty of first degree murder under the felony murder rule as to felony larceny with the use of a deadly weapon. Defendant was sentenced to a term of life imprisonment without parole. Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred by (A) denying his motion to dismiss the charge of first degree felony murder and by instructing the jury on felony murder based on insufficiency of the evidence; (B) allowing the prosecutor to make an improper closing argument; and (C) by failing to arrest judgment on the larceny conviction.

A. Motion to Dismiss

[1] Defendant contends that the State failed to present sufficient evidence on the charge of first degree felony murder with felony larceny as

the underlying predicate felony. Specifically, defendant argues that: (1) there was insufficient evidence to show that the glass bottle found at the crime scene constituted a "deadly weapon"; (2) that the alleged larceny was committed with the "use" of the glass bottle; and (3) that the killing occurred "in the perpetration" of the felonious larceny.

"A motion to dismiss for insufficiency of the evidence is properly denied if substantial evidence exists to show: (1) each essential element of the offense charged; and (2) that defendant is the perpetrator of such offense." *State v. Fuller*, 166 N.C. App. 548, 554, 603 S.E.2d 569, 574 (2004). While assessing a defendant's motion to dismiss for insufficiency of the evidence, "[t]he trial court's function is to test whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. The evidence is to be considered in the light most favorable to the State." *Id.* (internal citations and quotation marks omitted). "[T]he State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). This court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

First degree felony murder is a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen Stat. § 14-17(a) (2013). To find a defendant guilty of larceny, the State must prove that the defendant "(1) took the property of another; (2) carried it away; (3) without the owner's consent, and (4) with the intent to deprive the owner of the property permanently." *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983); *See* N.C. Gen. Stat. § 14-72 (2013). To convict a defendant of felonious larceny, the State must prove an additional element demonstrating that the value of the stolen property is more than $1,000.00. N.C.G.S. § 14-72(a).

First, we address defendant's assertion that the State failed to demonstrate that the beer bottle found at the crime scene was used as a "deadly weapon" within the meaning of N.C. Gen. Stat. § 14-17. Defendant argues that evidence that the bottle "could" have caused Dixon's injuries amounted to speculation or conjecture and was not substantial. Defendant's arguments are without merit.

"A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great

bodily harm." *State v. Flaugher*, 214 N.C. App. 370, 387, 713 S.E.2d 576, 589 (2011). There is no "mechanical definition" for "[t]he distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances[.]" *State v. Torain*, 316 N.C. 111, 121, 340 S.E.2d 465, 471 (1986). "Only where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." *Flaugher*, 214 N.C. at 387, 713 S.E.2d at 589 (citation and quotation marks omitted).

In the present case, Zachary Kallenbach, a forensic scientist at the North Carolina State Crime Lab, testified that defendant's DNA profile matched the DNA obtained from the top of a broken bottle found at the scene of the crime. Jonathan Privette, a forensic pathologist who performed the autopsy on Dixon's body, testified that Dixon died as a result of blunt force injuries to his head. Dixon suffered semicircular lacerations, which are tears to the tissue or skin caused by a blunt object striking the surface of the skin, on his skull and head. Dixon also suffered from a subdural hemorrhage, as well as swelling of the brain. The following exchange occurred between the State and Privette:

> Q. Injuries that you noted and showed the jury of the lacerations around the top of Mr. Dixon's skull, were those consistent with the injuries that could have been caused by a bottle breaking – or, a broken bottle striking the back of the head of Mr. Dixon?
>
> A. A bottle could cause those injuries.

Our Courts have established that "a substantial evidence inquiry examines the sufficiency of the evidence presented *but not its weight*, which is a matter for the jury." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (emphasis in original). Therefore, the weight of Privette's testimony and whether the bottle was likely to produce death or great bodily harm was a question for the jury. Taking the evidence in the light most favorable to the State, we hold that the State presented sufficient evidence that the broken beer bottle found at the scene of the crime constituted a deadly weapon.

Next, defendant argues that the State failed to provide sufficient evidence that defendant "used" the broken bottle during the commission of the felonious larceny. Defendant concedes that the State does not need to prove that the deadly weapon was used to effectuate the underlying felony, but argues that the State "must prove, at a minimum, that the

accused was in possession of a deadly weapon at the time the felony was committed."

N.C. Gen. Stat. § 14-17 (2013) provides that the murder is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon* shall be deemed murder in the first degree[.]" (emphasis added). In order to satisfy the "use" language of the felony murder statute, the defendant must either possess the deadly weapon in the commission of the underlying predicate felony or use that weapon to effectuate the felonious act. *See State v. Fields*, 315 N.C. 191, 199, 337 S.E.2d 518, 523 (1985) (holding that mere possession of a deadly weapon is sufficient to constitute "use" of that weapon "even if the weapon is not *physically* used to actually commit the felony").

Defendant relies primarily on *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), for his contention. In *Pakulski*, the unarmed defendants broke into a doctor's office with the intent to commit robbery. *Id.* at 566, 356 S.E.2d at 322. After being confronted by a security guard, one of the defendants stole the security guard's gun, which he then used to shoot and kill the security guard. *Id.* After killing the victim, the defendants proceeded to rob both the doctor's office and the victim, taking money, keys and other belongings from the deceased. *Id.* In *Pakulski*, the North Carolina Supreme Court held that while there was sufficient evidence to warrant an instruction allowing the jury to find that murder was committed in the course of an armed robbery, there was insufficient evidence presented that felonious breaking and entering could serve as the underlying felony for a felony murder charge based on the fact that the State "failed to prove possession of a deadly weapon at the time of the felonious breaking or entering." *Id.* at 573, 356 S.E.2d at 326.

In *Pakulski*, the State conceded that defendants did not use a deadly weapon to accomplish the breaking and entering of the doctor's office and there was no evidence that the defendants possessed a deadly weapon at the time of breaking and entering. *Id.* However, in the case *sub judice*, the evidence when viewed in the light most favorable to the State, tends to show that incapacitating Dixon with the deadly weapon – the broken bottle – was a prerequisite to the larceny of Dixon's vehicle. During trial, the State presented evidence of Dixon's blood found on a broken piece of glass found inside the apartment and splattered across a wall beside Dixon's dead body. The State presented evidence of defendant's DNA found on the neck of the bottle and an autopsy of the victim showing circular lacerations on Dixon's skull. During trial, Privette testified that

a glass bottle could have caused the lacerations found on Dixon's head and skull. In his own testimony, defendant admitted to both possessing the glass bottle while inside Dixon's apartment and also driving away with Dixon's vehicle. Based on the foregoing evidence, a jury could reasonably infer that the bottle was used to incapacitate the victim, which facilitated defendant's larceny of Dixon's vehicle. It would be a reasonable inference from the evidence in this case that defendant "used" the glass bottle in the same manner and for the same purpose as the defendants in *Pakulski* used the security guard's gun to facilitate the taking of the victim's property and commission of armed robbery.

Lastly, defendant contends that the State failed to present sufficient evidence that the killing was committed "in the perpetration" of the larceny. Defendant contends that there was only a speculation that the theft of Dixon's vehicle and Dixon's murder occurred during a single transaction. We disagree.

"A killing is committed in the perpetration or attempted perpetration for the purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death so that the homicide is part of [a] series of incidents which form one continuous transaction." *State v. Carroll*, 356 N.C. 526, 534, 573 S.E.2d 899, 905 (2002). Whether defendant's intent to steal Dixon's car was formulated before or after the killing is inconsequential, so long as the sequence of events constituted a single transaction. *See Fields*, 315 N.C. at 203, 337 S.E.2d at 525 ("[I]t makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction."); *See also State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992) ("Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing.") (internal citations omitted).

Here, defendant relies primarily on *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). In *Powell*, the defendant killed the victim during the perpetration of first degree rape and subsequently stole the victim's television and car. *Id.* at 96-97, 261 S.E.2d 116. The *Powell* Court upheld the defendant's conviction of first degree felony murder on the basis of first degree rape. However, the *Powell* Court found that the State was unable to establish a necessary element of robbery with a dangerous weapon – "that the defendant took the objects from the victim's presence by use of a dangerous weapon" – because the victim had already died before the

defendant took the objects. *Id.* at 102, 261 S.E.2d at 119. As a result, the Court reversed the trial court's denial of the motion to dismiss the charge of robbery with a dangerous weapon. *Id.*

As the State points out, the victim's presence, while required under the State's armed robbery statute pursuant to N.C. Gen. Stat. § 14-87, is not an element of larceny. In *Powell*, the State failed to provide sufficient evidence of the victim's presence during the felonious robbery, making it inoperative as the underlying predicate felony. Because presence of the victim is not required under the larceny statute, the holding in *Powell* with respect to the victim's presence is irrelevant to the present case. In so much as *Powell* is relevant to the case before us, however, it weighs against defendant's argument. The *Powell* Court indicated that the evidence in that case tended to show that the defendant was guilty of larceny, rather than robbery, because the former does not require the presence of the victim. *See Powell*, 299 N.C. at 102, 261 S.E.2d at 119 (stating that "while possession by defendant of the television and automobile belonging to [the victim] gave the inference that defendant took them, and therefore committed the crime of *larceny*, there is no substantial evidence giving rise to the reasonable inference that the defendant took the objects from the victim's presence by use of a dangerous weapon").

Rather, the circumstances of the present case is similar to those found in *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333 (1976), *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). In *Bush*, the defendant stole a car and crashed it into a ditch. Two people offered to obtain help for the defendant but he refused their offers. *Id.* at 173, 221 S.E.2d at 342. The defendant did not attempt to find a telephone, nor did he attempt to use an outside pay telephone that he passed. *Id.* Soon thereafter, the defendant entered into a nearby house. Once inside the house, he killed the occupant and stole the victim's car keys from his pants pocket. *Id.* at 163-64, 221 S.E.2d at 335. As the defendant prepared to leave in the victim's car, the victim's wife arrived at the house. The defendant followed her into the house, took money from her, cut the telephone line, and tied her into a chair. The defendant also took a rifle and some ammunition before he drove away in the victim's vehicle. *Id.* at 164, 221 S.E.2d at 336. On appeal, the defendant argued that the trial court erred by submitting the charge of first degree felony murder because the defendant did not intend to commit robbery until *after* he had killed the deceased victim. *Id.* at 173, 221 S.E.2d at 342. The *Bush* Court reviewed the evidence in the light most favorable to the State and concluded that defendant's actions were guided and controlled by an "intent to steal and rob" and that the defendant killed the victim while "in the perpetration" of a robbery. *Id.* at 174, 221 S.E.2d at 342.

Here, the evidence pertinent to this issue, viewed in the light most favorable to the State, establishes that a jury could reasonably infer that Dixon's murder and larceny of Dixon's vehicle comprised a series of incidents, forming one continuous transaction. When defendant first encountered Dixon, he did not have a car and rode with Dixon to his apartment. Within a 24 hour period, defendant killed Dixon. Thereafter, defendant drove off with Dixon's vehicle and did not return it because he needed to leave Fayetteville to avoid an outstanding warrant for his arrest. Samuel testified that during August and September 2010, defendant had access to a vehicle matching the description of Dixon's vehicle. Samuel further testified that defendant sought alternate tags and registration for the vehicle. Contrary to defendant's position that the State failed to prove that there was no break in the chain of events between the murder and larceny, defendant's actions from the day he met Dixon to at least several weeks after Dixon's murder demonstrate that they were guided and controlled by an intent to deprive Dixon of his vehicle permanently. We hold that the evidence was sufficient to permit a jury to find that defendant murdered Dixon in the perpetration of felony larceny. Accordingly, the trial court did not err by denying defendant's motion to dismiss the first degree felony murder charge and instructing the jury on first degree felony murder.

B. Closing Arguments

[2] In his next argument on appeal, defendant asserts that the prosecutor's closing arguments were grossly improper and that the trial court erred by failing to intervene. Defendant did not object during closing arguments. Defendant now argues that it was grossly improper for the prosecutor to "ask[] the jury to believe that, because [defendant] assaulted Dwayne Anderson after being asked to leave, he must have been asked to leave by Jeremy Dixon." Defendant also challenges the prosecutor's characterization of defendant as a "cold person."

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending

> attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Storm, __ N.C. App. __, __, 743 S.E.2d 713, 718 (2013) (citation omitted). Grossly improper closing arguments may include "statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002).

During closing arguments, the prosecutor stated the following:

> According to the defendant's testimony and according to State's Exhibit 142, which you saw this morning, on July the 15th, 2010, a man named Dwayne Anderson told the defendant you've got to leave, and he got beaten with a computer or slashed with a box cutter, 20 stiches and 7 staples, as a result. Two weeks later – or two weeks and a day later, on August the 1st, 2010, Jeremy Dixon tells the defendant, okay, it's time to go; you got to leave; and, Jeremy Dixon is dead. Prompt medical care, according to the examiner, would probably have saved his life; but no, the defendant was too busy making off with his stuff. Who does something like that? One cold person.

After the prosecutor's closing argument, the trial court issued a limiting instruction to the jury, stating the following:

> Evidence has been received concerning prior criminal convictions and/or criminal acts not related to the charges the defendant is currently on trial for. You may consider this evidence for one purpose only. If, considering the nature of the crimes, you believe that this bears on the defendant's truthfulness, then you may consider it and all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe the defendant's testimony at this trial. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charges because of something the defendant may have done in the past.

It is well established that "[a] prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom." *State v. Alford*, 339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995). "On appeal, particular prosecutorial arguments are not viewed in an isolated

vacuum. [Rather, f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citations omitted).

Here, the prosecutor was arguing facts already in evidence. Defendant had testified that he fled Fayetteville based on an outstanding warrant for his arrest stemming from the 15 July 2010 assault and testified to the circumstances surrounding that event. In addition, the trial court's limiting instruction directed the jury to consider defendant's prior convictions for impeachment purposes only and that a prior conviction could not be considered as evidence of defendant's guilt in the present case. After thoughtful review of the record, and considering that the prosecutor only made this argument once, we are unable to hold that the prosecutor's reference to the 15 July 2010 incident and suggesting that defendant is a "cold person" were so grossly improper that it interfered with defendant's right to a fair trial or the sanctity of the proceedings. The trial court did not err by failing to intervene *ex mero motu*.

C. Arresting Judgment

[3] In his last argument on appeal, defendant contends that upon his conviction of first degree murder on a theory of felony murder, the trial court erred by failing to arrest judgment on the underlying felony. We agree. Accordingly, judgment is arrested on defendant's conviction of felony larceny. *See State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (stating that "when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder").

III. Conclusion

The trial court did not err by denying defendant's motion to dismiss the charge of first degree felony murder, instructing the jury on the charge of first degree felony murder, or by failing to intervene *ex mero motu* during the prosecutor's closing arguments. However, we arrest judgment on defendant's felony larceny conviction.

NO ERROR AS TO THE CONVICTION OF FIRST DEGREE MURDER; JUDGMENT ARRESTED AS TO THE CONVICTION OF FELONY LARCENY.

Judges STROUD and INMAN concur.

STATE v. NKIAM

[243 N.C. App. 777 (2015)]

STATE OF NORTH CAROLINA
v.
ARCHIMEDE N. NKIAM, DEFENDANT

No. COA14-1164

Filed 3 November 2015

Constitutional Law—effective assistance of counsel—guilty plea—deportation consequences

A green card holder and permanent resident of the U.S. received ineffective assistance of counsel in entering a guilty plea to aiding and abetting common law robbery and conspiracy to commit common law robbery where his counsel informed him only that his plea could (not would) result in deportation. When deportation is unclear or uncertain, counsel need only advise the client of the risk, but that is not sufficient when the deportation consequences of defendant's guilty plea to aggravated felonies are truly clear. Moreover, defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice, taking into account defendant's fear of deportation, and the trial court's denial of defendant's Motion for Appropriate Relief was reversed for a determination of whether defendant had proven prejudice.

Appeal by defendant from order entered 26 November 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 4 March 2015.

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

Robert H. Hale, Jr. & Associates, Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

GEER, Judge.

Defendant Archimede N. Nkiam, an alien who had obtained permanent legal resident status in the United States, appeals from an order denying his motion for appropriate relief ("MAR") that, asserted a claim of ineffective assistance of counsel ("IAC") with respect to his guilty plea to two crimes that led to the initiation of deportation proceedings. On appeal, defendant argues that the trial court should have granted his MAR based on *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284, 130

S. Ct. 1473 (2010), which established that incorrect advice regarding the immigration consequences of a guilty plea may constitute IAC. We hold that the advice provided by defendant's counsel in connection with his plea did not comply with *Padilla*. Because the trial court did not specifically address the prejudice prong of defendant's IAC claim, we reverse the trial court's order denying defendant's MAR and remand for a determination whether defendant was prejudiced by the IAC and such further proceedings as are necessary.

Facts

Defendant was born on 5 January 1990 in the Democratic Republic of Congo ("DRC"). Defendant moved to the United States and settled in Raleigh with his family when he was about 11 years old. Defendant was admitted for an indefinite period as a returning asylee, and he later became a permanent resident of the United States after obtaining a green card.

On 24 February 2012, defendant was arrested in connection with an armed robbery of Jocqui Brown. On 16 April 2012, defendant was charged with having used a knife or pistol to commit armed robbery of Mr. Brown's personal property having a value of $50.00, including a cell phone and a ball cap. Defendant was also charged with conspiring with Terrence Mitchell and Leslie Martine to rob Mr. Brown. Attorney Deonte Thomas, a Wake County public defender, was assigned to represent defendant on the charges, and defendant met with Mr. Thomas several times about his case.

At a hearing on 7 January 2013, defendant appeared in Wake County Superior Court before Judge G. Wayne Abernathy to accept a plea offer that allowed him to plead guilty to aiding and abetting common law robbery, a Class G felony, and conspiracy to commit common law robbery, a Class H felony. After conducting a colloquy with defendant, Judge Abernathy accepted defendant's plea and sentenced him to two consecutive suspended sentences. For the aiding and abetting charge, defendant received a sentence of 13 to 25 months imprisonment, which was suspended and defendant was placed on 24 months of supervised probation. For the conspiracy charge, defendant was placed on an additional 24 months of supervised probation after suspension of a sentence of six to 17 months imprisonment.

Following defendant's guilty plea, the federal government initiated deportation proceedings against defendant. In January 2013, defendant was detained by immigration officials and transported to an immigration holding facility in Atlanta.

On 3 April 2013, defendant filed an MAR asserting IAC that the trial court denied without a hearing on 1 May 2013. This Court granted defendant's petition for writ of certiorari, reversed the trial court's order, and remanded for an evidentiary hearing. On 15 November 2013, the trial court held an evidentiary hearing at which Mr. Thomas, defendant, defendant's father, and an immigration law expert, Hans Linnartz, testified. Following the hearing, the trial court entered an order making the following pertinent findings of fact.

The trial court found that, following his arrest, defendant received "at a minimum" the following information regarding the immigration consequences of his guilty plea:

a. Defendant was informed by his attorney prior to accepting the plea that there was at least a possibility it could result in his deportation from the United States;

b. Defendant reviewed and answered question #8 on the Transcript of Plea form with his attorney, indicating that he was a permanent U.S. resident born in Congo, and that he understood his plea of guilty could therefore result in deportation from the country;

c. Judge Abernathy informed Defendant that his guilty plea "would make him subject to deportation," and his attorney responded by confirming that it could result in his deportation.

d. Defendant's attorney stated during the colloquy that he hoped the Defendant would not actually be deported, but also stated "we told him we can't do anything with that."

e. Judge Abernathy directly cautioned the Defendant that: i) his guilty plea could result in deportation; ii) the judge had no control over that in state court; and, iii) he could not make Defendant any promises about what would happen with his potential deportation.

f. During the colloquy, Defendant was asked three different times whether he understood that his plea could have immigration consequences, and each time the Defendant answered that he understood.

The trial court then further found that defendant testified that if he had "been advised of the high likelihood that he would be deported as a result of his negotiated plea, he would not have accepted it." However, the trial court also found that "[i]n reviewing the overall reasonableness of Defendant's decision to accept the original plea agreement," there was a "sound factual basis for th[e] plea," including (1) anticipated testimony from the victim, Mr. Brown, identifying defendant, Mr. Mitchell, and Mr. Martine as being involved in the robbery, as well as their car, the weapons used, and the stolen property found in defendant's and his accomplices' possession; (2) evidence that officers apprehended defendant and the other two men 30 minutes after Mr. Brown reported the crime; and (3) Mr. Mitchell's agreement in exchange for a plea to testify that defendant was driving when the robbery was committed although Mr. Mitchell denied any weapons were used.

The trial court found that had defendant proceeded to trial on the robbery with a dangerous weapon charge, he could have been sentenced to 51 to 74 months in prison and would be subject to the same immigration consequences he now faces. On the other hand, the trial court acknowledged that defendant and his father both testified as to their fears of political and ethnic persecution if defendant were to return to DRC.

The trial court then determined that, given its review of defendant's testimony, the relevant immigration statutes, and Mr. Linnartz' testimony,

> a. Defendant's conviction constituted an "aggravated felony" under 8 USC § 1101, since it carried a potential prison sentence of at least twelve months.
>
> b. Defendant therefore became "removable" and subject to deportation by accepting the plea, pursuant to 8 USC § 1227, and he is not eligible for Asylum or Cancellation of Removal relief. 8 USC § 1229b; 8 USC § 1158.
>
> c. However, several other avenues of relief from deportation were (and in some cases still are) possible for Defendant, such as:
>
> i. Withholding of Removal (8 USC § 1231);
>
> ii. Appeal of a denial of Withholding to the Immigration Board of Appeals or the 11th Circuit Court of Appeals (8 CFE § 1003; 8 USC § 1252);

iii. Convention Against Torture ("CAT") Relief (8 CFR § 208.16);

iv. Stay of Removal on discretionary grounds (8 CFR § 241.6).

Although these avenues were extremely difficult to achieve, according to Mr. Linnartz, defendant and his father had testified to the threat of political persecution in the Congo, and the trial court found defendant "therefore had a reasonable basis for asserting such a claim for relief."

Based on these findings of fact, the trial court concluded that for trial counsel to satisfy his responsibility to advise his client regarding the immigration consequences of a plea, *Padilla*'s "final holding" was that counsel need only " 'inform her client whether his plea carries a **risk** of deportation.' " (Quoting *Padilla*, 559 U.S. at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486). The trial court further concluded that "Defendant's assertion that he should have been advised he 'would' be deported rather than 'could' be deported is asking for a higher standard than the United States Supreme Court has set."

The trial court then distinguished *Padilla* on the grounds that counsel for the defendant in *Padilla* "incorrectly 'provided him with false assurance that his conviction would not result in his deportation[,]' " (quoting *Padilla*, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483), whereas in this case, "Defendant was correctly advised that he could be deported, and that advice was confirmed on multiple occasions throughout the colloquy." Further, the trial court noted that *Padilla* recognized that "when the law is not 'succinct and straightforward,' the defendant's attorney 'need do no more than advise a noncitizen client that pending criminal charges may carry a risk of immigration consequences.' " (Quoting *Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483). He concluded that the law was not clear because "Defendant was still eligible for various forms of relief from deportation[.]" Therefore, the standard set out in *Padilla* "was satisfied in the present case" when defendant's attorney advised defendant that he " 'could' be deported." The trial court consequently denied defendant's MAR. Defendant timely appealed to this Court.

Discussion

Defendant's sole argument on appeal is that the trial court erred in denying his MAR because the trial court misapplied the standard for determining IAC under *Padilla*. This Court has explained,

> "When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) . . . . However, "[i]f the issues raised by Defendant's challenge to [the trial court's] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *State v. Jackson*, [220] N.C. App. [1], [8], 727 S.E.2d 322, 329 (2012)[.]

State v. Marino, ___ N.C. App. ___, ___, 747 S.E.2d 633, 640 (2013), *app. dismissed and disc. review denied*, 367 N.C. 500, 757 S.E.2d 907, *cert. denied*, __ U.S. __, 188 L. Ed. 2d 914, 134 S. Ct. 1900 (2014).

To prevail on an IAC claim,

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

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

This case is the first in which our appellate courts have been called upon to interpret and apply *Padilla*'s holding. In *Padilla*, 559 U.S. at 359, 176 L. Ed. 2d at 289-90, 130 S. Ct. at 1477, the defendant, who was not a United States citizen, pled guilty to transporting a large amount of marijuana, and, as a result, he was deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (2014). 8 U.S.C. § 1227(a)(2)(B)(i) provides that any alien "convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of

marijuana, is deportable" if the offense is committed after entry into the United States.

After discovering that his pleas made him deportable, the defendant filed a postconviction IAC proceeding in Kentucky state court seeking to withdraw his guilty pleas. *Padilla*, 559 U.S. at 359, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478. In support of his IAC claim, the defendant alleged that his plea counsel failed to advise him of the immigration consequences of his plea and, further, told him that he did not have to worry about his immigration status since he had lived in the United States for such a long period of time. *Id.* The defendant alleged that he relied on his counsel's erroneous advice when pleading guilty and that he would have insisted on going to trial had he received correct advice from his attorney. *Id.*

After the defendant was denied relief in the Kentucky Supreme Court, the United States Supreme Court granted certiorari to address whether, under the Sixth Amendment right to effective assistance of counsel, defense counsel had "an obligation to advise [a client] that [an] offense to which he was pleading guilty *would result in his removal from this country*." *Id.* at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478 (emphasis added). In describing the context of its opinion, the *Padilla* majority noted that "[w]hile once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation . . . deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes." *Id.* (internal citation omitted). Consequently, "[u]nder contemporary law, if a noncitizen has committed a removable offense . . . , his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General [under 8 U.S.C. § 1229b (2002)] to cancel removal[.]" *Id.* at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480.

The *Padilla* majority acknowledged that, given the change in deportation law, " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence[,]' " and "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 367, 368, 176 L. Ed. 2d at 294, 295, 130 S. Ct. at 1482, 1483 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322, 150 L. Ed. 2d 347, 376, 121 S. Ct. 2271, 2291 (2001)).

The *Padilla* majority, therefore, held that "counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation

on families living lawfully in this country demand no less." *Id.* at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486. In rejecting the argument that the duty to provide correct advice only applies when an attorney chooses to advise her client on immigration consequences, the majority observed: "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.' " *Id.* at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484 (quoting *Hill v. Lockhart*, 474 U.S. 52, 62, 88 L. Ed. 2d 203, 212, 106 S. Ct. 366, 372 (1985) (White, J., concurring in judgment)).

Indeed, the majority noted that "were a defendant's lawyer to know that a particular offense would result in the client's deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client's home country, any decent attorney would inform the client of the consequences of his plea. We think the same result should follow when the stakes are not life and death but merely 'banishment or exile[.]' " *Id.* at 370 n.11, 176 L. Ed. 2d at 297 n.11, 130 S. Ct. at 1484 n.11 (internal citation omitted) (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 391, 92 L. Ed. 2d 17, 19, 68 S. Ct. 10, 12 (1947)).

The *Padilla* majority recognized the tension between the harshness of deportation and the fact that "[i]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges . . . may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* at 369, 176 L. Ed. 2d at 295-96, 130 S. Ct. at 1483.

Given this tension, the majority set out the following Sixth Amendment duty that an attorney owes to a noncitizen defendant:

> The duty of the private practitioner in [unclear or uncertain] cases is . . . limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO [in his concurring opinion]), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.*

Id., 176 L. Ed. 2d at 296, 130 S. Ct. at 1483 (emphasis added) (internal footnote omitted).

In *Padilla*, whether the defendant was subject to mandatory deportation was "truly clear," and his appeal was "not a hard case in which to find deficiency[.]" *Id.* at 368, 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483. The terms of the relevant immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), "[were] succinct, clear, and explicit in defining the removal consequence for [the defendant's] conviction. . . . [The defendant's] counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. . . . The consequences of [the defendant's] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Padilla*, 559 U.S. at 368-69, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483.

The *Padilla* majority, therefore, agreed with the defendant that, in his case, "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Id.* at 360, 176 L. Ed. 2d at 290, 130 S. Ct. at 1478. The Supreme Court, however, remanded the case for the Kentucky courts to determine whether the defendant was prejudiced by his trial counsel's incorrect advice. *Id.* at 374-75, 176 L. Ed. 2d at 299, 130 S. Ct. at 1487.

In this case, the State asserts that *Padilla* still requires no more than that "counsel must inform her client whether his plea carries a *risk* of deportation." *Id.* at 374, 176 L. Ed. 2d at 299, 130 S. Ct. at 1486 (emphasis added). However, a complete reading of the *Padilla* majority opinion indicates that the quotation the State relies upon represents a defense attorney's *minimum* duty to the client. The Supreme Court established a bifurcated duty: when the consequence of deportation is unclear or uncertain, counsel need only advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms. *Id.* at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483. To read *Padilla* otherwise would disregard the majority opinion's emphasis on counsel's duty, when "the deportation consequence is truly clear," to give "correct advice." *Id.* The majority opinion recognized that "[i]t is quintessentially the duty of counsel to provide her client with *available advice* about an issue like deportation[.]" *Id.* at 371, 176 L. Ed. 2d at 297, 130 S. Ct. at 1484 (emphasis added).

Moreover, Justice Alito's opinion concurring in the result confirms our interpretation of the majority opinion. Justice Alito warned, "the Court's opinion would not just require defense counsel to warn the

client of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be." *Id.* at 377, 176 L. Ed. 2d at 301, 130 S. Ct. at 1488. In Justice Alito's view, the majority's approach was "problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex." *Id.* Therefore, Justice Alito would have held, "an alien defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject." *Id.* at 388, 176 L. Ed. 2d at 307, 130 S. Ct. at 1494.

We hold that *Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to advise the client only that there is a risk of deportation. The State, however, alternatively contends that *Padilla*'s holding should be limited to the facts of that case and, therefore, apply only when a noncitizen defendant pleads guilty to a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i), involving crimes relating to controlled substances. The State further argues that *Padilla*'s holding should never apply to convictions for "aggravated felon[ies]," identified as deportable offenses under 8 U.S.C. § 1227(a)(2)(A)(iii), because the deportation consequences for an aggravated felony, as defined in 8 U.S.C. § 1101(a)(43) (2014), can never be "truly clear."

In support of its argument that deportation can never be a truly clear consequence when a defendant pleads guilty to an aggravated offense, the State cites no authority other than Justice Alito's opinion concurring in the result, which noted that whether an alien is convicted of an aggravated felony is not always easy to determine. *See Padilla*, 559 U.S. at 378, 176 L. Ed. 2d at 302, 130 S. Ct. at 1489 ("Defense counsel who consults a guidebook on whether a particular crime is an 'aggravated felony' will often find that the answer is not 'easily ascertained.' "). However, nothing in the majority opinion limits its holding to crimes relating to controlled substances or suggests that the deportation consequence of convictions under other subsections of 8 U.S.C. § 1227 cannot also be truly clear. Instead, the majority agreed only that immigration law is not succinct and straightforward "in *many of the scenarios* posited by Justice ALITO[.]" *Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483 (emphasis added).

However, numerous other courts considering guilty pleas to aggravated felonies have concluded that the immigration consequences of such pleas can be truly clear. *See*, *e.g.*, *United States v. Bonilla*, 637

F.3d 980, 984 (9th Cir. 2011) (holding, with respect to defendant who pled guilty to aggravated felony, that "[a] criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty"); *Hernandez v. State*, 124 So. 3d 757, 762 (Fla. 2012) (per curiam) (holding as to guilty plea to aggravated felony that "counsel was deficient under *Padilla* for failing to advise [the defendant] that his plea subjected him to presumptively mandatory deportation"); *Encarnacion v. State*, 295 Ga. 660, 663, 763 S.E.2d 463, 466 (2014) (holding with respect to guilty plea to aggravated felony that "[i]t is not enough to say 'maybe' when the correct advice is 'almost certainly will' " lead to deportation); *Chacon v. State*, 409 S.W.3d 529, 537 (Mo. Ct. App. 2013) (holding with respect to aggravated felony that "when the deportation consequence is clear, as it was in *Padilla* and as it is here, defense counsel has an equally clear duty to give correct advice"); *State v. Kostyuchenko*, 8 N.E.3d 353, 357 (Ohio Ct. App. 2014) (per curiam) (holding as to aggravated felony plea that counsel "had a duty under *Padilla* to ascertain from the immigration statutes, and to accurately advise him, that his conviction mandated his deportation"); *State v. Sandoval*, 171 Wash. 2d 163, 172, 249 P.3d 1015, 1020 (2011) (en banc) (holding that defense counsel violated *Padilla* in connection with aggravated felony plea).

We hold that *Padilla* is not limited to its facts and that the deportation consequences resulting from a guilty plea to an aggravated felony may, depending on the particular offense, be truly clear within the meaning of *Padilla*. Defendant asserts that, in this case, (1) the offenses of aiding and abetting common law robbery and conspiracy to commit common law robbery were aggravated felonies, and (2) the deportation consequences of defendant's guilty plea were truly clear. Therefore, according to defendant, mere advice that his guilty plea gave rise to a risk of deportation was not adequate under *Padilla*.

The State does not seriously dispute that defendant's offenses amount to aggravated felonies. 8 U.S.C. § 1101(a)(43)(G) defines "aggravated felony" to include "a theft offense . . . or burglary offense for which the term of imprisonment [is] at least one year[.]" Additionally, 8 U.S.C. § 1101(a)(43)(U) provides that "an attempt or conspiracy to commit an offense described in this paragraph" is an "aggravated felony." The offense of aiding and abetting common law robbery is plainly one of theft under 8 U.S.C. § 1101(a)(43)(G), and the conspiracy to commit common law robbery under 8 U.S.C. § 1101(a)(43)(U) is plainly a conspiracy to commit an offense under 8 U.S.C. § 1101(a)(43)(G). *See* John Rubin and Sejal Zota, *Immigration Consequences of a Criminal*

Conviction in North Carolina 100 (2008) (stating that common law robbery is aggravated felony because it is theft offense under 8 U.S.C. § 1101(a)(43)(G)). Defendant was also sentenced for a term of more than a year; the fact that the court suspended his sentences is immaterial. *See* 8 U.S.C. § 1101(a)(48)(B) ("Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

Moreover, the relevant provisions of the United States Code plainly indicate that defendant's deportation upon entering his guilty plea was "presumptively mandatory." *See Padilla*, 559 U.S. at 369, 176 L. Ed. 2d at 295, 296, 130 S. Ct. at 1483 (finding deportation consequences "truly clear" when "[t]he consequences of *Padilla*'s plea could easily be determined from reading the removal statute").

When other courts have found deportation consequences unclear for particular guilty pleas, they have pointed to the need for trial counsel to look beyond the plain language of the United States Code in order to reach a conclusion regarding the deportation consequences for the defendant. *See*, *e.g.*, *United States v. Chan Ho Shin*, 891 F. Supp. 2d 849, 856 (N.D. Ohio 2012) ("Given the divergent views among the few circuits that had addressed the issue, and the silence of the others, this Court cannot hold that the relevant immigration statute was . . . 'truly clear' at the time of [the defendant's] plea."); *State v. Ortiz-Mondragon*, 358 Wis. 2d 423, 433, 856 N.W.2d 339, 344 (Wis. App. 2014) ("If an attorney must search federal court and unfamiliar administrative board decisions from around the country to identify a category of elements that together constitute crimes of moral turpitude, and then determine whether a charged crime fits that category, then the law is not 'succinct, clear, and explicit.' " (quoting *Padilla*, 559 U.S. at 368, 176 L. Ed. 2d at 295, 130 S. Ct. at 1483)), *aff'd*, 364 Wis. 2d 1, 866 N.W.2d 717 (Wis. 2015). In this case, however, there was no need for counsel to do anything but read the statute.

Rather than argue that it was unclear whether defendant was subject to presumptive mandatory deportation, the State contends that the deportation consequences for defendant were not truly clear because of the availability of other "various forms of relief from deportation," as referenced in the trial court's order. These forms of relief include Withholding of Removal, 8 U.S.C. § 1231(b)(3) (2014) (prohibiting government from deporting alien if alien's life or freedom would be threatened because of race, religion, nationality, membership in particular social group, or political opinion; denial may be appealed); Convention

Against Torture, 8 C.F.R. §§ 208.16-18 (2014) (deferring deportation under the United States Convention Against Torture if alien can demonstrate he would be tortured if returned home); Stay of Removal, 8 C.F.R. § 241.6 (2014) (allowing application to local immigration director for discretionary stay of removal).

According to the uncontradicted testimony of defendant's immigration law expert Mr. Linnartz, these avenues of relief from deportation were "in the realm of mathematical possibility," but such relief was a "remote possibility" at the time defendant entered his guilty plea. With respect to Withholding of Removal and the Convention Against Torture, Mr. Linnartz testified that this type of relief was rarely granted, did not confer lawful legal status, and the deferral of deportation would be lifted as soon as the threat to the defendant abated. With respect to the Stay of Removal, Mr. Linnartz explained that such relief was only temporary -- such as in the event of a medical emergency -- and was almost never granted to an alien being deported due to a criminal conviction. Mr. Linnartz emphasized that (1) none of the forms of relief would eliminate the deportation order, (2) a defendant could end up spending his life in a detention facility, (3) a defendant could be deported to a third country if there was a fear of persecution, and (4) lawful status would never be conferred.

The State has cited no authority supporting its contention that the possible availability of these forms of rare relief render defendant's deportation consequences unclear. In *Padilla*, the majority opinion noted the potential availability to the defendant of an avenue of relief from a deportation order: 8 U.S.C. § 1229b, which grants the Attorney General discretionary authority to cancel an alien's removal. 559 U.S. at 363-64, 176 L. Ed. 2d at 292, 130 S. Ct. at 1480. The majority explained that a noncitizen's "removal is practically inevitable but for the possible exercise" of this discretion, but still concluded that the defendant's removal was a "presumptively mandatory" consequence and that "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[.]" *Id.* at 364, 368, 369, 176 L. Ed. 2d at 292, 295, 130 S. Ct. at 1480, 1483. In short, *Padilla* focused on whether the defendant's conviction made him deportable under 8 U.S.C. § 1227 and not on the availability of possible avenues of relief. If, as the *Padilla* Court necessarily concluded, the availability of discretionary relief under 8 U.S.C. § 1229b did not render the deportation consequences unclear, we cannot conclude that the unlikely avenues of relief that the trial court relied upon are sufficient to support a conclusion that the deportation consequences for defendant were not "truly clear."

Moreover, we believe that *Padilla*'s holding would be substantially undermined by the State's contention, if accepted, that the theoretical availability of relief that does not eliminate the deportation order and grant lawful status renders the law unclear. One or more of the avenues of relief relied upon by the trial court would theoretically be available to most defendants. We note that other courts have rejected the State's approach, and the State has cited no authority supporting it. *See Encarnacion*, 295 Ga. at 663, 763 S.E.2d at 466 (recognizing that counsel's advice of possibility of deportation for aggravated felony conviction pleas was incorrect despite fact that "some noncitizens convicted of an aggravated felony might avoid removal" because "those circumstances are exceptionally rare"); *Enyong v. State*, 369 S.W.3d 593, 600 (Tex. App. 2012) (concluding defendant's deportation consequence for pleading guilty to aggravated felony truly clear despite State's reference to internal United States Immigration and Customs Enforcement memo encouraging its employees to use prosecutorial discretion in enforcing immigration laws), *judgment vacated on other grounds*, 397 S.W.2d 208 (Tex. Crim. App. 2013) (per curiam).

Consequently, we hold that the deportation consequences of defendant's guilty plea were truly clear in this case. Trial counsel was required, therefore, under *Padilla*, "to give correct advice" and not just advise defendant that his "pending criminal charges may carry a risk of adverse immigration consequences." 559 U.S. at 369, 176 L. Ed. 2d at 296, 130 S. Ct. at 1483.

The trial court's findings establish only that defendant's trial counsel informed him that he could be deported, that the trial court had no control over deportation, that his plea could have immigration consequences, and that his attorney hoped that defendant would not actually be deported. While the State points to the attorney's testimony that he told defendant "you're not a legal citizen[and] it's going to result in deportation," Mr. Thomas clarified, when asked about the accuracy of that statement, that he actually advised defendant that he "could possibly be subject to deportation." Indeed, Mr. Thomas gave defendant a false assurance when he told Judge Abernathy: "We told [defendant] we can't do anything with [deportation], and I'm hoping that my past experience doing this kind of things [sic] – the Congo is not one of the places they're apt to send you back to."[1]

1. Mr. Thomas also testified that he told defendant he did not practice immigration law and that he offered to put defendant in touch with an immigration attorney if defendant ran into any trouble *after* pleading guilty. This advice would have erroneously suggested that defendant still could have done something to avoid deportation after pleading guilty.

The trial court's findings and the evidence, therefore, show that defendant was only advised of the risk of deportation. This advice was not sufficient under *Padilla* because it did not adequately advise defendant of the likelihood of deportation. *See, e.g.*, *Hernandez v. State*, 61 So. 3d 1144, 1151 (Fla. Dist. Ct. App. 2011) ("It is now the law in this and every other state that constitutionally competent counsel must advise a noncitizen/defendant that certain pleas and judgments *will*, not 'may,' subject the defendant to deportation."), *aff'd per curiam*, 124 So. 3d 757 (Fla. 2012); *Encarnacion*, 295 Ga. at 663, 763 S.E.2d at 466 ("It is not enough to say 'maybe' when the correct advice is 'almost certainly will.' " (quoting *Hernandez*, 61 So. 3d at 1151)).

We need not determine precisely what advice Mr. Thomas should have given defendant because, here, there can be no question that Mr. Thomas' advice fell short of what *Padilla* required. Defendant has, therefore, shown that he received ineffective assistance of counsel.

Turning to the question whether defendant was prejudiced by the inadequate advice, the State contends that any prejudice defendant might have suffered as a result of misadvice by Mr. Thomas was cured by the plea colloquy conducted by Judge Abernathy prior to defendant's entering his plea. In *Missouri v. Frye*, ___ U.S. ___, ___, 182 L. Ed. 2d 379, 389, 132 S. Ct. 1399, 1406-07 (2012) (emphasis added), the Supreme Court explained:

> At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands . . . the advantages and disadvantages of accepting [the plea deal.] . . . [*N*]*evertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered.* Still, the State, and the trial court itself, have . . . a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, *if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.*

At the plea hearing in this case, Judge Abernathy announced that defendant's "guilty plea 'would make him subject to deportation[.]' " However, this isolated statement, when read in the context of the entire colloquy, cannot reasonably be read as advising defendant that his plea would certainly result in deportation. Immediately following this statement, Mr. Thomas interjected that defendant's plea "possibly could"

make him subject to deportation. Then, the trial court asked defendant whether he understood that "there's a possibility, because you're not a U.S. citizen, upon your plea of guilty you could be deported from this country or denied readmission[,]" to which defendant replied that he did. Thus, the advice in the colloquy, which merely advised defendant of the risk of deportation, was incorrect and inadequate and did not cure any possible prejudice. *See Enyong*, 369 S.W.3d at 603 ("[I]t would seem illogical to . . . require effective counsel to provide specific advice regarding 'clear' or 'virtually certain' immigration consequences, but then . . . hold that a defendant is not prejudiced by counsel's failure to provide this constitutionally required advice simply when a trial court . . . provides a boilerplate warning concerning general immigration consequences. If such general admonishments precluded a finding of prejudice, the . . . holding in *Padilla* would be stripped of much of its force.").

The question remains whether defendant has adequately demonstrated prejudice. In the plea context, "[t]he . . . 'prejudice[]' requirement[] . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370. Thus, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* The Supreme Court in *Padilla* emphasized, that in applying *Hill*, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." 559 U.S. at 372, 176 L. Ed. 2d at 297, 130 S. Ct. at 1485.

In *Padilla*, upon remand, the Kentucky Court of Appeals addressed whether the defendant had been prejudiced by the incorrect advice he received from his trial counsel. *Padilla v. Commonwealth*, 381 S.W.3d 322, 328 (Ky. Ct. App. 2012) ("*Padilla II*"). In doing so, the Kentucky Court of Appeals held that a defendant need not show "that an acquittal at trial was likely." *Id.* The court in *Padilla II* explained:

> A reasonable probability [that a defendant, if advised adequately, would have decided to reject the plea offer] exists if the defendant convinces the court "that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, [559 U.S. at 372, 176 L. Ed. 2d at 297,] 130 S. Ct. at 1485. This standard of proof is "somewhat lower" than the common "preponderance of the evidence" standard. *Strickland*, 466 U.S. at 694, [80 L. Ed. 2d at 698,] 104 S. Ct. at 2068.

. . . .

> The [trial] court must determine whether the defendant's rejection of the plea offer would have been a rational choice, even if not the best choice. *Necessarily, the court must consider the importance a particular defendant places upon preserving his or her right to remain in the country.* A noncitizen defendant with significant ties to this country may rationally be willing to take the risk of a trial while the same decision by one who has resided in the United States for a relatively brief period of time or has no family or employment in this country may be irrational.

Id. at 328-29 (emphasis added) (internal footnote omitted).

Other jurisdictions addressing the question of prejudice in light of *Padilla* have adopted a similar approach to that taken in *Padilla II*. *See*, *e.g.*, *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015) (holding defendant alleged sufficient facts to support finding of prejudice from ineffective assistance of counsel in connection with guilty plea when defendant alleged that "he would not have pleaded guilty if a plea would have 'automatically remove[d] him from his family and from a Country he ha[s] called home all [of] his adult life' "); *United States v. Urias-Marrufo*, 744 F.3d 361, 368 (5th Cir. 2014) (finding prima facie evidence of prejudice for purposes of IAC claim when defendant swore in statement that had she known she was pleading guilty to deportable offense, she would not have pled guilty); *United States v. Orocio*, 645 F.3d 630, 643, 645 (3rd Cir. 2011) (rejecting contention that defendant must show acquittal at trial likely and finding prejudice when, "if made aware of the dire immigration consequences of the proposed guilty plea, [defendant] could have reasonably chosen to go to trial even though he faced a drug distribution charge constituting an aggravated felony"), *abrogated on other grounds by Chaidez v. United States*, ___ U.S. ___, 185 L. Ed. 2d 149, 133 S. Ct. 1103 (2013); *Bonilla*, 637 F.3d at 984 (finding district court abused its discretion when it unreasonably denied defendant's motion to withdraw his plea where "entering a plea would mean that after he served his sentence, [the defendant] would almost certainly be deported and separated from his wife and children"); *Commonwealth v. DeJesus*, 468 Mass. 174, 184, 9 N.E.3d 789, 797 (2014) ("If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen.");

State v. Tejeiro, 345 P.3d 1074, 1084 (N.M. Ct. App. 2014) ("Defendant is not required to demonstrate that he would have obtained a better result at trial than he received from his plea. He need only demonstrate a reasonable probability that he would have rejected the plea as offered had he known of its immigration consequences." (internal citation omitted)), *cert. denied*, 2015 N.M. LEXIS 128 (N.M. 2015); *Kostyuchenko*, 8 N.E.3d at 358 (finding evidence supporting prejudice where prior to plea negotiations defendant was unconcerned with deportation, yet, had defendant known plea would have resulted in deportation, defendant would have insisted on going to trial or seeking to negotiate plea that preserved eligibility for relief from deportation); *Enyong*, 369 S.W.3d at 603 (finding evidence of prejudice for noncitizen defendant where "appellant stated that he would not have pleaded guilty to the offenses if his trial counsel had advised him of the immigration consequences of his pleas"); *Sandoval*, 171 Wash. 2d at 176, 249 P.3d at 1022 (finding prejudice notwithstanding sentencing benefit of plea "[g]iven the severity of the deportation consequence"); *Ortega-Araiza v. State*, 331 P.3d 1189, 1194 (Wyo. 2014) ("It would . . . be entirely reasonable for [the defendant] to reject the plea and insist on going to trial (or seek a different plea agreement with lesser deportation consequence) as he was facing deportation whether he was convicted pursuant to a plea agreement or as a result of trial. Better to gamble on an acquittal at trial, than the assured conviction and deportation resulting from a guilty plea.").

Some courts discussing prejudice based on insufficient advice under *Padilla* have, however, focused on whether there was a likelihood of acquittal at trial. *E.g.*, *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013) (no possible prejudice where defendant faced almost certain conviction of aggravated felony at trial); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (finding no possible prejudice in light of overwhelming evidence of defendant's guilt for aggravated felony and noting that defendant cannot show prejudice on appeal "merely by telling [the Court] now that she would have gone to trial then if she had gotten different advice"); *Matos v. United States*, 907 F. Supp. 2d 378, 382 (S.D.N.Y. 2012) (holding that "[t]he overwhelming evidence of guilt forecloses any reasonable probability that [the defendant] would have proceeded to trial rather than accept the Government's [plea] offer" where defendant's insistence on appeal that he would have rejected plea bargain was deemed "self-serving"); *Mendoza v. United States*, 774 F. Supp. 2d 791, 800 (E.D. Va. 2011) (finding no possible prejudice in light of overwhelming evidence of defendant's guilt of deportable offenses and sentencing benefits defendant received from pleading guilty).

While the United States Supreme Court in *Hill* stated that "[i]n many guilty plea cases . . . the determination whether the error 'prejudiced' the defendant . . . will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial," 474 U.S. at 59, 88 L. Ed. 2d at 210, 106 S. Ct. at 370, "[t]he Supreme Court has 'never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice.' " *Padilla II*, 381 S.W.3d at 328-29 (quoting *Orocio*, 645 F.3d at 643). We believe cases focusing on the likelihood of acquittal rather than considering the importance a defendant places on avoiding deportation ignore the primary focus of *Padilla*, which was in large part the recognition that the likelihood of deportation may often be a much more important circumstance for a defendant to consider than confinement in prison for any length of time. 559 U.S. at 365, 368, 176 L. Ed. 2d at 293, 295, 130 S. Ct. at 1481, 1483. Thus, the consequence of deportation may, in certain cases, weigh more heavily in a defendant's risk-benefit calculus on whether he should proceed to trial. For this reason, *Padilla II*'s analysis is persuasive, and we hold that a defendant makes an adequate showing of prejudice by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country.

In this case, because the trial court concluded that defendant had failed to show that his attorney inadequately advised him, the court never addressed the prejudice prong of defendant's IAC claim. The trial court held that defendant's decision to accept the plea was reasonable, but did not consider whether rejection of the plea would be a reasonable choice given the immigration consequences. We hold that defendant presented sufficient evidence to support a finding that rejection of the plea offer would have been a rational choice for defendant, taking into account defendant's fear of deportation. Even if the evidence against defendant may have made conviction for a deportable offense likely at trial, the evidence would permit a finding that, had Mr. Thomas provided correct advice, it would have been a rational course of action for defendant to forego the plea offered to him for the chance of acquittal at trial or even just to delay deportation. "Moreover, had the immigration consequences of [defendant's] plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation." *Padilla II*, 381 S.W.3d at 330.[2] We therefore remand so that the trial court may address, in

2. We note that our own case law, consistent with other jurisdictions, forbids a finding of prejudice upon " '[a] mere allegation by the defendant that he would have insisted on

the first instance, whether defendant was prejudiced by his trial counsel's inadequate advice regarding the immigration consequences of his guilty plea.

Conclusion

We hold that the trial court's findings of fact establish under *Padilla* that defendant received ineffective assistance of counsel in connection with his decision whether to enter into a guilty plea. We, therefore, reverse the trial court's denial of defendant's MAR and remand for a determination whether defendant has proven the prejudice prong of his IAC claim. In the event the trial court determines that defendant has adequately shown prejudice, the trial court must set aside defendant's conviction and allow defendant to withdraw his guilty plea. *State v. Moser*, 20 Neb. App. 209, 225, 822 N.W.2d 424, 436 (2012).

REVERSED AND REMANDED.

Judges ELMORE and INMAN concur.

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going to trial[.]' " *State v. Goforth*, 130 N.C. App. 603, 605, 503 S.E.2d 676, 678 (1998) (quoting *Barker v. United States*, 7 F.3d 629, 633 (7th Cir. 1993)). The evidence here, however, far surpasses such an allegation and affirmatively establishes circumstances demonstrating that if defendant had been properly informed of the consequences of his plea, his priority would have been avoiding deportation.

THOMAS JEFFERSON CLASSICAL ACAD. CHARTER SCH. v. CLEVELAND CNTY. BD. OF EDUC.

[243 N.C. App. 797 (2015)]

THOMAS JEFFERSON CLASSICAL ACADEMY CHARTER SCHOOL, PIEDMONT COMMUNITY CHARTER SCHOOL, AND LINCOLN CHARTER SCHOOL, PLAINTIFFS
v.
CLEVELAND COUNTY BOARD OF EDUCATION, D/B/A CLEVELAND COUNTY SCHOOLS, DEFENDANT

No. COA15-464

Filed 3 November 2015

1. Schools and Education—charter schools—underfunding—unrestricted funds—tuition/fees

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "Tuition/Fees" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for CCS's general operating expenses and general K-12 population supported the trial court's findings and conclusion on this issue.

2. Schools and Education—charter schools—underfunding—unrestricted funds—indirect costs

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds labeled "indirect costs" were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds received from federal grants for indirect costs were spent in the normal operations of the school district supported the trial court's findings and conclusion on this issue.

3. Schools and Education—charter schools—underfunding—unrestricted funds—Medicaid reimbursement

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Medicaid

reimbursement funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that CCS used the funds to provide services for students with IEPs in the general K-12 population supported the trial court's findings and conclusion on this issue.

4. Schools and Education—charter schools—underfunding—unrestricted funds—E-Rate

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that E-Rate (a federal program that reimburses the school system for a percentage of what it pays for telecommunications and Internet access) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the federal government did not designate or restrict the funds for a specific purpose and that the funds were used for Internet and telecommunications services for all K-12 CCS students and staff supported the trial court's findings and conclusion on this issue.

5. Schools and Education—charter schools—underfunding—unrestricted funds—Juvenile Crime Prevention Council

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Juvenile Crime Prevention Council funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used for life skills counselors who were available to the entire K-12 population supported the trial court's findings and conclusion on this issue.

6. Schools and Education—charter schools—underfunding—unrestricted funds—Dropout Prevention Grant

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that funds designated as the

Dropout Prevention Grant were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were intended to benefit the entire K-12 population and that CCS exercised discretion over how to spend the funds supported the trial court's findings and conclusion on this issue.

7. Schools and Education—charter schools—underfunding—unrestricted funds—Reserved Officers' Training Corps

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Reserved Officers' Training Corps (ROTC) funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were used to reimburse ROTC instructors' salaries paid from CCS's current expense fund and that the federal government did not restrict the funds to a specific purpose supported the trial court's findings and conclusion on this issue.

8. Schools and Education—charter schools—underfunding—unrestricted funds—WorkForce Investment Act

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that WorkForce Investment Act funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were used to pay two employees at the Job Link Center and to pay the students who participated in the program supported the trial court's findings and conclusion on this issue.

9. Schools and Education—charter schools—underfunding—unrestricted funds—Gear Up Grant

On appeal from a judgment awarding Thomas Jefferson Classical Academy Charter School $54,527.80 based on the trial court's conclusion that Cleveland County Schools (CCS) had underfunded the School during the 2009-10 fiscal year, the Court of Appeals concluded that the trial court did not err by finding that Gear Up Grant

funds were not restricted and therefore were subject to per-pupil distribution to the charter schools. Evidence showing that the funds were not restricted and were spent on programs available to the general K-12 population of CCS supported the trial court's findings and conclusion on this issue.

Judge BRYANT concurs in part and dissents in part by separate opinion.

Appeal by defendant from judgment entered 29 January 2015 by Judge Jesse B. Caldwell, III in Cleveland County Superior Court. Heard in the Court of Appeals 8 October 2015.

Robinson Bradshaw & Hinson, P.A., by Richard A. Vinroot, Matthew F. Tilley and Amanda R. Pickens, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for defendant-appellant.

Christine T. Scheef and Allison B. Schafer, for amicus curiae North Carolina School Boards Association.

TYSON, Judge.

Defendant Cleveland County Board of Education, d/b/a Cleveland County Schools ("CCS" or "Defendant"), appeals from judgment entered in favor of Thomas Jefferson Classical Academy Charter School, Piedmont Charter School, and Lincoln Charter School (collectively, "the charter schools" or "Plaintiffs") in the amount of $54,527.80. The trial court concluded CCS had underfunded Plaintiffs during the 2009-10 fiscal year. We affirm.

I. Factual and Procedural Background

This case returns to this Court after prior remand to the trial court by a divided panel of this Court. *See Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland Cnty. Bd. Of Educ. (Thomas Jefferson II)*, __ N.C. __, 763 S.E.2d 288 (2014).

Plaintiffs commenced this action on 9 January 2012 by filing a complaint, in which they alleged CCS had underfunded the charter schools for fiscal year 2009-10. Plaintiffs asserted CCS failed to pay them the statutorily required per-pupil amount of all money contained in the local

current expense fund. Plaintiffs alleged CCS owed them approximately $102,480.00

Plaintiffs asserted CCS wrongfully transferred approximately $4.9 million from the local current expense fund into a "special revenue fund" known as Fund 8. Monies in the local current expense fund must be shared with charter schools, while monies in a special revenue fund are not required to be shared with the charter schools.

Plaintiffs sought a declaratory judgment that CCS was statutorily required to allocate the funds in accordance with N.C. Gen. Stat. § 115C-238.29H (2009), and demanded recovery in the amount of $102,480.00 and attorneys' fees. CCS timely served an answer, and denied the transfer of funds to the special revenue fund violated any relevant statutory provisions.

A non-jury trial was held on 9 October 2012. On 21 February 2013, the trial court entered a final judgment in favor of Plaintiffs and awarded the charter schools $57,836.00. Plaintiffs were also awarded attorneys' fees by separate order. CCS appealed both orders.

In an opinion issued 2 September 2014, this Court reversed the trial court's order awarding attorneys' fees to Plaintiffs. This Court held "the determination of whether funds that accrued to the local school administrative unit were 'restricted' is a conclusion of law rather than a finding of fact." *Thomas Jefferson II*, __ N.C. at __, 763 S.E.2d at 293.

This Court remanded the case to the trial court for "a revised judgment with appropriate findings of fact and conclusions of law as to the funds at issue." *Id.* at __, 763 S.E.2d at 295. This Court instructed the trial court that "[r]elevant findings of fact would concern the origin, purpose, and ultimate use of the funds, not their designation as 'restricted.' " *Id.* at __, 763 S.E.2d at 293.

The hearing after remand was held on 21 November 2014. The trial court entered a final judgment on 29 January 2015 in favor of the charter schools and awarded them $54,527.80, which represented their "per-pupil share of those moneys CCS had included in its Special Revenue Fund that were not, in fact, restricted."

Defendant gave timely notice of appeal to this Court.

II. Issue

Defendants argue the trial court erred by finding and concluding certain revenues were not restricted, and the charter schools were

therefore entitled to a *pro rata* share of those revenues pursuant to N.C. Gen. Stat. § 115C-238.29H(b) (2009).

III. Standard of Review

"When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Jackson v. Culbreth*, 199 N.C. App. 531, 537, 681 S.E.2d 813, 817 (2009) (citation and quotation marks omitted). "Evidence must support the findings, the findings must support the conclusions of law, and the conclusions of law must support the ensuing judgment." *Id.* (citation omitted).

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (citation omitted). "The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Id.*

IV. Analysis

Former N.C. Gen. Stat. § 115C-238.29H governed the allocation of funds between local school administrative units and charter schools during the 2009-10 school year, which is the relevant time frame in this appeal. N.C. Gen. Stat. § 115C-238.29H (2009). N.C. Gen. Stat. § 115C-238.29H(b) required the local school administrative unit to "transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year" for each student who attends a public charter school. N.C. Gen. Stat. § 115C-238.29H(b).

This Court held the phrase "local current expense appropriation" is "synonymous with the phrase 'local current expense fund' in the School Budget and Fiscal Control Act, N.C.G.S. § 115C-426(e)." *Francine Delany New School for Children, Inc. v. Asheville City Bd. of Educ.*, 150 N.C. App. 338, 347, 563 S.E.2d 92, 98 (2002), *disc. review denied*, 356 N.C. 670, 577 S.E.2d 117 (2003). N.C. Gen. Stat. § 115C-426(e) defines "local current expense fund" as:

> The local current expense fund shall include appropriations sufficient, when added to appropriations from the State Public School Fund, for the current operating expense of the public school system in conformity with the educational goals and policies of the State and the local board of education, within the financial resources and

> consistent with the fiscal policies of the board of county commissioners. These appropriations shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C. Gen. Stat. § 115C-426(e) (2009). *See* N.C. Const. art. IX, § 7(a) ("[A]ll moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools."); *Francine Delaney*, 150 N.C. App. at 339, 563 S.E.2d at 93.

The applicable 2009 version of N.C. Gen. Stat. § 115C-426(c) permitted the creation of "other funds . . . to account for trust funds, federal grants restricted as to use, and special programs." This Court interpreted this statutory provision in two related cases.

In *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. (Sugar Creek I)*, this Court held county appropriations specifically earmarked for two particular programs were subject to the mandatory provisions of N.C. Gen. Stat § 115C-238.29H(b). 188 N.C. App. 454, 460, 655 S.E.2d 850, 854, *disc. review denied*, __ N.C. __, 667 S.E.2d 460 (2008). This Court's decision emphasized the fact that the school board had failed to set up a "separate special fund" for these programs, and placed the appropriations in the school board's local current expense fund. *Id.* at 460-463, 655 S.E.2d at 855-56.

This holding was expanded in *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Bd. of Educ. (Sugar Creek II)*, 195 N.C. App. 348, 360-61, 673 S.E.2d 667, 676, *appeal dismissed and disc. review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009). In *Sugar Creek II*, this Court concluded several sources of revenue with either a designated purpose or for a special program were subject to the per-pupil distribution, because the funds were placed in the local current expense fund, as opposed to a separate fund. This Court reiterated its prior holding in

Sugar Creek I that "[b]ecause Defendants have held these moneys in their local current expense fund, they are required to share these moneys with Plaintiffs." *Sugar Creek II*, 195 N.C. App. at 361-62, 673 S.E.2d at 676 (citation omitted).

Based on *Sugar Creek I* and *II*, this Court held "the provisions of Chapter 115C . . . do not require that all monies provided to the local administrative unit be placed into the 'local current expense fund[.]' " *Thomas Jefferson Classical Acad. Charter Sch. v. Rutherford Cnty. Bd. of Educ. (Thomas Jefferson I)*, 215 N.C. App. 530, 543, 715 S.E.2d 625, 633 (2011), *disc. review denied and appeal dismissed*, __ N.C. __, 724 S.E.2d 531 (2012). "Rather, *Sugar Creek I* and *II* clearly indicate that it is incumbent upon the local administrative unit to place restricted funds into a separate fund." *Id.* at 544-45, 715 S.E.2d at 634. This Court further stated "[i]f the funds are left in the 'local current expense fund,' then they are to be considered in computing the per pupil amount to be allocated to the charter school." *Id.* at 545, 715 S.E.2d at 634.

While these prior cases clearly indicate local school boards are permitted to place certain restricted funds in a separate fund, so as to not require their inclusion in the charter schools' *pro rata* share, "restricted funds" were not defined until this Court's recent decision in *Thomas Jefferson II*. *Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 292 (noting "we have never defined what 'restricted funds' are or who has the authority to make that determination.").

In *Thomas Jefferson II*, this Court relied on our prior holdings in *Sugar Creek I* and *II*, and *Thomas Jefferson I*, and concluded "the local school administrative unit may deposit any 'restricted' funds into a fund separate from the current expense fund." *Id.* (citations omitted). This Court set forth the proper legal framework under which to analyze "restricted" funds:

> We further conclude that the determination of which funds may be placed in a separate fund is a question of law and not solely in the discretion of the local school board, given the mandatory language found in the budget statute [N.C. Gen. Stat. § 115C-426(e)]. . . .
>
> Because the issue of whether funds are "restricted" or not is an issue of law, we further hold that the determination of whether funds that accrued to the local school administrative unit were "restricted" is a conclusion of law rather than a finding of fact. . . . Relevant findings

> of fact would concern the origin, purpose, and ultimate use of the funds, not their designation as "restricted."

Id. at __, 763 S.E.2d at 293 (citation omitted).

This Court continued by noting " '[r]estricted' is not a term found in any of the relevant statutes," but is "the Court's shorthand for those monies that can be placed in a separate fund, i.e. those from 'trust funds, federal grants restricted as to use, and special programs' which must be accounted for separately." *Id.* (quoting N.C. Gen. Stat. § 115C-426(c)).

This Court explained in order to determine which funds were "restricted," "the question is . . . whether the funds have a limited use and specific purpose, such as to fund a special program." *Id.* (citation omitted). By contrast, "unrestricted funds are those that could be used for *all* of the K-12 population *without restriction*." *Id.* (emphasis in original). We held "[b]ased on the prior cases and the language of the applicable statutes, we define 'restricted' funds as *those funds which have been designated by the donor for some specific program or purpose, rather than for the general K-12 population of the local school system.*" *Id.* (emphasis supplied).

Defendant argues the trial court erred by finding various sources of revenue were not restricted, and concluding these funds are subject to a per-pupil distribution to the public charter schools. The following sources of revenue are specifically at issue: (1) tuition/fees; (2) indirect costs; (3) Medicaid reimbursement; (4) E-Rate; (5) Juvenile Crime Prevention Council; (6) Dropout Prevention Grant; (7) ROTC; (8) WorkForce Investment Act; and (9) Gear Up Grant. We address each one in turn.

A. Tuition/Fees

[1] Defendant argues the trial court erred by finding the funds labeled "Tuition/Fees" were not restricted, and therefore subject to per-pupil distribution to the charter schools. We disagree.

The trial court made the following finding of fact regarding the origin, purpose, and use of the tuition/fees funds:

> 15. CCS included moneys designated as "Tuition" and "Tuition/Fees" in its Special Revenue Fund during fiscal year 2009-10. This money consisted of the payment of tuition and fees CCS received from parents of students residing outside of Cleveland County. CCS receives tuition and fees to educate its students, including out-of-district

> students, and these funds are used for CCS's general operating expenses and its general K-12 educational program. The parents that pay tuition and fees to CCS place no restriction on CCS's use of those funds.

The trial court concluded as a matter of law that the money listed as "tuition" and "tuition/fees" were not restricted based on this finding of fact.

CCS argues the money listed as "tuition/fees" was restricted because the money was "paid to the Board by the Rutherford County Board of Education to provide a teacher assistant for a single, specific special education student who resided in Rutherford County but attended CCS." CCS contends this money differs from the money listed as "tuition," which was paid directly from parents. CCS asserts the trial court failed to make findings of fact with respect to the origin, purpose, and use of the "tuition/fees" funds.

David Lee ("Mr. Lee"), the chief financial officer for CCS, was asked at trial whether he had stated in his deposition that the local source money, including money for tuition/fees, was not restricted. He responded in the affirmative. Dr. Nellie Aspel ("Dr. Aspel"), the director of exceptional children for CCS, testified CCS "sign[ed] an annual contract and then we hire the teacher assistant. And then each month we invoice Rutherford County for that month's portion of that TA pay." The Individuals with Disabilities Act requires CCS to provide such services to students with disabilities in accordance with their individualized education plans ("IEPs"). *See* 20 U.S.C. § 1400, *et seq.* Regardless of whether CCS receives reimbursement for this particular student from Rutherford County, providing these services is part of CCS's general operating costs.

We have reviewed the evidence of record and the transcript, and fail to see a significant distinction between the money paid to CCS by Rutherford County Schools, and tuition paid by parents of CCS students residing in Cleveland County. Both sources of tuition funds were used for CCS's general operating expenses and its general K-12 population.

Competent evidence supports the trial court's findings of fact regarding the tuition/fees funds. These findings of fact support the trial court's conclusion of law that this money was not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

B. Indirect Costs

[2] Defendant argues the trial court erred by finding the funds labeled "indirect costs" were not restricted and subject to the statutory per-pupil distribution to the charter schools. We disagree.

The trial court made the following finding of fact with regard to indirect costs:

> 19. CCS included moneys designated as "Indirect Cost Allocated" in its Special Revenue Fund during fiscal year 2009-10. This money consisted of reimbursements from the federal government for a portion of CCS's "general overhead" expenses, which CCS received in connection with its operation of federal programs. CCS refers to these expenses as "indirect costs." As CCS acknowledges, indirect costs are not attributable to any particular program within CCS, and include various general operating expenses, such as accounting, payroll, purchasing, facilities management, and utilities. The federal government does not place any restriction on how CCS uses the reimbursements it receives for indirect costs.

Testimony at trial tended to show the origin, purpose, and use of the funds for indirect costs. Mr. Lee testified the federal government placed no restrictions on the portion of the federal grants CCS received in relation to indirect costs and operating expenses. Mr. Lee stated the money received from federal grant funds for indirect costs are spent in the normal operations of the school district, and are not spent for any restricted programs or expenses.

Although indirect costs may be connected to federal grant money for a particular program, this fact does not *per se* make these funds restricted. In *Thomas Jefferson II*, this Court stated "the question is . . . whether the funds have a limited use and specific purpose, such as to fund a specific program." *Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293 (citation omitted).

Mr. Lee further testified the indirect cost money is "plain money that goes in [the] current expense fund" and was "spent for current operating expenses." Mr. Lee explained no one required him to deposit the money into a separate fund, and he did so on his own volition. Mr. Lee's testimony supports the trial court's findings of fact that these funds "consisted of reimbursements," because they were part of the federal grant reimbursement money CCS received. Mr. Lee's testimony also supports

the trial court's finding of fact that the funds were not "designated by the donor for some specific program or purpose[.]" *Thomas Jefferson II*, ___ N.C. App. at ___, 763 S.E.2d at 293.

The trial court's findings of fact regarding funds labeled "indirect costs" are supported by competent evidence. Any evidence to the contrary does not change our analysis regarding the classification of these funds. Under the applicable standard of review, it is for the trial court to "pass[] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "The trial court must . . . determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted).

The trial court's findings of fact support its conclusion that these funds were not restricted based on their origin, purpose, and use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. The trial court did not err by finding these funds should have been included in the local current expense account and apportioned to the charter schools on a per-pupil basis. This argument is overruled.

C. Medicaid Reimbursement

[3] Defendant argues the trial court erred by concluding the Medicaid reimbursement funds were not restricted. We disagree.

The trial court made the following finding of fact regarding the Medicaid reimbursement funds:

> 27. CCS used moneys designated in its audit as "Medicaid Reimbursement" for its general operating expenses during its 2009-10 fiscal year. CCS received these reimbursements for services CCS provided for students with individual education plans ("IEP's"), i.e., in accordance with federal law, which requires both CCS and the Charter Schools to provide such services to students with learning disabilities. The evidence shows that CCS used other moneys from its general funds to operate its IEP programs as well, and that the federal government does not restrict the use of the reimbursement funds once received by CCS.

Testimony regarding the origin, purpose, and use of the Medicaid reimbursement funds tended to show the following: Dr. Aspel stated she was responsible for Medicaid billing for direct services. Dr. Aspel explained students with special needs are given an IEP. An IEP is an outline of special education or specialized instruction-related services students with disabilities will receive throughout the school year. These students are part of the general K-12 population enrolled throughout CCS and the charter schools.

Dr. Aspel testified CCS, as the local education agency ("LEA"), provides services to any disabled students according to the student's IEP. The federal government subsequently reimburses the LEA for "what [they have] already delivered." Mr. Lee also admitted the $162,098.00 CCS received as "Medicaid Reimbursement" was not restricted.

Dr. Aspel explained "[t]he Medicaid [reimbursements] go back into the exceptional children's budget to help offset the cost of the employment of the physical therapist, occupational therapist, speech therapist, and all the specialized equipment that they need to deliver the services that are on the IEP." As discussed *supra*, federal law requires both CCS *and* the charter schools to provide these services to students with disabilities *regardless* of whether Medicaid provides reimbursements. The Medicaid reimbursements merely serve as an alternative source of funding to recoup expenses CCS is mandated to incur and provide for certain students with IEPs. These students are part of the general K-12 population.

We emphasize that under the applicable standard of review, "findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings." *Montague v. Montague*, __ N.C. App. __, __, 767 S.E.2d 71, 74 (2014) (citation and quotation marks omitted). "[I]t is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble*, 300 N.C. at 712-13, 268 S.E.2d at 189.

The trial court's findings of fact regarding Medicaid reimbursement funds indicate the funds originated from the federal government as the donor. The trial court also found these funds were used by CCS to provide services for students with IEPs in the general K-12 population, in accordance with federal law. The transcript and evidence clearly show the donor of the funds did not designate or restrict the funds for a specific purpose. Competent evidence supports the trial court's findings of fact.

These findings of fact support the trial court's conclusion of law that the Medicaid reimbursement funds were not restricted based on their origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

D. E-Rate

[4] Defendant argues the trial court erred by concluding E-Rate funds were not restricted. We disagree.

The trial court's finding of fact regarding the E-Rate funds stated:

> 29. During 2009-10, CCS used moneys designated in its audit as "E-Rate — Other Unrestricted" to reimburse other moneys paid out of its current expense fund for internet and telecommunications. CCS received the "E-Rate" reimbursement funds for operating federal programs. The evidence shows that CCS used moneys from its general fund to pay for CCS's telephones, internet, and telecommunications. Providing internet, telephones, and telecommunication services to school buildings is a utility cost and part of the operating expenses of CCS's general educational program, and such money is not used for any special program. The federal government does not restrict the use of the reimbursement funds once received by CCS.

Testimony regarding the origin, purpose, and use of the E-Rate funds tended to show the following: Dr. Cheryl Lutz ("Dr. Lutz"), the director of technology services for CCS, testified E-Rate is a federal program, which reimburses the school system for a percentage of what it pays for telecommunications and Internet access. The amount of federal reimbursement is calculated based on the school system's free and reduced lunch numbers from across the general K-12 population.

According to Dr. Lutz, CCS contracts with and pays a vendor for Internet and telecommunications services. CCS is reimbursed by the federal government under the E-Rate program for a portion of the money previously expended for Internet and telecommunications services. CCS is required to apply and be approved for the E-Rate program, before it purchases the services and must submit a reimbursement form.

CCS funds these services from its local current expense fund prior to reimbursement from the E-rate program. All CCS K-12 students, staff, faculty, and bus drivers may utilize the Internet and telecommunications services. The transcript and evidence clearly show the donor of these funds did not designate or restrict these funds for some specific purpose.

The trial court's findings of fact regarding the E-Rate funds indicate the federal government was the origin of these funds. The trial court also found the E-rate funds were used for Internet and telecommunications services for all CCS K-12 students, staff, faculty, and bus drivers.

The trial court's findings of fact are supported by competent evidence. These findings of fact support the trial court's conclusion that the E-Rate funds were not restricted based on the origin, purpose, and use of the moneys. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

E. Juvenile Crime Prevention Council

[5] Defendant argues the trial court erred by concluding the Juvenile Crime Prevention Council ("JCPC") funds were not restricted. We disagree.

The trial court's finding of fact regarding the JCPC funds states:

> 33. CCS included moneys designated as "JCPC" in its Special Revenue Fund during fiscal year 2009-10 to hire and pay for three school counselors. CCS received this federal grant money to pay for the salaries and benefits of personnel that trained, managed, and supported at-risk students in grades K-12. The evidence revealed that in 2009-10, CCS chose to use the grant to offset salaries and benefits for two school counselors, and to combine this grant with another federal grant, Governor's Crime Commission, to offset the compensation of another school counselor. These counselors served students in CCS's general K-12 population and were therefore part of its general program. The provision of hiring and paying the salaries and benefits of school counselors for students in grades K-12 is a part of CCS's current operating expenses.

Testimony regarding the origin, purpose, and use of the JCPC funds tended to show the following: Rodney Borders ("Mr. Borders") served as the director of alternative programs for CCS during the 2009-2010 school year. Mr. Borders explained CCS sets up an alternative program for students who are "at risk as far as attendance, discipline problems, hardships in the lives, that need a smaller environment." Mr. Borders testified the alternative programs are funded by JCPC moneys, which are obtained through a federal grant.

Mr. Borders explained the JCPC funds were combined with another grant from the Governor's Crime Commission to hire and pay the salaries and benefits of additional life skills counselors. Mr. Borders testified the JCPC funds were also used to pay the salaries of life skills counselors currently employed by CCS. The life skills counselors were available to all K-12 students in Cleveland County schools.

The trial court's findings of fact regarding the JCPC funds indicates the origin of the funds was from the federal government. The JCPC funds were used to pay the salaries of life skills counselors. These life skills counselors were available to the entire K-12 population of CCS.

The trial court's findings of fact regarding the JCPC funds are supported by competent evidence. These findings of fact support the trial court's conclusion that the JCPC funds were not restricted based on origin, purpose, and use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

F. Dropout Prevention Grant

[6] Defendant argues the trial court erred by concluding funds designated as the Dropout Prevention Grant were not restricted. We disagree.

The trial court's finding of fact regarding the Dropout Prevention Grant states:

> 35. CCS included moneys designated as "Dropout Prevention Grant" in its Special Revenue Fund during fiscal year 2009-10. CCS received this state funded grant for purposes of providing a dropout prevention program as part of its general K-12 educational programs and school curriculum. The evidence revealed that CCS was given discretion in deciding how to spend the funds received from the Dropout Prevention Grant. For the 2009-10 fiscal year, CCS decided to spend the funds to purchase computer software programs and general K-12 curriculum programs, to pay for the salaries and benefits of three CCS employees, specifically two teaching assistants and a truancy court coordinator for CCS, and to provide staff development for school counselors. Those employees were each employed by CCS in its general K-12 program.

Testimony regarding the origin, purpose, and use of the Dropout Prevention Grant tended to show: Tony Fogelman ("Mr. Fogelman"), the career and technical education director for CCS, oversaw the Dropout

Prevention Grant. He explained the Dropout Prevention Grant was a "state-funded grant that provides resources to public school systems, for them to make the decision as to how they want to best spend their money to prevent dropouts, keep kids in school."

Mr. Fogelman testified the Dropout Prevention Grant was targeted at all CCS students. For the 2009-2010 school year, CSS used the Dropout Prevention Grant to pay for two teaching assistants and a truancy court coordinator.

The trial court's findings of fact regarding the Dropout Prevention Grant indicate the origin of these funds was from North Carolina state government. The transcript and evidence clearly show the Dropout Prevention Grant was intended to benefit the entire K-12 student population. CCS exercised discretion over how to spend the funds, in furtherance of its goal of preventing students from dropping out of school.

The trial court's finding of fact regarding the Dropout Prevention Grant is supported by competent evidence. The findings of fact support the trial court's conclusion that the funds designated for the Dropout Prevention Grant were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

G. ROTC

[7] Defendant argues the trial court erred by concluding the Reserved Officers' Training Corps ("ROTC") funds were not restricted. We disagree.

The trial court's findings of fact regarding the ROTC funds state:

> 44. CCS included moneys designated as "ROTC" in its Special Revenue Fund during fiscal year 2009-10 to reimburse the salaries of its high school teachers teaching reserve officers' training corps courses ("ROTC"). CCS offers ROTC courses to high school students as part of its general high school program and regular high school curriculum.
>
> 45. CCS received ROTC moneys from the federal government in connection with its operation of federal programs. During 2009-10, CCS used other moneys from its general fund to pay for the salaries and benefits of its ROTC teachers in the K-12 population, and the federal government provided a reimbursement to CCS for such expenditures.

> The federal government places no restriction on the use of the reimbursement funds once received by CCS.

Evidence regarding the origin, purpose, and use of the ROTC funds tended to show the following: Mr. Lee testified the ROTC funds are reimbursed by the United States Armed Services for partial payment of ROTC instructors' salaries. The instructors' salaries are initially paid out of the current expense fund. CCS is subsequently partially reimbursed by the federal government. Mr. Lee testified the ROTC funds were included in the current expense fund prior to the 2009-2010 school year.

The trial court's findings of fact indicate the origin of the ROTC funds was from the federal government. These funds were used to reimburse ROTC instructors' salaries paid from CCS's current expense fund. The transcript and evidence clearly show the federal government did not restrict the ROTC funds to a specific purpose.

Competent evidence supports the trial court's finding of fact that "[t]he federal government places no restriction on the use of the reimbursement funds once received by CCS." These findings of fact support the trial court's conclusion that the ROTC funds were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

H. WorkForce Investment Act

[8] Defendant argues the trial court erred in concluding WorkForce Investment Act ("WIA") funds were not restricted. We disagree.

The trial court's findings of fact regarding WIA funds state:

> 52. During 2009-10, CCS used moneys designated in its audit as "WIA," meaning WorkForce Investment Act, to support, prepare, and train students to enter the workforce upon graduation from high school. The provision of preparing and training high school students for the workforce is part of CCS's general educational program and its regular curriculum.
>
> 53. CCS received the WIA funds as a federal grant through Isothermal Community College, which distributes moneys under the WorkForce Investment Act program to school systems within the state. The evidence reveals that CCS had discretion in deciding how to spend this grant for training students to enter the workforce upon graduation. In 2009-10, CCS chose to use this grant to offset the salaries

> of two employees to work at CCS's Job Link Center and to pay the hourly wages of students that were placed in the workforce through the program.

Testimony regarding the origin, purpose, and use of the WIA funds tended to show the following: Mr. Lee testified WIA is a program administered by the Isothermal Community College to transition CCS students into the workforce. Mr. Fogelman testified he was responsible for overseeing WIA money.

Mr. Fogelman stated WIA is a federal program through which the federal government distributes money to the states. He explained the states allocate this money in the form of block grants to school systems through workforce development boards.

Mr. Fogelman testified CCS submitted a grant application to the workforce development board, in which it requested a certain amount of WIA funds. CCS largely spent the money it received to pay the salaries of students who were working for various employers through the program. WIA funds were also used to pay two employees who worked at the Job Link Center, which assists students in finding employment.

Mr. Fogelman stated WIA funds were primarily used to serve the general K-12 population of CCS, because the program is open to every age-eligible student. He testified every student in the school, who qualified, could participate in the program.

The trial court's findings of fact regarding WIA funds indicate the funds originated from the federal government and were allocated throughout North Carolina. WIA funds were used to pay two employees at the Job Link Center and to pay the salaries of those students who participated in the program.

Competent evidence supports the trial court's findings of facts regarding WIA funds. These findings of fact support the trial court's conclusion that WIA funds were not restricted based on the origin, purpose, and use of these funds. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

I. Gear Up Grant

[9] Defendant argues the trial court erred by concluding the Gear Up Grant funds were not restricted. We disagree.

The trial court's finding of fact regarding the Gear Up Grant funds states:

> 55. CCS included moneys designated as "Gear Up Grant" in its Special Revenue Fund during fiscal year 2009-10. CCS received this grant from the University of North Carolina to support providing programs that would increase the number of students attending a post-secondary educational institution. The provision of providing a program to students in grades K-12 to increase the number of students who attend college is part of CCS's general educational programs and its regular curriculum. The evidence revealed that CCS was given great discretion in deciding how to spend its general funds in order to receive reimbursement funds from the Gear Up Grant. In 2009-10, CCS used moneys from the Gear Up Grant to reimburse expenses for tutoring services CCS provided to K-12 students, to pay for the salaries and benefits of CCS personnel, and to provide after-school activities. The University of North Carolina does not restrict the use of the reimbursement funds once received by CCS.

Testimony regarding the use, origin, and source of the Gear Up Grant funds tended to show the following: Juan Cherry ("Mr. Cherry"), a Graham Elementary School counselor, served as the "Gear Up coordinator" during the 2009-2010 school year. Mr. Cherry testified Gear Up is a federal grant program designed to increase the number of students who enter and succeed in post-secondary education. CCS's Gear Up program was a part of the grant received by the state. The North Carolina Gear Up grant program was administered by the University of North Carolina. Defendant provided tutors, toured university campuses, hosted mentoring programs, and other programs to their students through the Gear Up program. These programs were aimed at achieving higher college attendance rates.

CCS initially spent money out of its current expense fund, and was reimbursed through the Gear Up Grant program on a monthly basis for the money spent on the program. CCS deposited the reimbursement money into its restricted fund. Mr. Cherry testified the Gear Up Grant money was spent on the general K-12 student population, with the intention of increasing the number of CCS students who attend college.

The trial court's findings of fact regarding the Gear Up Grant funds indicate the origin of these funds was from the state government to the University of North Carolina. These funds were spent on various programs aimed at achieving higher college attendance rates among CCS

students. The programs were made available to the general K-12 population of CCS.

Competent evidence supports the trial court's finding of fact that "[t]he University of North Carolina does not restrict the use of the reimbursement funds once received by CCS." These findings of fact support the trial court's conclusion that the Gear Up Grant funds were not restricted based on origin, purpose, or use. *See Thomas Jefferson II*, __ N.C. App. at __, 763 S.E.2d at 293. This argument is overruled.

V. Conclusion

The trial court properly concluded certain funds, discussed *supra*, were not restricted. The trial court's findings of fact regarding the origin, purpose, and use of certain funds are supported by competent evidence contained in the record and transcript.

These findings of fact support the trial court's conclusions of law that these funds were not restricted, and must be included in the per-pupil share of funding allotted to the charter schools. The order from which defendant CCS appealed is affirmed.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge BRYANT concurs in part and dissents in part by separate opinion.

BRYANT, Judge, concurring in part and dissenting in part.

I concur in the majority opinion affirming the trial court's findings and conclusions regarding the restricted or nonrestricted nature of certain funds; however, I dissent from the majority's holding that the trial court's findings of fact and conclusions of law support its determination that "indirect costs" and "E-rate" funds are nonrestricted.

Indirect Costs

The majority opinion holds that the trial court did not err in finding and concluding that "indirect costs," which are a percentage of the total federal grant funding that pays for the operating expenses incurred by the school system to implement federally funded grant programs, are nonrestricted revenues. I respectfully disagree with this holding. This Court has noted that " 'federal grants restricted as to use' . . . clearly

have operating expenses . . . but that fact does not make the funds 'unrestricted.' " *Thomas Jefferson et al. v. Cleveland Cnty. Bd. of Educ.*, ___ N.C. App. ___, ___, 763 S.E.2d 288, 293 (2014) ("*Thomas Jefferson II*") (instructing the trial court on remand to determine whether funds are restricted). The trial court specifically found that CCS received indirect costs "in connection with its operation of federal programs." Because the *origin* of revenue for indirect costs was the federal grants themselves, and because the federal grant money was restricted to specific purposes, the funding for operating expenses incurred in connection with those grants is likewise restricted.

Additionally, even though the trial court found that "[t]he federal government [did] not place any restrictions on how CCS *uses* the reimbursements it received for indirect costs," it nonetheless acknowledges those funds are received in connection with CCS's operation of federal programs. *See id.* ("[W]e define 'restricted' funds as those funds which have been designated by the donor for some specific program or purpose . . . .").

Finally, the majority opinion focuses quite a bit on Mr. Lee's testimony. With regard to his testimony, it is notable that the trial court found that indirect costs "consisted of reimbursements from the federal government," when Mr. Lee testified exactly to the contrary. He testified that indirect costs "are not reimbursements at all. They are in fact a part of the full [federal] grant." It is unclear from the record that there is evidence to support this finding of fact by the trial court. Further, the findings by the trial court confirm that the origin and purpose of the indirect costs were restricted. Here, the trial court found that "CCS received [the indirect costs] in connection with its operation of federal programs," whose funds were restricted. To then say that the government placed no restriction on the use of those funds is not supported by the record, and further, violates the mandate of the Court in *Thomas Jefferson II* as to the definition of "restricted" funds. *See id.* For these reasons, I disagree with the majority opinion regarding indirect costs, and would hold that the indirect costs are restricted funds.

E-Rate

The majority opinion also holds that the trial court did not err in finding and concluding that E-Rate funding was made available by the federal government for unrestricted *use* for the entire K–12 population and was not *used* for any special program. Again, I disagree.

The majority opinion, as did the trial court, disregards the origin of the E-Rate funds. The trial court's findings are insufficient to support its conclusion that the E-Rate funds are not restricted. The trial court, in defiance of the mandate of *Thomas Jefferson II*, made conclusory findings as to use, but failed to make findings concerning the funds' origin and purpose. While it is true that all CCS students, staff, and even bus drivers could use the Internet and telecommunications services provided for by the E-Rate funds, the funds were essentially restricted because of the nature of the strict application and approval process, which goes towards the funds' "origin and purpose." *See id.* at ___, 763 S.E.2d at 294 (instructing the trial court on remand to determine whether funds are restricted by examining and making findings of fact about the *origins*, purpose, and uses of the challenged funds). Evidence in the record shows that the funds originated from the federal government for very specific technological purposes and that the funds were used for those specific purposes.

Specifically, E-Rate funds are made available to reimburse a school only after certain pre-approved purchases are made. CCS was required to obtain approval for the purchase of qualified technology services in advance and only then could the school system purchase the service. Once CCS purchased the pre-approved telecommunications and internet access, the school system was eligible to submit an application for reimbursement at a set rate.

E-Rate funding was not made available by the federal government for unrestricted use for the entire K–12 population. Rather, the E-Rate funds were provided by the federal government for a specific purpose. Therefore, the trial court's finding of fact which includes the statement that "[t]he federal government does not restrict the use of the reimbursement funds once received by CCS," is not supported by the evidence. To the contrary, the evidence established that E-rate funds would never have been provided to defendant but for its compliance with the federal government's lengthy and detailed approval process to ensure that only qualified technology services were purchased.

Despite who ultimately benefited from the *use* of the technology, the *funds* were restricted in that pre-approval was required and the funds were used for their specified purpose. Accordingly, I would reverse the trial court and find that the E-rate funds were restricted by the donor—the federal government—and required to be used for a specific purpose.

WAKEMED, Plaintiff
v.
SURGICAL CARE AFFILIATES, LLC, Defendant

No. COA15-127

Filed 3 November 2015

Contracts—indemnity clauses—ambiguous—question for trier of fact

The trial court's order granting defendant-Surgical Care Affiliates' Rule 12(b)(6) motion to dismiss was reversed in a breach of contract action involving contracts providing that defendant would manage the surgical departments at two of plaintiff-WakeMed's facilities. The contentions of both parties regarding the indemnity clauses in the contracts were reasonable, and interpretation of the ambiguity was best left to the trier of fact.

Appeal by plaintiff from order entered 4 August 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 13 August 2015.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, William R. Forstner, and Maureen Demarest Murray, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr., Frank Kirschbaum, and Tobias Hampson, for defendant-appellee.

McCULLOUGH, Judge.

Plaintiff WakeMed appeals from an order of the trial court, granting defendant Surgical Care Affiliates, LLC's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Based on the reasons stated herein, we reverse the order of the trial court.

I. Background

On 17 April 2014, plaintiff (otherwise referred to as "owner") filed a complaint against defendant (otherwise referred to as "manager") alleging a breach of contract claim. Plaintiff alleged that on or about 1 April 2010, plaintiff and defendant entered into two contracts: Management Agreement WakeMed Cary Hospital Surgery Department ("Cary Agreement") and Management Agreement WakeMed North Healthplex Surgical Department ("North Agreement") (collectively the

"Agreements"). The Agreements provided that defendant would manage the surgical departments at two of plaintiff's facilities for a monthly fee, pursuant to the applicable terms and conditions. The Agreements had an initial term of seven years with successive renewals of three years. Either party could terminate the Agreements upon sixty days' written notice for a material breach, with an opportunity for the breaching party to cure within this period.

The complaint alleged that defendant undertook several duties under the Agreements, "including the express obligation to reduce the costs associated with surgical procedures" at WakeMed. Defendant was required to comply with "Global Performance Standards" ("GPS") which were attached to the Agreements and incorporated by reference as part of the binding contracts. The GPS provided as follows:

> The following criteria shall be used to measure and evaluate the overall performance of the Manager in the Department:
>
> (a) Reduction of average total cost per case adjusted for type of procedure by 5% or greater from pre-Agreement levels (adjusted for inflation), which may include reductions in supply costs per case and reductions in labor costs per case.
>
> (b) Improvement of perioperative processes from pre-Agreement levels, including turnaround times, publicly-reported clinical measures and on-time case starts.
>
> (c) Achievement of reasonably acceptable surgeon and patient satisfaction targets, as measured by a third party vendor mutually agreed upon by the Owner and the Manager.
>
> The failure by the Manager to satisfy criterion (a) above, or both criteria (b) and (c) above, shall constitute a material breach for purposes of Article I, Section 6 of the Agreement.

Pursuant to Article I, Section 6 of the Agreements, failure to satisfy the GPS constituted a "material breach" of the Agreements. Plaintiff alleged that defendant failed to achieve a 5% reduction in cost per case and instead, the average total cost per case increased during the time defendant served as manager. Defendant also "failed to maintain surgeon satisfaction, surgical volume diminished, operating room turnover

rate decreased, and staff departures and turnover increased, all of which were caused by [defendant's] actions and resulted in a significant loss of revenue for [plaintiff.]"

The complaint further alleged that as a result of defendant's material breach, plaintiff terminated the Agreements in 2011. On 10 June 2011, plaintiff provided written notice of breach to defendant, explicitly identifying defendant's failure to satisfy the GPS. The notice of breach permitted defendant to cure the breach within sixty days, but plaintiff alleged that defendant failed to do so. By a letter dated 31 August 2011, plaintiff and defendant mutually agreed that the Agreements had been terminated effective 15 August 2011, "except for a brief period of continued retention of a surgical department manager." The 31 August 2011 letter expressly reserved the right of plaintiff to seek legal and equitable relief against defendant pursuant to Article I, Section 9 of the Agreements. As a result of defendant's breach of contract, plaintiff alleged that it was damaged in excess of $10,000.00.

On 13 May 2014, defendant filed a motion to dismiss plaintiff's complaint based upon insufficiency of process and service of process, failure to state a claim upon which relief can be granted, and in the alternative, for summary judgment on the defense of the statute of limitations only pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(4), 12(b)(5), 12(b)(6), and Rule 56. Defendant argued that pursuant to Rule 12(b)(6), plaintiff failed to state a claim because the Agreements contained an exclusive remedy of contract termination and plaintiff elected to exercise that exclusive remedy in the termination of the Agreements. Defendant further argued that it "did not guarantee that it would achieve any particular operating results for plaintiff" and that plaintiff "explicitly agreed to indemnify and hold harmless [defendant] from any claims arising out of [defendant's] performance" under the Agreements.

A hearing on defendant's motion was held at 24 July 2014 Civil Session of Wake County Superior Court, the Honorable Paul Ridgeway presiding. On 4 August 2014, the trial court entered an order granting defendant's motion to dismiss plaintiff's complaint with prejudice on the theory that plaintiff's claim is "barred by the express language of the contract between the parties[.]"

On 28 August 2014, plaintiff filed notice of appeal from the 4 August 2014 order.

II. Standard of Review

"In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the

complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't. of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (citation and quotation marks omitted). "A complaint is properly dismissed pursuant to Rule 12(b)(6) when (1) the complaint, on its face, reveals that no law supports the plaintiff's claim; (2) the complaint, on its face, reveals an absence of facts sufficient to make a good claim; or (3) some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Blow v. DSM Pharms., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009).

"[W]e review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Gilmore v. Gilmore*, __ N.C. App. __, __, 748 S.E.2d 42, 45 (2013) (citation and quotation marks omitted).

III. Discussion

This appeal centers around the interpretation of a single sentence found within the Agreements; specifically, the last sentence of Article XII, Section 2. Article XII of both Agreements is entitled "Indemnification" and provides as follows, in pertinent part:

> 1. The Manager does not hereby assume any of the obligations, liabilities or debts of the Owner, except as otherwise expressly provided herein, and shall not, by virtue of its performance hereunder, assume or become liable for any of such obligations, debts or liabilities of the Owner. The Owner hereby agrees to indemnify and hold the Manager, its affiliates and owners, and their respective officers, governors, directors, employees, agents, owners and affiliates (each a "Manager Indemnified Party") harmless from and against any and all claims, actions, liabilities, losses, costs and expenses of any nature whatsoever, including reasonable attorneys' fees and other costs of investigating and defending any such claim or action (a "Loss"), which may be asserted against any of the Manger Indemnified Parties, arising out of or related to (i) the operation of the Department (excluding the acts or omissions of any Employees in the course of providing services in the Department), the Hospital and the Owner, (ii) the acts or omissions of the Department, the Hospital and the Owner or its agents or employees, and (iii) the Manager's performance of its duties hereunder during the term of this

> Agreement, but excluding any Loss arising as a result of the gross negligence or willful misconduct of the Manager.
>
> 2. The Manager hereby agrees to indemnify and hold harmless the Owner and its members, officers, governors, directors, employees, agents, and affiliates (each an "Owner Indemnified Party") from and against any and all Loss which may be asserted against an Owner Indemnified Party as a result of the gross negligence or willful misconduct of the Manager or its agents or employees in connection with the performance by the Manager of its duties hereunder. In no event shall the Manager be liable under this Agreement for any act of professional malpractice committed by any Medical Staff Physician, or other member of the Department's Medical Staff. **This Article XII Section 2 shall constitute the sole obligation of the Manager with respect to any Loss and any claims arising out of this Agreement, the services provided by the Manager and/or the relationship created hereby, whether such claim is based in contract, tort, fraud or otherwise.**

(emphasis added).

"[T]he goal of construction is to arrive at the intent of the parties when the [contract] was [written.]" *Reaves v. Hayes*, 174 N.C. App. 341, 345, 620 S.E.2d 726, 729 (2005) (citation and quotation marks omitted). "[O]ur courts adhere to the central principle of contract interpretation that [t]he various terms of the [contract] are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *In re Foreclosure of a Deed of Trust*, 210 N.C. App. 409, 415, 708 S.E.2d 174, 178 (2011) (citation and quotation marks omitted). "It is presumed that each part of the contract means something." *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 393, 390 S.E.2d 150, 153 (1990) (citation omitted).

"A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury." *Commscope Credit Union v. Butler & Burke, LLP*, __ N.C. App. __, __, 764 S.E.2d 642, 651 (2014) (citation omitted). "An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Variety Wholesalers, Inc. v. Salem Logistics Traffic*

Servs., *LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012) (citation omitted). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *Dockery v. Quality Plastic Custom Molding*, *Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001) (citation omitted).

In the current case, the clause at issue is found within Article XII, entitled "Indemnification." Where a contract does not define a term used, "non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." *Reaves*, 174 N.C. App. at 345, 620 S.E.2d at 729 (citation omitted). Here, the Agreements do not define the term "indemnification." "Ordinarily, indemnity connotes liability for derivative fault. In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party[.]" *Dixie Container Corp. v. Dale*, 273 N.C. 624, 628, 160 S.E.2d 708, 711 (1968) (citation omitted). "The court must construe the contract 'as a whole' and an indemnity provision 'must be appraised in relation to all other provisions.' " *Schenkel & Shultz*, *Inc. v. Hermon F. Fox & Assocs.*, *P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citation omitted).

On appeal, plaintiff argues that the trial court erred by concluding that plaintiff's claim is "barred by the express language of the contract between the parties[.]" Plaintiff asserts that the trial court misread the disputed clause as an unambiguous exculpatory clause when rather, it is an ordinary indemnity provision, "further explaining the circumstances in which [defendant] would be obligated to indemnify [plaintiff] against third-party claims." Plaintiff contends that Section 1 of Article XII sets forth circumstances where plaintiff would indemnify defendant for third party claims made against defendant, even indemnifying defendant from claims made against defendant by third parties to the extent they arose from defendant's mere negligence. On the other hand, plaintiff interprets Section 2 of Article XII as setting forth circumstances where defendant would indemnify plaintiff for third party claims against plaintiff arising from defendant's gross negligence or willful misconduct. Furthermore, plaintiff reads Section 2 as the parties agreeing that defendant would not "be liable under this Agreement for any act of professional malpractice committed by any Medical Staff Physician, or other member of the Department's Medical Staff."

More importantly, plaintiff argues that defendant's express agreement to indemnify plaintiff against third party claims arising from defendant's gross negligence and willful misconduct "is not the only way" in which defendant would be obligated to indemnify plaintiff against third

party claims. Plaintiff suggests that indemnification obligations, regardless of defendant's contractual indemnity obligations, could arise in one of three ways – express contract, contract implied-in-fact, or through equitable concepts arising from the tort theory of indemnity. Plaintiff states as follows:

> For example, [defendant] promised to "[a]ssist Owner in negotiating or retaining contractual relationships for anesthesiology, radiology and pathology services, as appropriate" and to "[a]rrange for the purchase or lease by the Owner of all supplies and equipment." . . . The circumstances relating to [defendant's] negotiation of such contracts on behalf of [plaintiff] could, under appropriate facts, create a contract to indemnify implied-in-fact. Similarly, if [plaintiff] was secondarily or derivatively liable for any torts committed by [defendant] (*e.g.*, in a lawsuit against [plaintiff] filed by, or relating to the actions of, an employee under [defendant's] supervision and control), [plaintiff] could have a common law right to indemnification under a contract implied-in-law of primary/secondary liability.

Accordingly, plaintiff interprets the challenged clause as a "catch-all" provision "to foreclose any such possible indemnification obligations for [defendant] . . . other than those expressly delineated." Plaintiff argues that the "catch-all" provision relieves defendant of any other obligation to indemnify plaintiff whether arising in contract, in tort, or otherwise.

In contention with plaintiff's interpretation, defendant argues that the clause constitutes a clear and unambiguous, blended indemnity and exculpatory clause that limits defendant's liability under the Agreements. Defendant agrees with plaintiff's contention inasmuch as the last sentence in Section 2 of Article XII is a "catch-all" to the indemnity provision, protecting defendant from extra-contractual circumstances in which defendant is required to indemnify plaintiff. However, defendant argues that the "plain language of the provision makes clear its application spans beyond indemnity." Defendant contends as follows:

> it states that the indemnity obligations of [defendant] are the sole obligation of [defendant] with respect to "<u>any claims arising out of this Agreement</u> . . . whether such claim is based in <u>contract</u>, tort, fraud or otherwise." This language is unmistakably broader than an indemnity provision focused on protecting a party against "extra-contractual

> circumstances," and contrary to [plaintiff's] argument, speaks directly to contractual circumstances.

Furthermore, defendant argues that reading the clause at issue, in conjunction with Article XIII (entitled "Miscellaneous"), Section 9 of the Agreements, references claims between the parties. Article XIII, Section 9 provides as follows:

> The terms and provisions of this Agreement are intended solely for the benefit of the parties hereto and their respective permitted successors or assigns, and it is not the intention of the parties to confer third-party beneficiary rights upon any other person or entity.

Lastly, defendant argues that the title of Article XII, "Indemnification," does not limit the application of the clause at issue to indemnification only. Defendant directs our attention to Article XIII, Section 5 which states that "[t]he headings used in this Agreement have been inserted for convenience and do not constitute provisions to be construed or interpreted in connection with this Agreement."

After careful review, we conclude that both plaintiff and defendant's interpretations of the language of the Agreements are reasonable. *See Dockery*, 144 N.C. App. at 422, 547 S.E.2d at 852 (stating that "[a]mbiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties"). Because the language of the provision creates an ambiguity as to the true intention of the parties, interpretation of an ambiguous contract is best left to the trier of fact. Therefore, we hold that the trial court erred by granting defendant's 12(b)(6) motion to dismiss and reverse the trial court's order.

IV. Conclusion

The trial court's order granting defendant's Rule 12(b)(6) motion to dismiss is reversed.

REVERSED.

Judges STROUD and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 NOVEMBER 2015)

IN RE B.J.L. No. 15-576	Buncombe (13JT196)	Affirmed
IN RE D.C.J. No. 15-503	Watauga (13JT5)	Affirmed
IN RE K.W. No. 15-435	Wake (14JA369-72)	Affirmed
REAVIS v. COLLINS No. 15-545	Wilkes (13CVS1304)	Dismissed
SARTORI v. N.C. DEP'T OF PUB. SAFETY No. 15-319	Wake (14CVS2489)	No Error
STATE v. BAREFOOT No. 15-218	Henderson (12CRS50798)	No Error
STATE v. HOWARD No. 15-16	Wake (12CRS223754) (13CRS185)	New Trial
STATE v. HOWARD No. 15-96	Mecklenburg (11CRS256439) (12CRS200894-899)	NO ERROR IN PART; NO PLAIN ERROR IN PART
STATE v. MANNO No. 15-33	Cleveland (12CRS3538-40) (12CRS3546-47)	No Prejudicial Error at Trial; Remanded for Recalculation of Prior Record Level and Resentencing
STATE v. STONE No. 15-314	Person (12CRS52110) (14CRS875)	Dismissed in part; no error in part.
SUAREZ v. LCD PROPS., LLC No. 15-129	Henderson (12CVS2161)	Affirmed
VOGEL v. FOOD LION No. 14-1301	N.C. Industrial Commission (Y11706)	Affirmed in part; reversed and remanded in part

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