Chapter 50B.

Domestic Violence.

§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

(b) For purposes of this section, the term "personal relationship" means a relationship wherein the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

(c) As used in this Chapter, the term "protective order" includes any order entered pursuant to this Chapter upon hearing by the court or consent of the parties. (1979, c. 561, s. 1; 1985, c. 113, s. 1; 1987, c. 828; 1987 (Reg. Sess., 1988), c. 893, ss. 1, 3; 1995 (Reg. Sess., 1996), c. 591, s. 1; 1997-471, s. 1; 2001-518, s. 3; 2003-107, s. 1; 2009-58, s. 5; 2015-181, s. 36.)

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders; temporary custody.

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through

the appropriate law enforcement agency where the defendant is to be served. In compliance with the federal Violence Against Women Act, no court costs or attorneys' fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. 1A-1, Rule 11.

(b) Emergency Relief. – A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders. –

(1) Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts.

(2) A temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse.

(3) If the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the court shall consider and may order the other party to (i) stay away from a minor child, or (ii) return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the court finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child.

(4) If the court determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the court shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party.

(5) Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. The hearing shall have priority on the court calendar.

(6) If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the

end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county.

(7) Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c1) Ex Parte Orders by Authorized Magistrate. – The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the magistrate shall consider and may order the other party to stay away from a minor child, or to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the magistrate finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child. If the magistrate determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the magistrate shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

(c2) The authority granted to authorized magistrates to award temporary child custody pursuant to subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms. – The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized

magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section.

(e) All documents filed, issued, registered, or served in an action under this Chapter relating to an ex parte, emergency, or permanent domestic violence protective order may be filed electronically. (1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 893, s. 2; 1989, c. 461, s. 1; 1994, Ex. Sess., c. 4, s. 1; 1997-471, s. 2; 2001-518, s. 4; 2002-126, s. 29A.6(a); 2004-186, ss. 17.2, 19.1; 2009-342, s. 2; 2012-20, s. 1; 2013-390, s. 1; 2015-62, s. 3(b); 2021-47, s. 10(i).)

§ 50B-3. Relief.

(a) If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:

(1) Direct a party to refrain from such acts.

(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household.

(3) Require a party to provide a spouse and his or her children suitable alternate housing.

(4) Award temporary custody of minor children and establish temporary visitation rights pursuant to G.S. 50B-2 if the order is granted ex parte, and pursuant to subsection (a1) of this section if the order is granted after notice or service of process.

(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it.

(6) Order either party to make payments for the support of a minor child as required by law.

(7) Order either party to make payments for the support of a spouse as required by law.

(8) Provide for possession of personal property of the parties, including the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

(9) Order a party to refrain from doing any or all of the following:

a. Threatening, abusing, or following the other party.

b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.

b1. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

c. Otherwise interfering with the other party.

(10) Award attorney's fees to either party.

(11) Prohibit a party from purchasing a firearm for a time fixed in the order.

(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission.

(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(a1) Upon the request of either party at a hearing after notice or service of process, the court shall consider and may award temporary custody of minor children and establish temporary visitation rights as follows:

(1) In awarding custody or visitation rights, the court shall base its decision on the best interest of the minor child with particular consideration given to the safety of the minor child.

(2) For purposes of determining custody and visitation issues, the court shall consider:

a. Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse.

b. Whether the minor child was present during acts of domestic violence.

c. Whether a weapon was used or threatened to be used during any act of domestic violence.

d. Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or the minor child.

e. Whether a party placed the aggrieved party or the minor child in reasonable fear of imminent serious bodily injury.

f. Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress.

g. Whether there is a pattern of abuse against an aggrieved party or the minor child.

h. Whether a party has abused or endangered the minor child during visitation.

i. Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party.

j. Whether a party has improperly concealed or detained the minor child.

k. Whether a party has otherwise acted in a manner that is not in the best interest of the minor child.

(3) If the court awards custody, the court shall also consider whether visitation is in the best interest of the minor child. If ordering visitation, the court shall provide for the safety and well-being of the minor child and the safety of the aggrieved party. The court may consider any of the following:

a. Ordering an exchange of the minor child to occur in a protected setting or in the presence of an appropriate third party.

b. Ordering visitation supervised by an appropriate third party, or at a supervised visitation center or other approved agency.

c. Ordering the noncustodial parent to attend and complete, to the satisfaction of the court, an abuser treatment program as a condition of visitation.

d. Ordering either or both parents to abstain from possession or consumption of alcohol or controlled substances during the visitation or for 24 hours preceding an exchange of the minor child.

e. Ordering the noncustodial parent to pay the costs of supervised visitation.

f. Prohibiting overnight visitation.

g. Requiring a bond from the noncustodial parent for the return and safety of the minor child.

h. Ordering an investigation or appointment of a guardian ad litem or attorney for the minor child.

i. Imposing any other condition that is deemed necessary to provide for the safety and well-being of the minor child and the safety of the aggrieved party.

If the court grants visitation, the order shall specify dates and times for the visitation to take place or other specific parameters or conditions that are appropriate. A person, supervised visitation center, or other agency may be approved to supervise visitation after appearing in court or filing an affidavit accepting that responsibility and acknowledging accountability to the court.

(4) A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year. Nothing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes.

(a2) If the court orders that the defendant attend an abuser treatment program pursuant to G.S. 50B-3(a)(12), the defendant shall begin regular attendance of the program within 60 days of the entry of the order. When ordering a defendant to attend an abuser treatment program, the court shall also specify a date and time for a review hearing with the court to assess whether the defendant has complied with that part of the order. The review hearing shall be held as soon as practicable after 60 days from the entry of the original order. The date of the review shall be set at the same time as the entry of the original order, and the clerk shall issue a Notice of Hearing for the compliance review to be given to the defendant and filed with the court on the same day as the entry of the order. If a defendant is not present in court at the time the order to attend an abuser treatment program is entered and the Notice of Hearing for review is filed, the clerk shall serve a copy of the Notice of Hearing together with the service of the order. The plaintiff may, but is not required to, attend the 60-day review hearing.

(a3) At any time prior to the 60-day review hearing set forth in subsection (a2) of this section, a defendant who is ordered to attend an abuser treatment program may present to the clerk a written statement from an abuser treatment program showing that the defendant has enrolled in and begun regular attendance in an abuser treatment program. Upon receipt of the written statement, the clerk shall remove the 60-day review hearing from the court docket, and the defendant shall not be required to appear for the 60-day review hearing. The clerk shall also notify the plaintiff that the defendant has complied with the order and that no 60-day review hearing will occur.

(b) Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party

acted primarily in self-defense, and that the right of each party to due process is preserved. Protective orders entered pursuant to this Chapter expire at 11:59 P.M. on the indicated expiration date, unless specifically stated otherwise in the order.

(b1) A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law.

(b2) Upon the written request of either party at a hearing after notice or service of process, the court may modify any protective order entered pursuant to this Chapter after a finding of good cause.

(c) A copy of any order entered and filed under this Article shall be issued to each party. Law enforcement agencies shall accept receipt of copies of the order issued by the clerk of court by electronic or facsimile transmission for service on defendants. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued promptly to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides. If the defendant is ordered to stay away from the child's school, a copy of the order shall be delivered promptly by the sheriff to the principal or, in the principal's absence, the assistant principal or the principal's designee of each school named in the order.

(c1) When a protective order issued under this Chapter is filed with the Clerk of Superior Court, the clerk shall provide to the applicant an informational sheet developed by the Administrative Office of the Courts that includes:

(1) Domestic violence agencies and services.
(2) Sexual assault agencies and services.
(3) Victims' compensation services.
(4) Legal aid services.
(5) Address confidentiality services.
(6) An explanation of the plaintiff's right to apply for a permit under G.S. 14-415.15.

(d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis. Modifications, terminations, renewals, and dismissals of the order shall also be promptly entered. (1979, c. 561, s. 1; 1985, c. 463; 1994, Ex. Sess., c. 4, s. 2; 1995, c. 527, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 2; c. 742, s. 42.1.; 1999-23, s. 1; 2000-125, s. 9; 2002-105, s. 2; 2002-126, s. 29A.6(b); 2003-107, s. 2; 2004-186, ss. 17.3-17.5; 2005-343, s. 2; 2005-423, s. 1; 2007-116, s. 3; 2009-425, s. 1; 2013-237, s. 1; 2015-176, s. 1; 2017-92, s. 2; 2019-168, ss. 1, 2(b).)

§ 50B-3.1. Surrender and disposal of firearms; violations; exemptions.

(a) Required Surrender of Firearms. – Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

(1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
(2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.
(3) Threats to commit suicide by the defendant.
(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

(b) Ex Parte or Emergency Hearing. – The court shall inquire of the plaintiff, at the ex parte or emergency hearing, the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(c) Ten-Day Hearing. – The court, at the 10-day hearing, shall inquire of the defendant the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(d) Surrender. – Upon service of the order, the defendant shall immediately surrender to the sheriff possession of all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. In the event that weapons cannot be surrendered at the time the order is served, the defendant shall surrender the firearms, ammunitions, and permits to the sheriff within 24 hours of service at a time and place specified by the sheriff. The sheriff shall store the firearms or contract with a licensed firearms dealer to provide storage.

(1) If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the protective order and include these terms on the face of the order, including that the defendant is prohibited from possessing, purchasing, or receiving or attempting to possess, purchase, or receive a firearm for so long as the protective order or any successive protective order is in effect. The terms of the order shall include instructions as to how the defendant may request retrieval of any firearms, ammunition, and permits surrendered to the sheriff when the protective order is no longer in effect. The terms shall also include notice of the penalty for violation of G.S. 14-269.8.
(2) The sheriff may charge the defendant a reasonable fee for the storage of any firearms and ammunition taken pursuant to a protective order. The fees are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer. The fees shall be used by the sheriff to pay the costs of administering this section and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only. The sheriff shall not release firearms, ammunition, or permits without a court order granting the release. The defendant must remit all fees owed prior to the authorized return of any firearms, ammunition, or permits. The sheriff shall not incur any civil or criminal liability for alleged damage or deterioration due to storage or transportation of any firearms or ammunition held pursuant to this section.

(e) Retrieval. – If the court does not enter a protective order when the ex parte or emergency order expires, the defendant may retrieve any weapons surrendered to the sheriff unless the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order.

(f) Motion for Return. – The defendant may request the return of any firearms, ammunition, or permits surrendered by filing a motion with the court at the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order and not later than 90 days after the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order. Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms, ammunition, or permits. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:

(1) Whether the protective order has been renewed.
(2) Whether the defendant is subject to any other protective orders.
(3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.
(4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order.

The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or if the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges.

(g) Motion for Return by Third-Party Owner. – A third-party owner of firearms, ammunition, or permits who is otherwise eligible to possess such items may file a motion requesting the return to said third party of any such items in the possession of the sheriff seized as a result of the entry of a domestic violence protective order. The motion must be filed not later than 30 days after the seizure of the items by the sheriff. Upon receipt of the third party's motion, the court shall schedule a hearing and provide written notice to all parties and the sheriff. The court shall order return of the items to the third party unless the court determines that the third party is disqualified from owning or possessing said items pursuant to State or federal law. If the court denies the return of said items to the third party, the items shall be disposed of by the sheriff as provided in subsection (h) of this section.

(h) Disposal of Firearms. – If the defendant does not file a motion requesting the return of any firearms, ammunition, or permits surrendered within the time period prescribed by this section, if the court determines that the defendant is precluded from regaining possession of any firearms, ammunition, or permits surrendered, or if the defendant or third-party owner fails to remit all fees owed for the storage of the firearms or ammunition within 30 days of the entry of the order granting the return of the firearms, ammunition, or permits, the sheriff who has control of the firearms, ammunition, or permits shall give notice to the defendant, and the sheriff shall apply to the court for an order of disposition of the firearms, ammunition, or permits. The judge, after a hearing, may order the disposition of the firearms, ammunition, or permits in one or more of the ways authorized

by law, including subdivision (4), (4b), (5), or (6) of G.S. 14-269.1. If a sale by the sheriff does occur, any proceeds from the sale after deducting any costs associated with the sale, and in accordance with all applicable State and federal law, shall be provided to the defendant, if requested by the defendant by motion made before the hearing or at the hearing and if ordered by the judge.

(i) It is unlawful for any person subject to a protective order prohibiting the possession or purchase of firearms to:

(1) Fail to surrender all firearms, ammunition, permits to purchase firearms, and permits to carry concealed firearms to the sheriff as ordered by the court;

(2) Fail to disclose all information pertaining to the possession of firearms, ammunition, and permits to purchase and permits to carry concealed firearms as requested by the court; or

(3) Provide false information to the court pertaining to any of these items.

(j) Violations. – In accordance with G.S. 14-269.8, it is unlawful for any person to possess, purchase, or receive or attempt to possess, purchase, or receive a firearm, as defined in G.S. 14-409.39(2), machine gun, ammunition, or permits to purchase or carry concealed firearms if ordered by the court for so long as that protective order or any successive protective order entered against that person pursuant to this Chapter is in effect. Any defendant violating the provisions of this section shall be guilty of a Class H felony.

(k) Official Use Exemption. – This section shall not prohibit law enforcement officers and members of any branch of the Armed Forces of the United States, not otherwise prohibited under federal law, from possessing or using firearms for official use only.

(l) Nothing in this section is intended to limit the discretion of the court in granting additional relief as provided in other sections of this Chapter. (2003-410, s. 1; 2004-203, s. 34(a); 2005-287, s. 4; 2005-423, ss. 2, 3; 2011-183, s. 40; 2011-268, ss. 23, 24.)

§ 50B-4. Enforcement of orders.

(a) A party may file a motion for contempt for violation of any order entered pursuant to this Chapter. This party may file and proceed with that motion pro se, using forms provided by the clerk of superior court or a magistrate authorized under G.S. 50B-2(c1). Upon the filing pro se of a motion for contempt under this subsection, the clerk, or the authorized magistrate, if the facts show clearly that there is danger of acts of domestic violence against the aggrieved party or a minor child and the motion is made at a time when the clerk is not available, shall schedule and issue notice of a show cause hearing with the district court division of the General Court of Justice at the earliest possible date pursuant to G.S. 5A-23. The Clerk, or the magistrate in the case of notice issued by the magistrate pursuant to this subsection, shall effect service of the motion, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(b) Repealed by Session Laws 1999-23, s. 2, effective February 1, 2000.

(c) A valid protective order entered pursuant to this Chapter shall be enforced by all North Carolina law enforcement agencies without further order of the court.

(d) A valid protective order entered by the courts of another state or the courts of an Indian tribe shall be accorded full faith and credit by the courts of North Carolina whether or not the order has been registered and shall be enforced by the courts and the law enforcement agencies of North Carolina as if it were an order issued by a North Carolina court. In determining the validity of an out-of-state order for purposes of enforcement, a law enforcement officer may rely upon a copy of the protective order issued by another state or the courts of an Indian tribe that is provided to the

officer and on the statement of a person protected by the order that the order remains in effect. Even though registration is not required, a copy of a protective order may be registered in North Carolina by filing with the clerk of superior court in any county a copy of the order and an affidavit by a person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Notice of the registration shall not be given to the defendant. Upon registration of the order, the clerk shall promptly forward a copy to the sheriff of that county. Unless the issuing state has already entered the order, the sheriff shall provide for prompt entry of the order into the National Crime Information Center registry pursuant to G.S. 50B-3(d).

(e) Upon application or motion by a party to the court, the court shall determine whether an out-of-state order remains in full force and effect.

(f) The term "valid protective order," as used in subsections (c) and (d) of this section, shall include an emergency or ex parte order entered under this Chapter.

(g) Notwithstanding the provisions of G.S. 1-294, a valid protective order entered pursuant to this Chapter which has been appealed to the appellate division is enforceable in the trial court during the pendency of the appeal. Upon motion by the aggrieved party, the court of the appellate division in which the appeal is pending may stay an order of the trial court until the appeal is decided, if justice so requires. (1979, c. 561, s. 1; 1985, c. 113, s. 4; 1987, c. 739, s. 6; 1989, c. 461, s. 2; 1994, Ex. Sess., c. 4, s. 3; 1995 (Reg. Sess., 1996), c. 591, s. 3; 1999-23, s. 2; 2002-126, s. 29A.6(c); 2003-107, s. 3; 2009-342, s. 4; 2017-92, s. 1.)

§ 50B-4.1. Violation of valid protective order.

(a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.

(b) A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a valid protective order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from doing any or all of the acts specified in G.S. 50B-3(a)(9).

(c) When a law enforcement officer makes an arrest under this section without a warrant, and the party arrested contests that the out-of-state order or the order issued by an Indian court remains in full force and effect, the party arrested shall be promptly provided with a copy of the information applicable to the party which appears on the National Crime Information Center registry by the sheriff of the county in which the arrest occurs.

(d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to convictions of a Class A or B1 felony or to convictions of the offenses set forth in subsection (f) or subsection (g) of this section.

(e) An indictment or information that charges a person with committing felonious conduct as described in subsection (d) of this section shall also allege that the person knowingly violated a valid protective order as described in subsection (a) of this section in the course of the conduct constituting the underlying felony. In order for a person to be punished as described in subsection

(d) of this section, a finding shall be made that the person knowingly violated the protective order in the course of conduct constituting the underlying felony.

(f) Unless covered under some other provision of law providing greater punishment, any person who knowingly violates a valid protective order as provided in subsection (a) of this section, after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony.

(g) Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.

(g1) Unless covered under some other provision of law providing greater punishment, any person who is subject to a valid protective order, as provided in subsection (a) of this section, who enters property operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing, shall be guilty of a Class H felony. A person violates this subsection regardless of whether the person protected under the order is present on the property.

(h) For the purposes of this section, the term "valid protective order" shall include an emergency or ex parte order entered under this Chapter. (1997-471, s. 3; 1997-456, s. 27; 1999-23, s. 4; 2001-518, s. 5; 2007-190, s. 1; 2008-93, s. 1; 2009-342, s. 5; 2009-389, s. 2; 2010-5, s. 1; 2015-91, s. 3.)

§ 50B-4.2. False statement regarding protective order a misdemeanor.

A person who knowingly makes a false statement to a law enforcement agency or officer that a protective order entered pursuant to this Chapter or by the courts of another state or Indian tribe remains in effect shall be guilty of a Class 2 misdemeanor. (1999-23, s. 5.)

§ 50B-5. Emergency assistance.

(a) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance as soon as practicable. The local law enforcement officer responding to the request for assistance may take whatever steps are reasonably necessary to protect the complainant from harm and may advise the complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer may transport the complainant to appropriate facilities such as hospitals, magistrates' offices, or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(b) In providing the assistance authorized by subsection (a), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a). (1979, c. 561, s. 1; 1985, c. 113, s. 5; 1999-23, s. 6.)

§ 50B-5.5. Employment discrimination unlawful.

(a) No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief

under this Chapter. An employee who is absent from the workplace shall follow the employer's usual time-off policy or procedure, including advance notice to the employer, when required by the employer's usual procedures, unless an emergency prevents the employee from doing so. An employer may require documentation of any emergency that prevented the employee from complying in advance with the employer's usual time-off policy or procedure, or any other information available to the employee which supports the employee's reason for being absent from the workplace.

(b) The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to the Article. (2004-186, s. 18.1.)

§ 50B-6. Construction of Chapter.

This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein. This Chapter shall not be construed as relieving any person or institution of the duty to report to the department of social services, as required by G.S. 7B-301, if the person or institution has cause to suspect that a juvenile is abused or neglected. (1979, c. 561, s. 1; 1985, c. 113, s. 6; 1998-202, s. 13(r).)

§ 50B-7. Remedies not exclusive.

(a) The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes.

(b) Any subsequent court order entered supersedes similar provisions in protective orders issued pursuant to this Chapter. (1979, c. 561, s. 1; 2019-168, s. 2(a).)

§ 50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals.

The granting of a protective order, prosecution for violation of this Chapter, or the granting of any other relief or the institution of any other enforcement proceedings under this Chapter shall not be construed to afford a defense to any person or persons charged with fornication and adultery under G.S. 14-184 or charged with any other offense against the public morals; and prosecution, conviction, or prosecution and conviction for violation of any provision of this Chapter shall not be a bar to prosecution for violation of G.S. 14-184 or of any other statute defining an offense or offenses against the public morals. (1979, c. 561, s. 1; 2003-107, s. 4.)

§ 50B-9. Domestic Violence Center Fund.

(a) The Domestic Violence Center Fund is established within the State Treasury. The fund shall be administered by the Department of Administration, North Carolina Council for Women and Youth Involvement, and shall be used to make grants to centers for victims of domestic violence and to The North Carolina Coalition Against Domestic Violence, Incorporated. This fund shall be administered in accordance with the provisions of the State Budget Act. The Department of Administration shall make quarterly grants to each eligible domestic violence center and to The North Carolina Coalition Against Domestic Violence, Incorporated. The Department of Administration shall send the contracts to grantees within 10 business days of the date the Current Operations Appropriations Act, as defined in G.S. 143C-1-1, is certified for that fiscal year.

(b) Each grant recipient shall receive the same amount. To be eligible to receive funds under this section, a domestic violence center must meet the following requirements:

(1) It shall have been in operation on the preceding July 1 and shall continue to be in operation.

(2) It shall offer all of the following services: a hotline, transportation services, community education programs, daytime services, and call forwarding during the night and it shall fulfill other criteria established by the Department of Administration.

(3) It shall be a nonprofit corporation or a local governmental entity.

(c) On or before September 1, the North Carolina Council for Women and Youth Involvement shall report on the quarterly distributions of the grants from the Domestic Violence Center Fund to the House and Senate chairs of the General Government Appropriations Committee and the Fiscal Research Division. The report shall include the following:

(1) Date, amount, and recipients of the fund disbursements.

(2) Eligible programs which are ineligible to receive funding during the relative reporting cycle as well as the reason of the ineligibility for that relative reporting cycle. (1991, c. 693, s. 3; 1991 (Reg. Sess., 1992), c. 988, s. 1; 2017-57, s. 31.2(a); 2021-180, s. 20.6(a).)

More on DVPOs: What is a 'Dating Relationship'?

In my last post, Ex Parte DVPOs, I promised more on ex parte DVPOs. But the Court of Appeals issued an important decision this week on another aspect of Chapter 50B – the definition of 'dating relationship' – so I'll come back to ex parte orders later.

Act of Domestic Violence

Two elements are required to prove an act of domestic violence:

1. That one of the acts listed in GS 50B-1(a) was committed upon the aggrieved party or a minor child residing with or in the custody of the aggrieved party; and
2. That the act was committed by someone with whom the aggrieved party has or has had a personal relationship.

G.S. 50B-1.

Personal Relationship

We have a number of opinions interpreting the act element but much less guidance on the relationship requirement.

The statute states that personal relationship means that the parties:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren - except no order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are or have been in a dating relationship.

G.S. 50B-1(b).

Before this week, we had one case addressing these definitions - *Tyll v. Willets,* 748 SE2d 329 (2013)(trial court cannot assume siblings are current or former household members).

Dating Relationship

Thomas v. Williams, decided this week on July 7, 2015, is our second appellate opinion addressing the definition of personal relationship –specifically, the dating relationship in G.S. 50B-1(b)(6). Especially now when younger members of our society rarely if ever refer to their romantic relationships as 'dating', it is not obvious what a plaintiff needs to show to establish this relationship. Thomas gives some much needed guidance.

Thomas v. Williams

Plaintiff Caroline Thomas and defendant Kevin Williams met in April 2014 and "dated" for less than three weeks. "Dated" is the term used in the opinion. There is nothing in the case indicating whether "dated" means that the parties went to dinner and a movie two or three Friday nights, met for coffee on a couple of occasions, hung out with mutual friends a few times, or something else.

On May 1, 2014, Caroline told Kevin she had no interest in continuing the relationship and asked him to stop calling her. But Kevin continued to attempt to contact Caroline through phone calls, voicemails and text messages. In June, 2014, Caroline filed a 50B proceeding and the trial court entered a DVPO after concluding Caroline and Kevin had been in a dating relationship and that Kevin's conduct throughout May and June "placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress."

Kevin appealed, arguing that he and Caroline did not have a personal relationship. In affirming the trial court's conclusion that the parties were in a dating relationship, the court of appeals noted that GS 50B-1(b)(6) offers some guidance by stating two things:

1. A dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of a relationship; and
2. A "casual acquaintance or ordinary fraternization between persons in a business of social setting is not a dating relationship."

Because neither party argued that they never actually dated – Kevin argued only that they did not date very long – the court does not discuss at all the type of activities that actually constitute dating. Instead, the court held that the only issue to be resolved in this case was "how long a "continuous" "romantic" relationship must exist in order for it to exist "over time."

In answering this question, the court held that the term 'dating relationship' in this context should be interpreted broadly enough to cover a wide range of 'romantic' relationships. To support this conclusion, the court noted that the exclusion of only "casual acquaintances" and people who merely "fraternize" with each other indicates a legislative intent to exclude from the definition of dating relationship "only the least intimate of personal relationships." According to the court, this expression of legislative intent coupled with the rule of statutory construction that remedial statutes

such as the 50B statute be interpreted broadly, means that the mere fact that a relationship is "short-term" does not "categorically preclude" that relationship from being one covered by Chapter 50B.

Instead, the court listed "six non-exhaustive factors" that should be used to determine if a dating relationship existed:

1. Was there a minimal social interpersonal bonding of the parties over and above [that of] mere casual [acquaintances or ordinary] fraternization?

2. How long did the alleged dating activities continue prior to the acts of domestic violence alleged?

3. What were the nature and frequency of the parties' interactions?

4. What were the parties' ongoing expectations with respect to the relationship, either individually or jointly?

5. Did the parties demonstrate an affirmation of their relationship before others by statement or conduct?

6. Are there any other reasons unique to the case that support or detract from a finding that a "dating relationship" exists?

Thomas.

Applying these factors to the case at hand, the court found that dating for less than three weeks "appears to exceed the minimal social interpersonal bonding" discussed in factor #1 and the fact that plaintiff became afraid of defendant after less than three weeks addressed factor #2. The fact that factors #3, 4 and 5 were not addressed by the trial court order was "not dispositive." With regard to factor #6, the court found it significant that defendant continued to harass plaintiff for two-to-three months after plaintiff tried to end the relationship.

Still many questions about dating, but at least now we have factors and legislative intent.

IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-23

No. 18A21

Filed 11 March 2022

M.E.

v.

T.J.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 528 (2020), reversing the ruling entered 7 June 2018 by Judge Anna Worley in the District Court of Wake County, and remanding for further proceedings. Heard in the Supreme Court on 5 January 2022.

Scharff Law Firm, PLLC, by Amily McCool; ACLU of North Carolina Legal Foundation, by Irena Como and Kristi L. Graunke; and Patterson Harkavy LLP, by Christopher A. Brook, for plaintiff-appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, D. Martin Warf, and G. Gray Wilson, for defendant-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for State of North Carolina and Governor Roy Cooper, amici curiae.

Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP, by Sarah M. Saint and Eric M. David; and Kathleen Lockwood and Nisha Williams, for North Carolina Coalition Against Domestic Violence, amicus curiae.

Poyner Spruill LLP, by Andrew H. Erteschik, John Michael Durnovich, N. Cosmo Zinkow; and Robinson, Bradshaw, & Hinton, P.A., by Stephen D. Feldman, Mark A. Hiller, and Garrett A. Steadman, for Legal Aid of North Carolina, The North Carolina Justice Center, and The Pauli Murry LGBTQ+ Bar Association, amici curiae.

Womble Bond Dickinson (US) LLP, by Kevin A. Hall, Samuel B. Hartzell, and Ripley Rand, for Former District Court Judges, amicus curiae.

HUDSON, Justice.

¶ 1 For well over a century, North Carolina courts have abided by the foundational principle that administering equity and justice prohibits the elevation of form over substance. *See, e.g.*, *Currie v. Clark*, 90 N.C. 355, 361 (1884) ("This would be to subordinate substance to form and subserve no useful purpose."); *Moring v. Privott*, 146 N.C. 558, 567 (1908) ("Equity disregards mere form and looks at the substance of things."); *Fidelity & Casualty Co. v. Green*, 200 N.C. 535, 538 (1931) ("To hold otherwise, we apprehend, would be to exalt the form over the substance."). In alignment with this principle, our Rules of Civil Procedure are intended to *facilitate* access to justice, not obstruct it. *See Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 443 (1988) (noting that "deny[ing] plaintiff its day in court simply for its imprecision with the pen . . . would be contrary to the purpose and intent of . . . the modern rules of civil procedure."). Indeed, "it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99 (1972).

¶ 2 This principle holds particular salience in the realm of Domestic Violence Protective Orders (DVPO). Survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma,

and without the assistance of legal counsel. Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 Law & Ineq. 167, 170 (2003) (noting that "the effects [of domestic violence] extend beyond the physical harms, causing substance abuse, severe psychological trauma, and stress-related illnesses."); Julia Kim & Leslie Starsoneck, *North Carolina District Courts' Response to Domestic Violence* 57 (Dec. 2007), https://www.nccourts.gov/assets/inline-files/dv_studyreport.pdf [hereinafter Kim & Starsoneck] (noting that "generally most 50B plaintiffs and defendants appear pro se."). Accordingly, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey v. Hennessy*, 201 N.C. App. 56, 63 (2009).

¶ 3 Today, we apply these longstanding principles here, where plaintiff struck through and wrote "I do not want to dismiss this action" on a Notice of Voluntary Dismissal form that she had filed thirty-nine minutes previously, after learning that she could, in fact, proceed with her original Chapter 50B DVPO complaint. Defendant contends, *inter alia*, that this handwritten amendment could not revive plaintiff's previously dismissed complaint, and therefore that the trial court erred in exercising jurisdiction over the subsequent hearing. Holding so, however, "would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 4 Accordingly, we hold that the district court did not err in determining that it had subject matter jurisdiction to allow plaintiff to proceed with her Chapter 50B DVPO action. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate review, and that defendant's Rule 19(d) necessary joinder argument was not properly preserved for appellate review. Finally, we note that the merits of the Court of Appeals' ruling that N.C.G.S. § 50-B(1)(b)(6)'s exclusion of complainants in same-sex dating relationships from DVPO protection is unconstitutional were not at issue before this Court, and therefore stand undisturbed and maintain normal precedential effect. We therefore modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

I. Factual and Procedural Background

A. Chapter 50B Filings and District Court Rulings

¶ 5 Plaintiff M.E. and defendant T.J., both women, were in a dating relationship that ended badly. After plaintiff ended the relationship on 29 May 2018, she alleged that defendant became verbally and physically threatening toward plaintiff, including attempting to force her way into plaintiff's house and needing to be removed by police. On the morning of 31 May 2018, plaintiff, accompanied by her mother, went to the Wake County Clerk of Superior Court office seeking the protections of a Domestic Violence Protective Order and an ex parte temporary DVPO pursuant to

N.C.G.S. Chapter 50B. After plaintiff explained her situation to staff members at the clerk's office, they provided her with the appropriate forms to file a Chapter 50B "Complaint and Motion for Domestic Violence Protective Order" (AOC-CV-303), which include a section to request a temporary "Ex Parte Domestic Violence Order of Protection." *See* N.C.G.S. § 50B-2(d) (2021) (establishing that "[t]he clerk of superior court of each county shall provide pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section.").

¶ 6 Plaintiff then filled out the Chapter 50B forms she had been given. Plaintiff checked Box 4 of the form, which alleges that "[t]he defendant has attempted to cause or has intentionally caused me bodily injury; or has placed me or a member of my family or household in fear of imminent serious bodily injury or in fear of continued harassment that rises to such a level as to inflict sustained emotional distress . . ." In the subsequent space for further details, plaintiff wrote:

> May 29th 2016[.] Became aggressive after stating the relationship was over. Had to push her back twice and lock her out of my home then placed 911 call. Officer arrived and she appeared to have left. She was hiding in back yard. Attempted to force entry into the home. 911 was called again. Defendant has not stopped attempting to contact me.

Plaintiff also checked Box 6, indicating that "I believe there is danger of serious and imminent injury to me or my child(ren)." Finally, plaintiff checked Box 9, indicating that "[t]he defendant has firearms and ammunition as described below." Below,

plaintiff wrote "access to father[']s gun collection[.]"

¶ 7 Plaintiff requested "emergency relief" by way of "an Ex Parte Order before notice of a hearing is given to the defendant." Plaintiff further requested that the court order Defendant: "not to assault, threaten, abuse, follow, harass, or interfere with me[;]" "not to come on or about . . . my residence [or] . . . the place where I work[;]" "[to] have no contact with me[;]" "[not] possess[ ] or purchas[e] a firearm[;]" and take "anger management classes." After filing this paperwork, plaintiff was instructed by the staff members to return to court later that day for her hearing.

¶ 8 When plaintiff returned to court for her hearing, the trial court "informed [her] that because both she and [d]efendant were women, and only in a 'dating' . . . relationship, N.C.G.S. § 50B-1(b)(6) did not allow the trial court to grant her an ex parte DVPO or any other protections afforded by Chapter 50B." *M.E.*, 275 N.C. App. at 533. Indeed, N.C.G.S. § 50B-1(a) limits DVPO protection to those who are in or have been in a "personal relationship," and N.C.G.S. § 50B-1(b) subsequently defines "personal relationship" as "a relationship wherein the parties involved:"

> (1) Are current or former spouses;
>
> (2) Are persons *of opposite sex* who live together or have lived together;
>
> (3) Are related as parents and children . . . ;
>
> (4) Have a child in common;
>
> (5) Are current or former household members; [or]

> (6) Are persons *of the opposite sex* who are in a dating relationship or have been in a dating relationship.

(emphasis added). As such, the statute excludes from DVPO eligibility any person, like plaintiff, who is or was in a same-sex dating relationship. Instead of seeking a DVPO under Chapter 50B, trial court informed plaintiff

> that she could seek a civil ex parte temporary no-contact order and a permanent civil no-contact order, pursuant to Chapter 50C. *See* N.C.G.S. § 50C-2 (2017). Chapter 50C expressly states that its protections are for "persons against whom an act of unlawful conduct has been committed by another person *not involved in a personal relationship* with the person *as defined in G.S. 50B-1(b).*" N.C.G.S. § 50C-1(8) (2017) (emphasis added).

M.E., 275 N.C. App. at 533. Notably, however, unlike DVPOs under Chapter 50B, no-contact orders under Chapter 50C do not allow the trial court to place any limits upon the defendant's right to possess a weapon.

¶ 9 Accordingly, plaintiff returned to the clerk's office and explained to staff members what the judge had told her. Staff members then gave plaintiff a new stack of forms to complete, including the Chapter 50C forms and a notice of voluntary dismissal of her previous Chapter 50B complaint. Plaintiff filled out the forms and gave them back to the staff members, who filed them. Plaintiff's notice of voluntary dismissal was filed-stamped 3:12 p.m.

¶ 10 Shortly thereafter, after a conversation among the staff, staff members informed plaintiff that she could still request a DVPO under Chapter 50B even if the

trial court was going to deny it. Staff members then gave the original file-stamped notice of voluntary dismissal back to plaintiff. Plaintiff struck through the notice and wrote on it: "I strike through this voluntary dismissal. I do not want to dismiss this action[.]" Plaintiff then returned the form to the staff, who wrote "Amended" at the top and refiled it. The amended form was file-stamped a second time at 3:51 p.m., thirty-nine minutes after the original filing.

¶ 11 Plaintiff's four actions (Chapter 50B ex parte DVPO, Chapter 50B permanent DVPO, Chapter 50C ex parte Temporary No-Contact Order for Stalking, and Chapter 50C permanent Temporary No-Contact Order for Stalking) were then heard at the afternoon session of district court that same day, 31 May 2018. Plaintiff was present without counsel at this hearing; defendant was not present. The court had before it the full record of the case, including plaintiff's amended voluntary dismissal form. The court "denied [p]laintiff's request for a Chapter 50B *ex parte* DVPO, but set a hearing date of 7 June 2018 for a hearing on [p]laintiff's request for a permanent DVPO." *M.E.*, 275 N.C. App. at 533. Specifically, the trial court concluded in its order that: "allegations are significant but parties are in same[-]sex relationship and have never lived together, [and] therefore do not have relationship required in statute." The trial court did, however, grant plaintiff's ex parte request pursuant to Chapter 50C by entering a "Temporary No-Contact Order for Stalking or Nonconsensual Sexual Conduct" that same day. *See* N.C.G.S. § 50C-6(a) (2021).

> In the *ex parte* 50C Order, the trial court found as fact that "plaintiff has suffered unlawful conduct by defendant in that:" "On 5/29/18, defendant got physically aggressive and was screaming in plaintiff's face; defendant then left after LEO (law enforcement officers) were called; after LEO left," defendant "attempted to re-enter plaintiff's house; LEO returned to remove defendant from plaintiff's house; since that date, defendant has repeatedly called plaintiff, texted plaintiff from multiple numbers, and contacted plaintiff's friends and family." The trial court found that defendant "continues to harass plaintiff," and that "defendant committed acts of unlawful conduct against plaintiff." The trial court concluded that the "only reason plaintiff is not receiving a 50B DVPO today" is because plaintiff and defendant had been "in a same[-]sex relationship and do not live together," and that N.C.G.S. § 50B-1(b), as plainly written, requires the dating relationship to have consisted of people of the "opposite sex."

M.E., 275 N.C. App. at 534 (cleaned up).

¶ 12 On 7 June 2018, the trial court conducted its subsequent hearing on plaintiff's Chapter 50B and Chapter 50C permanent motions. Plaintiff appeared with counsel at this hearing; defendant appeared pro se. Here again, the trial court enjoyed the benefit of the full case record, including plaintiff's amended voluntary dismissal form. First, regarding the Chapter 50B complaint, "[d]efendant consented to an amendment to the order to indicate her relationship with [p]laintiff was one 'of same sex currently or formerly in dating relationship.' " *Id.* at 535. The trial court then stated: "I do not have a complaint . . . that would survive a Rule 12 motion [to dismiss]" because the plain language of N.C.G.S. § 50B-1(b)(6) does not include same-sex dating relationships within its definition of covered "personal relationships." The

trial court and plaintiff's counsel then engaged in the following exchange:

> [Plaintiff's counsel]: Your honor, with that amended, I understand what you already said, that you don't believe it would survive a motion to dismiss. However, . . . we do feel at this point that [plaintiff] should be allowed to proceed with the Domestic Violence Protective Order, that it's—the statute, that 50B, is unconstitutional as it's written post the same-sex marriage equality case from the Supreme Court in *Obergefell* and that there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex. So we would ask that Your Honor consider allowing [plaintiff] to proceed with her Domestic Violence Protective Order case.
>
> [The court]: Do you have any precedent?
>
> [Plaintiff's counsel]: Not in North Carolina.
>
> [The court]: Other than the *Obergefell* case.
>
> [Plaintiff's counsel]: No, Your Honor, not in North Carolina.
>
> [The court]: In anywhere else that has a similar statute?
>
> [Plaintiff's counsel]: Your Honor[,] . . . South Carolina recently just overturned their statute that was written similarly.
>
> [The court]: In what procedure?
>
> [Plaintiff's counsel]: In a Domestic Violence Protective Order procedure.
>
> [The court]: By what court?
>
> [Plaintiff's counsel]: Either their court of appeals or their supreme court. Not by a district court, Your Honor. Yes, I believe it was a court of appeals case.

> [The court]: And in checking the legislative history, when was the last time our legislature addressed this?
>
> [Plaintiff's counsel]: Your Honor, our legislature has amended 50B for different reasons, but they have not amended the personal relationship categories any time in the recent past that I can recall. And, your honor, we've explained to [plaintiff], certainly, the bind that the [c]ourt is in in being bound by the language of the statute.
>
> [The court]: Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion that I'm ready to do that.
>
> [Plaintiff's counsel]: Thank you, Your Honor. Then with the [c]ourt's denial of the plaintiff's 50B action, then we would like to proceed with the 50C.
>
> [The court]: Okay.

¶ 13 In its subsequent form order, the trial court ruled that:

> plaintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of [a] statutorily defined personal relationship. . . . [H]ad the parties been of opposite genders, those facts would have supported the entry of a Domestic Violence Protective Order (50B).
>
> N.C.G.S. [§] 50B was last amended by the legislature in 2017 without amending the definition of "personal relationship" to include persons of the same sex who are in or have been in a dating relationship. This recent amendment in 2017 was made subsequent to the United States Supreme Court decision in *Obergefell v. Hodges*, 576 U.S. [664,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating

partners of the same sex.

Accordingly, the trial court dismissed plaintiff's Chapter 50B DVPO motion.

¶ 14 Later, the trial court issued a subsequent written order regarding plaintiff's Chapter 50B DVPO motion. There, the trial court concluded the following:

> 2. The [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current North Carolina General Statute 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships who are not spouses, ex-spouses, or current or former household members.
>
> 3. North Carolina General Statute 50B was passed by the North Carolina General Assembly in 1979 and later amended on several occasions. It states that an aggrieved party with whom they have a personal relationship may sue for a [DVPO] in order to prevent further acts of domestic violence. The question for the [c]ourt is how a personal relationship is defined. North Carolina General Statute 50B-1 states: "for purposes of this section, the term 'personal relationship' means wherein the parties involved: (1) are current or former spouses; (2) are persons of opposite sex who live together or have lived together; (3) are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) have a child in common; (5) are current or former household members; (6) are persons of the opposite sex who are in a dating relationship or have been in a dating relationship."
> . . . .
>
> 4. This definition prohibits victims of domestic violence in same sex dating relationships that are not spouses, ex-

> spouses, or current of former household members from seeking relief against a batterer under Chapter 50B.
>
> 5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any domestic violence protective order. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. On numerous occasions the Court of Appeals has stricken orders entered by the District Court that do no[t] include proper findings of fact or conclusions of law that are necessary to meet the statute. [ ] Defendant must be on notice that a cause of action exists under this section when the act of domestic violence is committed. The [c]ourt cannot enter a [DVPO] against a [d]efendant when there is no statutory basis to do so. In the case before the [c]ourt, the [d]efendant had no such notice.
>
> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:
>
> 1. The [p]laintiff has failed to prove grounds for issuance of a [DVPO] as [p]laintiff does not have a required "personal relationship" with the [d]efendant as required by North Carolina General Statute [Chapter] 50B.

¶ 15 The trial court did, however, grant plaintiff's Chapter 50C motion for a No-Contact Order for Stalking or Nonconsensual Sexual Conduct, ordering defendant not to "visit, assault, molest, or otherwise interfere with the plaintiff" for one year

from the date issued, 7 June 2018.

¶ 16 On 29 June 2018, plaintiff appealed the trial court's denial of her DVPO motion to the North Carolina Court of Appeals. In response, defendant sent a letter to plaintiff's counsel and the trial court that: denied that she and plaintiff were in a dating relationship; requested that the Court of Appeals not hear the case; asserted that "the LGBT community is asking for special treatment[ ] in this proceeding" and that "[t]hey should not be given equal access to protection under law as heterosexual relationships[;]" and emphasized that she did not want to be involved in the appeal.

B. Court of Appeals

¶ 17 Before the Court of Appeals, plaintiff argued "that the trial court's denial of her request for a DVPO violated [her] constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment [of the United States Constitution], as well as the associated provisions of the North Carolina Constitution." *M.E.*, 275 N.C. App. at 538.

¶ 18 The Court of Appeals also allowed several parties to file *amicus curiae* briefs in favor of the plaintiff. These amici included the Attorney General of North Carolina, who submitted a brief on behalf of the State seeking "to vindicate the State's powerful interests in safeguarding all members of the public from domestic violence." *Id.*

¶ 19 Defendant did not file an appellate brief, and no *amici* sought to file briefs contesting plaintiff's arguments on appeal.

> There were also no motions filed by any entity of the State to submit an *amicus* brief, or otherwise intervene in th[e] action, for the purpose of arguing in favor of the constitutionality of the Act. Therefore, [the Court of Appeals], on its own motion and by order entered 3 May 2019, appointed an *amicus curiae* ("*Amicus*"), to brief an argument in response to [p]laintiff's arguments on appeal.

Id.

¶ 20 On 31 December 2020, the Court of Appeals filed an opinion in which it agreed with plaintiff's claims under both the North Carolina and United States constitutions. Accordingly, the Court of Appeals reversed the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO and remanded for entry of an appropriate order. *Id.* at 590. Further, the court explicitly stated that its holding applied with equal force "to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the 'same-sex' or 'opposite sex' nature of their "dating relationship" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act." *Id.*

¶ 21 Judge Tyson dissented. *Id.* Specifically, the dissent would have held that plaintiff's appeal was not properly before the court because of five purported jurisdictional and procedural defects: (1) plaintiff's filing of a voluntary dismissal of her 50B complaint; (2) plaintiff's failure to subsequently file a post-dismissal Rule 60 motion; (3) plaintiff's failure to argue and preserve any constitutional issue for appellate review; (4) plaintiff's failure to join necessary parties; and (5) plaintiff's

failure to comply with Rule 3 to invoke appellate review. *Id.* (Tyson, J., dissenting). Additionally, the dissent asserted that the majority's dismissal of the arguments of the appointed *amicus curiae* regarding the trial court's jurisdiction was erroneous.

¶ 22 First, the dissent asserted that plaintiff's filing of her voluntary dismissal of her previous 50B complaint extinguished the trial court's jurisdiction over that action. *Id.* at 591–92 (Tyson, J., dissenting). The dissent would have held that plaintiff's informal nullification of the voluntary dismissal did not properly revive her claim—she instead should have re-invoked the district court's jurisdiction with a new complaint. *Id.* at 592 (Tyson, J., dissenting).

¶ 23 Second, and as an alternative to filing a new complaint, the dissent asserted that plaintiff should have filed a Rule 60(b) motion to seek to revive the dismissed complaint. *Id.* (Tyson, J., dissenting). Without a refiling or a 60(b) motion, the dissent contended, plaintiff's complaint was extinguished by her voluntary dismissal. *Id.* at 593 (Tyson, J., dissenting).

¶ 24 Third, the dissent asserted that plaintiff did not properly preserve her constitutional argument for appellate review. *Id.* at 593–94 (Tyson, J., dissenting). The dissent would have instead held that plaintiff counsel's reference to *Obergefell* did not adequately raise a constitutional question, and, in any event, the trial court did not rule on the act's constitutionality, so that plaintiff may not now argue on appeal that the Act is unconstitutional. *Id.* at 594 (Tyson, J., dissenting).

¶ 25 Fourth, the dissent would have held that, because this is a civil action challenging the validity of a North Carolina statute, the Speaker of the House of Representatives and the President Pro Tempore of the Senate must be joined as defendants under Rule 19(d) of the North Carolina Rules of Civil Procedure. *Id.* at 595 (Tyson, J., dissenting). Separate from and in addition to the trial court's lack of subject matter jurisdiction, then, the dissent asserted that no further action or review is proper until this statutory defect is cured. *Id.* (Tyson, J., dissenting).

¶ 26 Fifth, the dissent noted that plaintiff's trial counsel's hard copy of the notice of appeal was filed with the clerk of superior court and bore no manuscript signature. *Id.* at 596 (Tyson, J., dissenting). Accordingly, the dissent asserted, the notice of appeal is defective under N.C. R. App. P. 3(d), which requires that a notice of appeal be signed by the counsel of record. *Id.* (Tyson, J., dissenting).

¶ 27 Finally, the dissent took issue with the majority's failure to review and dismissal of the arguments regarding subject matter jurisdiction raised by the appointed *amicus curiae*. *Id.* at 597 (Tyson, J., dissenting). The dissent asserted that amicus' supplemental filing and motion to dismiss for lack of jurisdiction were vital and should have been included in the record on appeal. *Id.* at 597–99 (Tyson, J., dissenting).

¶ 28 In sum, the dissent would have held that no appeal was actually pending before the court due to the trial court's lack of jurisdiction, among other procedural defects. *Id.* at 599–600 (Tyson, J., dissenting).

C. Present Appeal

¶ 29 On 11 January 2021, defendant, now represented by the former court-appointed *amicus* counsel, filed a notice of appeal in this Court based on the Court of Appeals dissent.

¶ 30 First, defendant asserts that the trial court and the Court of Appeals lacked proper jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal, on the basis that plaintiff's Chapter 50B DVPO complaint was completely extinguished upon the filing of the notice of voluntary dismissal at 3:12 p.m. on 31 May 2018. Accordingly, defendant asserts, because plaintiff never formally filed a new Chapter 50B complaint and no request for Rule 60(b) relief was sought or granted by the trial court, "the action was rendered moot and the [trial] court was divested of subject matter jurisdiction to proceed with the merits disposition." Defendant further contends that because the trial court lacked subject matter jurisdiction on the Chapter 50B action, its subsequent order on the action was void *ab initio*.

¶ 31 Correspondingly, defendant asserts that when plaintiff did not include the notice of voluntary dismissal form in her record on appeal, she "failed to meet her

burden of establishing jurisdiction of the [trial] court and Court of Appeals by omitting a court paper essential to the determination of whether such jurisdiction existed." Independent of this omission, though, defendant contends that the Court of Appeals had a duty to evaluate its own appellate jurisdiction over plaintiff's purported appeal before proceeding to a disposition on the merits. Defendant argues that "by deciding an appeal with a blind eye towards" a missing jurisdictional document, the [Court of Appeals] majority failed to carry out its duty to properly examine [its own] jurisdiction."

¶ 32 Second, defendant asserts that plaintiff failed to specifically preserve the constitutional issue for review by the Court of Appeals pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, or to obtain a ruling from the trial court on the issue upon the party's request, objection, or motion." Here, defendant contends, plaintiff's "vague constitutional reference" did not properly specify the grounds of her objection, and the trial court "confined its ruling to non[-]constitutional grounds." Accordingly, defendant asserts, the Court of Appeals erred in considering plaintiff's constitutional argument.

¶ 33 Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Defendant notes that Rule 19(d) requires that

> [t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina Statute or provision of the North Carolina Constitution under State or federal law.

Echoing the reasoning first raised in the Court of Appeals dissent, defendant contends that "[b]ecause plaintiff has challenged the constitutionality of N.C.G.S. § 50B-1(b)(6), the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives are necessary parties and '*must be joined as defendants*' in the civil action." "Consequently," defendant argues, "no disposition on appeal or before the [trial] court can occur until mandatory joinder is completed as provided by statute."

¶ 34 In response, plaintiff first argues that the trial court had proper jurisdiction to hear her DVPO complaint and motions where, at the suggestion of court staff, she quickly withdrew a notice of voluntary dismissal filed mistakenly or inadvertently because she wished to continue prosecuting her case. Plaintiff claims that defendant waived her objection regarding the notice of voluntary dismissal when she failed to raise it in the trial court or the Court of Appeals. In any event, plaintiff contends, the trial court had authority and discretion to construe plaintiff's filings in her favor and permit amendment as needed to promote justice where plaintiff was proceeding pro se in a domestic violence action. To prevent injustice and inefficiency, plaintiff asserts, "trial courts have discretion to take steps to protect litigants poised to

relinquish their cases, particularly where those litigants are vulnerable."

¶ 35 Further, plaintiff asserts, the trial court had inherent authority to grant plaintiff relief under Rule 60(b) in the interest of justice. Although plaintiff's amended notice of dismissal was not styled as a formal 60(b) motion, plaintiff contends that it was "nonetheless sufficient for the trial court to award her equitable relief from the unintended dismissal under" that rule because it met the substantive requirements of that rule, namely that it was filed inadvertently or mistakenly, and was quickly fixed.

¶ 36 Second, plaintiff addresses defendant's preservation argument. As an initial matter, plaintiff again argues that by failing to raise objections to constitutional preservation below, defendant waived those objections. Indeed, plaintiff notes, in Defendant's lone submission during the appellate process (the letter to the trial court after its ruling), defendant herself briefly engaged in the constitutional merits without objecting to preservation. But even if defendant has not waived her preservation challenge, plaintiff argues, the constitutional issue was properly preserved. Specifically, plaintiff contends that the record makes clear that the trial court had notice of the constitutional issue before it and ruled on it, which is sufficient to preserve it for appeal. Plaintiff agues that her counsel expressly preserved the constitutional issue by mentioning *Obergefell* by name, arguing that the statute was unconstitutional because there was no rational basis supporting the exclusion of

same-sex couples, and noting a recent South Carolina Supreme Court case raising the same constitutional issues. Further, plaintiff asserts, the trial court ruled on the constitutional issue where it expressly engaged with the issue both on the record during oral argument and in its final written order before denying the DVPO motion.

¶ 37 Third and finally, plaintiff addresses defendant's joinder challenge, arguing first that Defendant waived her joinder defense where she failed to raise it in either the trial court or the Court of Appeals. Even if defendant has not waived her objection to joinder, though, plaintiff argues that joining legislative leaders is not required here because actions under Chapter 50B are not "civil actions challenging the validity of a North Carolina statute" under Rule 19(d). Rather, plaintiff asserts that her Chapter 50B complaint was brought for the sole purpose of obtaining a DVPO, and the as-applied constitutional question was raised merely in defense of the trial court's statutory jurisdiction to hear the claim of a person in a same-sex dating relationship.

¶ 38 Finally, this Court allowed several *amici* to file briefs, including: (1) North Carolina Solicitor General Ryan Park, on behalf of the State; (2) the North Carolina Coalition Against Domestic Violence; (3) Legal Aid of North Carolina, the North Carolina Justice Center, and the Pauli Murray LGBTQ+ Bar Association; and (4) ten former North Carolina District Court judges. All *amicus* briefs filed supported the ruling of the Court of Appeals and plaintiff's positions on appeal.

II. Analysis

¶ 39 We now consider each of defendant's claims before this Court. As conclusions of law, each of the issues raised by defendant "are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168 (2011).

¶ 40 First, we conclude that the trial court acted within its broad discretion in exercising jurisdiction over plaintiff's Chapter 50B complaint because plaintiff's amended notice of dismissal functionally served as a motion for equitable relief under Rule 60(b), and plaintiff's amendment to the complaint—which defendant consented to—functionally served as a refiling. Second, we hold that plaintiff properly preserved the constitutional issue for appellate review. Third, we conclude that defendant did not properly preserve her joinder argument because it was first raised by the Court of Appeals dissent without being argued before that court. Accordingly, we modify and affirm the ruling of the Court of Appeals below reversing the trial court's denial of plaintiff's Chapter 50B complaint.

A. Jurisdiction

¶ 41 First, defendant asserts that the trial court and the Court of Appeals lacked jurisdiction due to plaintiff's voluntary dismissal of the Chapter 50B complaint and plaintiff's failure to include the dismissal in the record on appeal. We disagree.

¶ 42 Generally, trial court judges enjoy broad discretion in the efficient administration of justice and in the application of procedural rules toward that goal.

See Miller v. Greenwood, 218 N.C. 146, 150 (1940) ("It is within [a judge's] discretion to take any action [toward ensuring a fair and impartial trial] within the law and so long as he [or she] does not impinge upon [statutory] restrictions.") Indeed,

> [i]t is impractical and would be almost impossible to have legislation or rules governing all questions that may arise on the trial of a case. Unexpected developments, especially in the field of procedure, frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice.

Shute v. Fisher, 270 N.C. 247, 253 (1967).

¶ 43 Accordingly, rather than erecting hurdles to the administration of justice, "[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings." *Quackenbush v. Groat*, 271 N.C. App. 249, 253 (2020) (cleaned up).

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If [procedural filings use] such terms that every intelligent person understands [what] is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Harris v. Maready, 311 N.C. 536, 544 (1984) (cleaned up).

¶ 44 These general principles are particularly important within the context of DVPOs. In fact, the remedies of N.C.G.S. Chapter 50B are specifically written with

ease of access for pro se complainants in mind. For instance, N.C.G.S. § 50B-2(a) notes that "[a]ny aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel." Further, subsection (d) of that statute is dedicated entirely to establishing procedures for "Pro se Forms[:]"

> The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under . . . this section.

N.C.G.S. § 50B-2(d).

¶ 45 This statutory emphasis recognizes and accounts for the factual reality of domestic violence adjudication: survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma, and without the assistance of legal counsel. Calaf, 21 Law & Ineq. at 170; Kim & Starsoneck at 57. As such, "[t]he procedures under N.C.[G.S.] § 50B-2 are intended to provide a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Hensey*, 201 N.C. App. at 63.

¶ 46 Rule 60 of the North Carolina Rules of Civil Procedure provides trial courts with a procedure through which they can provide equitable relief from various

judgments, orders, or proceedings. N.C.G.S. § 1A-1, R. 60. Specifically, Rule 60(b) establishes that "[o]n motion and upon such terms as are just, the court may relieve a party or [her] legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." *Id*.

¶ 47 Here, the trial court acted well within its broad discretion, and with the benefit of the full record before it, when exercised jurisdiction over plaintiff's Chapter 50B DVPO complaint. Specifically, plaintiff's amended notice of voluntary dismissal—in which she struck through and handwrote "I do not want to dismiss this action" on the form she had inadvertently or mistakenly filed thirty-nine minutes previously—served as functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief. There is plainly no doubt as to plaintiff's intentions as expressed through the amended form: she "d[id] not want to dismiss th[e] action." Likewise, when the trial court allowed plaintiff to amend her Chapter 50B complaint—without objection from defendant—at the 7 June hearing on the merits, it reasonably could have considered this amendment as, in essence, a refiling after a voluntary dismissal.[1] While it may have been preferable for plaintiff to have filed an official 60(b) motion or a new Chapter 50B complaint for formality's sake, her amendment nevertheless expressed her intention to proceed with the complaint "in

[1] In light of defendant's consent to this amendment, there can be no doubt that she had ample notice that plaintiff was pursuing a DVPO under Chapter 50B.

such terms that every intelligent person understands [what] is meant, [and therefore] has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *Harris*, 311 N.C. at 544. Indeed, "[t]o hold otherwise . . . would be to exalt the form over the substance." *Fidelity & Casualty Co.*, 200 N.C. at 538.

¶ 48 Plaintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma. At every turn on 31 May 2018, plaintiff diligently followed the direction of court staff: in filing her initial Chapter 50B forms that morning, in completing the stack of new forms including the notice of voluntary dismissal at 3:12 p.m., and in amending and refiling that form thirty-nine minutes later to express her intention to proceed with her complaint. When the trial court exercised jurisdiction over plaintiff's Chapter 50B complaint, it did so with the benefit of the full record before it, including the court file (the trial court noted it was entering an order denying the DVPO "after hearing from the parties and reviewing the file") which held the amended notice of voluntary dismissal. It was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its

jurisdiction. To be clear, this is not to say that plaintiff, acting without legal counsel in the harried setting of the clerk's office, intended for her amendment to the voluntary dismissal form to serve as a formal 60(b) motion, or that she or her counsel intended for the Chapter 50B complaint amendment at the 7 June hearing to serve as a formal refiling. They likely did not. Rather, we hold that it was within the trial court's broad discretion—with the benefit of the full record before it—to *treat* these two amendments as a functional 60(b) motion or refiling in light of the plaintiff's plain intention to move forward with her Chapter 50B complaint.[2] While we cannot know precisely from the record whether the trial court considered these procedures when it determined that it had jurisdiction, its decision to exercise jurisdiction itself evidences that the court understood plaintiff's plain intention to proceed. It is not the job of this Court to second-guess the trial court's determination of its own jurisdiction when that determination was supported by competent evidence and practical common sense. Accordingly, the trial court did not err in exercising jurisdiction, and the Court of Appeals did not err in its subsequent review.

B. Preservation

¶ 49 Second, defendant asserts that plaintiff failed to preserve the constitutional

[2] While the dissent warns that this understanding of the trial court's discretion "will disrupt the orderly flow of cases through our trial courts[,]" the facts here prove the opposite: it ensures that common sense and the smooth functioning of vital remedial procedures, like those protecting survivors of domestic violence, will not be thwarted by overly technical scrutiny of that discretion.

issue for appeal. Again, we disagree.

¶ 50 Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure establishes that

> [i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted . . . may be made the basis of an issue presented on appeal.

Put differently, Rule 10(a)(1) creates two distinct requirements for issues preservation: (1) a timely objection clearly (by specific language or by context) raising the issue; and (2) a ruling on that issue by the trial court. These requirements are grounded in judicial efficiency; they "prevent[ ] unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *State v. Bursell*, 372 N.C. 196, 199 (2019). "Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party." *Id.*

¶ 51 Notably, Rule 10(a)(1) does not require a party to recite certain magic words in order to preserve an issue; rather, it creates a functional requirement of bringing the

trial court's attention to the issue such that the court may rule on it. *See State v. Garcia*, 358 N.C. 382, 410 (2004) (noting that because an issue was not raised at trial, "the trial court was denied the opportunity to consider, and, if necessary, to correct the error.") For instance, in *State v. Murphy*, this Court determined that "[a]lthough the issue of defendant's invocation of his right to remain silent was not clearly and directly presented to the trial court, . . . the defendant's theory was implicitly presented to the trial court and thus [was properly preserved for appellate review]." 342 N.C. 813, 822 (1996). Contrastingly, in cases where this Court has determined that an issue was *not* properly preserved, the records tend to include no reference to the issue at trial. *See, e.g.*, *Bursell*, 372 N.C. at 200 (noting "the absence of any reference to the Fourth Amendment, *Grady*[,] or other relevant SBM case law, privacy, or reasonableness"); *Garcia*, 358 N.C. at 410 (noting that "defendant did not raise this constitutional issue at trial."); *State v. McKenzie*, 292 N.C. 170, 176 (1997) (noting that because "[n]o argument was made in the trial court on that issue . . . the trial court was wholly unaware" of the issue.).

¶ 52 Regarding the second requirement of Rule 10(a)(1), this Court has observed that appellate courts "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564 (1955). For instance, in *State v. Dorsett*, this Court declined to consider a constitutional issue after the trial court "expressly

declined to rule on th[e] question." 272 N.C. 227, 229 (1967).

¶ 53 Here, plaintiff properly raised and received a ruling on her claim that it would be unconstitutional to deny relief under N.C.G.S. Chapter 50B because she was in a same-sex dating relationship. Thus, the question of whether DVPO protection could be denied to those in same-sex dating relationships was properly preserved for appeal. First, there can be no doubt that plaintiff's counsel properly raised the issue during the hearing. Specifically, plaintiff's counsel asserted that "[Chapter] 50B[ ] is unconstitutional as it's written post the same-sex marriage equality case in *Obergefell* and . . . there's no rational basis at this point to have a statute that limits dating relationships to folks of opposite sex." In this statement, plaintiff's counsel expressly: (1) asserted that the judge's application of the statute in question was unconstitutional; (2) cited by name the landmark United States Supreme Court ruling on the unconstitutionality of same-sex marriage prohibitions under the Fourteenth Amendment, *see Obergefell v. Hodges*, 576 U.S. 644 (2015); and (3) recited a specific legal standard associated with judicial analysis under that amendment. Contrary to the claim of the dissenting opinion below that plaintiff's counsel's statement was merely a "cryptic reference to *Obergefell*[,]" we understand it to clearly and explicitly challenge the constitutionality of the application of the statute in question under well-established Due Process and Equal Protection doctrines.

¶ 54 Next, when asked by the trial court if any other jurisdictions have struck down

similar DVPO restrictions, plaintiff's counsel noted a recent case in which the South Carolina Supreme Court, citing *Obergefell*, ruled that the sections of their state's DVPO statute that excluded people in same-sex relationships from protection were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. *Doe v. State*, 421 S.C. 490, 495–96, 507 n.12 (2017).

¶ 55 Finally, the trial court's subsequent written order explicitly acknowledged that plaintiff had raised this constitutional issue, noting that

> [p]laintiff, through her counsel, argued that she should be allowed to proceed on her request for a [DVPO] because the current [N.C.G.S. §] 50B-1(b) is unconstitutional after the United States Supreme Court decision in *Obergefell v. Hodges* and that there is no rational basis for denying protection to victims in same-sex dating relationships . . . .

Accordingly, plaintiff clearly raised her constitutional argument at trial, thus satisfying the first requirement for issue preservation under Rule 10(a)(1).

¶ 56 Second, the record makes clear that the trial court sufficiently ruled on the constitutional issue, thus satisfying the second requirement for issue preservation under Rule 10(a)(1). Specifically, the trial court "passed upon" this issue in three distinct places: (1) during the hearing; (2) in its subsequent form order; and (3) in its subsequent written order.

¶ 57 First, the trial court ruled upon plaintiff's constitutional argument during the hearing. In response to plaintiff's counsel's request "that Your Honor consider

allowing [plaintiff] to proceed with her [DVPO] case" in light of the constitutional argument, the trial court stated: "Without a more expansive argument on constitutionality, I won't do it. I think there is room for that argument. I think that with some more presentation that maybe we could get there, but I don't think on the simple motion I'm ready to do that." Plainly, this exchange constitutes the trial court making a determination, or "passing upon," plaintiff's argument.

¶ 58 Second, the trial court ruled upon plaintiff's constitutional argument within its subsequent form order denying plaintiff's DVPO motion. Specifically, after noting that "had the parties been of opposite genders, th[e]se facts would have supported the entry of a [DVPO,]" the trial court observed that the General Assembly's 2017 amendment to Chapter 50B "was made subsequent to the United Statutes Supreme Court decision in *Obergefell v. Hodges*, 567 U.S. [644,] (2015), and yet the legislature did not amend the definition of personal relationship to include dating partners of the same sex." Again, this statement indicates the trial court's rejection of, and thus ruling upon, plaintiff's constitutional argument in light of legislative intent.

¶ 59 Third, the trial court ruled upon plaintiff's constitutional argument within its subsequent written order. Specifically, after summarizing plaintiff's constitutional argument and noting Chapter 50B's legislative history and exclusion of same-sex dating relationships from DVPO protection, the trial court stated:

> 5. The [c]ourt must consider whether it has jurisdiction to create a cause of action that does not exist and to enter an

> order under this statute when the statute specifically excludes it. The difficult answer to this question is no, it does not. The General Assembly has the sole authority to pass legislation that allows for the existence of any [DVPO]. The legislature has not extended this cause of action to several other important family relationships including siblings, aunts, uncles, "step" relatives, or in-laws.
>
> 6. In this context, the [c]ourts only have subject matter jurisdiction and the authority to act and enjoin a defendant when the legislature allows it. . . .

As above, this statement indicates the trial court's rejection of plaintiff's constitutional argument on the grounds of legislative intent.

¶ 60 Finally, it is also worth noting that in her only submission in this case from the trial court's initial ruling to her notice of appeal to this Court, defendant directly engaged in the constitutional issue raised by plaintiff at trial. Specifically, defendant asserted "that the LGBT community is asking for special treatment[ ] in this proceeding . . . [and] should not be given equal access to protection under law as heterosexual relationships." This direct engagement by defendant in the constitutional issue further indicates that the issue was properly preserved for appellate review.

¶ 61 Accordingly, plaintiff's argument regarding the constitutionality of Chapter 50B as applied to DVPO complainants in same-sex dating relationships was properly preserved for appellate review. We therefore hold that the Court of Appeals did not err in determining the same.

C. Joinder

¶ 62 Third, defendant contends that the Court of Appeals ruling must be vacated and remanded for the mandatory joinder of the North Carolina General Assembly under Rule 19(d) of the North Carolina Rules of Civil Procedure. Because this argument was not raised by defendant below and was first raised by the Court of Appeals dissent, though, it is not properly before this Court, and we therefore decline to consider it. In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) need not be raised below in order to be considered here, joining the legislative leaders is not required here.

¶ 63 "This Court has long held that issues and theories of a case not raised below will not be considered on appeal . . . ." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001); *see, e.g.*, *Smith v. Bonney*, 215 N.C. 183, 184–85 (1939) (noting that "[t]o sustain the assignments of error would be to allow the appellant to try the case in the Superior Court upon one theory and to have the Supreme Court to hear it upon a different theory."). Indeed, when "[a]n examination of the record discloses that the cause was not tried upon that theory [below], . . . the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10 (1934).

¶ 64 Rule 19(d) of the North Carolina Rules of Civil Procedure establishes that "[t]he Speaker of the House of Representatives and the President Pro Tempore of the

Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." This Rule, however, must be read in harmony with its preceding Rules. Specifically, Rule 12(h)(2) establishes that "a defense of failure to join a necessary party . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Further, "[a]lthough a defense of lack of subject matter jurisdiction may not be waived and may be asserted for the first time on appeal[,] a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding." *Stancil v. Bruce Stancil Refrigeration, Inc.*, 81 N.C. App. 567, 574 (1986) (citing Wright & Miller, *Fed. Practice and Procedure: Civil* § 1392 (1969)), *disc. review denied*, 318 N.C. 418, (1986). Accordingly, and in alignment with our well-established prohibition of raising new issues on appeal, "[t]he defense of failure to join a necessary party must be raised before the trial court and may not be raised for the first time on appeal." *Phillips v. Orange County Health Dept.*, 237 N.C. App. 249, 255 (2017).

¶ 65 Here, defendant did not raise the issue of necessary joinder of the legislature under Rule 19(d) before the trial court. Further, neither defendant nor the appointed *amicus* counsel raised this issue before the Court of Appeals. Indeed, the first time that this issue was raised in this case was by the dissenting opinion below. *See M.E.*,

275 N.C. App. at 595 (Tyson, J., dissenting). Specifically, the Court of Appeals dissent cites this Court's ruling in *Booker v. Everhart*, 294 N.C. 146, 158 (1978), for the proposition that "neither the district court, nor [the Court of Appeals], can address the underlying merits of [p]laintiff's assertions until this mandatory joinder defect is cured." *M.E.*, 275 N.C. App. at 595 (Tyson, J., dissenting). In *Booker*, however, the defendants directly raised their necessary joinder issue before the trial court by making a motion to dismiss under Rule 12(b)(7). *Booker*, 294 N.C. at 149. Here, contrastingly, the necessary joinder issue was raised neither by defendant nor by the trial court *ex meru motu* and was not mentioned until the Court of Appeals dissent. Accordingly, this issue is not properly before this Court, and we therefore decline to consider it. To the extent that *Booker* suggests that an *appellate* court must correct a necessary joinder defect *ex meru motu* before a ruling on the merits, it is overruled.

¶ 66 In any event, even assuming *arguendo* that mandatory joinder under Rule 19(d) may be raised for the first time on appeal, joining the legislative leaders is not required here because plaintiff's arguments do not fall within the purview of Rule 19(d). Rule 19(d) establishes that legislative leaders "must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law." Here, contrastingly, plaintiff's complaint was brought under N.C.G.S. Chapter 50B for the sole purpose of obtaining a DVPO through a judicial proceeding under that chapter, not as an action

challenging the facial validity of that statute. Although plaintiff asserted an as-applied constitutional defense in order to prevent the dismissal of her action, this alone does not convert her action seeking a DVPO into a "civil action challenging the validity of a North Carolina statute."

¶ 67 Accordingly, even if defendant's Rule 19(d) joinder argument could be raised for the first time on this appeal, it is meritless within the context of the present case.

III. Court of Appeals' Constitutional Ruling Undisturbed

¶ 68 Finally, we note that defendant has not challenged the Court of Appeals' substantive ruling on the merits of the constitutional issue. Accordingly, we do not address the Court of Appeals' ruling that Chapter 50B's exclusion of complainants in same-sex relationships from DVPO protection is unconstitutional as applied to plaintiff and those similarly situated, and this portion of the holding stands undisturbed.

IV. Conclusion

¶ 69 As explained above, we hold that the trial court acted within its broad discretion in exercising its jurisdiction over plaintiff's Chapter 50B DVPO complaint where plaintiff's amended form served as a functional Rule 60(b) motion for equitable relief from her mistaken or inadvertent dismissal filed thirty-nine minutes previously, and the Court of Appeals did not err in determining the same. Further, we hold that plaintiff's constitutional argument was properly preserved for appellate

review under Rule 10(a)(1). Next, we hold that defendant's Rule 19(d) necessary joinder argument is not properly before this Court, and in any event is meritless as intervention of legislative leaders, though optional, was not mandatory in the context of plaintiff's Chapter 50B complaint. Finally, we note that because the Court of Appeals' substantive constitutional ruling was not at issue before this court, its decision on this issue remains undisturbed.

MODIFIED AND AFFIRMED.

Justice BERGER dissenting.

¶ 70 The Rules of Civil Procedure "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." N.C.G.S. § 1A-1, Rule 1 (2021). These rules exist to provide order and certainty for all parties involved in civil litigation. There is a predictable outcome for this case if the Rules of Civil Procedure are respected. However, because the majority fails to adhere to these basic rules, and because the majority's newly crafted "mistaken or inadvertent dismissal" rule cannot be found in the Rules of Civil Procedure, I respectfully dissent.

¶ 71 A complaint seeking entry of a domestic violence protective order pursuant to Chapter 50B is a civil action. N.C.G.S. § 50B-2(a) (2021). "A civil action is commenced by filing a complaint with the court." N.C.G.S. § 1A-1, Rule 3(a) (2021). Any action or claim may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before the plaintiff rests his case. N.C.G.S. § 1A-1, Rule 41(a) (2021).

¶ 72 "It is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case, except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (cleaned up). "After a plaintiff takes a Rule 41(a) dismissal, there is nothing the defendant can do

to fan the ashes of that action into life, and the court has no role to play." *Id.* (cleaned up). "A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964).

¶ 73 "An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the ground therefor, and shall set forth the relief or order sought." N.C.G.S. § 1A-1, Rule 7(b)(1) (2021). On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect. N.C.G.S. § 1A-1, Rule 60(b) (2021). However, "[a] voluntary dismissal with prejudice, or a voluntary dismissal without prejudice, once a year has elapsed and the action cannot be refiled, constitutes a final adjudication subject to relief under [Rule 60(b)]." G. Gray Wilson, 2 *North Carolina Civil Procedure* § 60-2 (4th ed. 2021) (footnotes omitted).

¶ 74 On May 31, 2018, plaintiff commenced her Chapter 50B action against defendant upon the filing of her "Complaint and Motion for Domestic Violence Protective Order." Later that day, plaintiff dismissed her Chapter 50B action against defendant by filing a notice of voluntary dismissal. Plaintiff's voluntary dismissal of the Chapter 50B action was filed eight minutes after she filed a Chapter 50C

"Complaint for No-Contact Order for Stalking or Nonconsensual Sexual Conduct." Plaintiff subsequently attempted to withdraw the voluntary dismissal she had filed by striking through the paper with a diagonal line, writing the word "amended" at the top along with a sentence at the bottom explaining "I strike through this voluntary dismissal. I do not want to dismiss this action." Plaintiff filed these various documents pro se and the trial court granted her motion for a Chapter 50C temporary no-contact order, denied her motion for a Chapter 50B emergency DVPO, and set the matter for a plenary hearing on the merits for June 7, 2018. As defendant was not present at the initial hearing, she was not provided with notice of the complaints until after the May 31, 2018. Defendant was never served with the voluntary dismissal of the Chapter 50B action.

¶ 75 At the June 7, 2018, hearing, plaintiff was represented by two attorneys. Defendant did not file an answer to either complaint, appeared pro se, and did not raise any objections during the hearing. In fact, according to the transcript, defendant spoke just once during the hearing in which she acknowledged to the trial court her understanding of the Chapter 50C no-contact order. Despite the fact that plaintiff's voluntary dismissal had already "strip[ped] the trial court of authority," *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570, over the Chapter 50B claim, the trial court entered an order dismissing the Chapter 50B complaint on other grounds and granted the Chapter 50C no-contact order.

¶ 76 The majority does not take issue with the trial court's lack of jurisdiction. Rather, the majority relies on the notion that trial courts have broad discretion to take any action within the law to ensure a fair and impartial trial "so long as he [or she] does not impinge upon [statutory] restrictions." The majority further states that "[w]hen there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his [or her] discretion in the interest of efficiency, practicality, and justice." One glaring gap in this logic, however, is that there *is* a statutory provision and well recognized rule such that a trial court's exercise of jurisdiction after a complaint has been voluntarily dismissed *does* impinge upon such statutory restrictions. *See* N.C.G.S. § 1A-1, Rule 41(a); *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

¶ 77 According to the majority, plaintiff's voluntary dismissal "served as [a] functional Rule 60(b) motion through which the trial court could, and did, grant equitable relief." Untethered to the rules, the majority divines the intent of plaintiff, stating that "courts should not put themselves in the position of failing to recognize what is apparent to everyone else." Thus, the majority reasons, "[i]t was squarely within the discretion of the trial court to understand the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling, and to subsequently exercise its jurisdiction." However, this approach is contrary to the Rules of Civil

Procedure as plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today. N.C.G.S. § 1A-1, Rule 7(b)(1), N.C.G.S. § 1A-1, Rule 60(b). The idea that plaintiff's filing was a motion pursuant to Rule 60(b) likely comes as a surprise to the trial court and both of plaintiff's counsel below. Nowhere in the transcript or the trial court's order is it intimated that the trial court "underst[ood] the plain intent of plaintiff's amended notice of voluntary dismissal as a Rule 60(b) motion for equitable relief or her amended Chapter 50B complaint as a functional refiling." Indeed, neither of plaintiff's attorneys argued before the trial court that the diagonal strikethrough and statement on the voluntary dismissal should in any way be considered as a Rule 60(b) motion. If neither the trial court nor plaintiff's lawyers recognized plaintiff's "mistaken or inadvertent dismissal" as a Rule 60(b) motion, it is difficult to comprehend how "every intelligent person underst[ood what was] meant." There plainly was never a subsequent motion filed by the plaintiff upon which the trial court could grant the relief allowed by the majority.

¶ 78 It is interesting that in one breath the majority claims there is "no doubt as to plaintiff's intentions" and in another, the majority concedes that it "cannot know precisely from the record whether the trial court considered [the amendment to the voluntary dismissal as a Rule 60(b) motion or a refiling of the Chapter 50B complaint] when it determined that it had jurisdiction." Further, according to the majority,

plaintiff and her counsel "likely did not" intend for her amendment to the voluntary dismissal or her amended Chapter 50B complaint to serve as a 60(b) motion or a formal refiling, respectively. Even assuming "every intelligent person" should understand what plaintiff intended based on documents in the court file, the majority is apparently uncertain itself about whether plaintiff was refiling her Chapter 50B complaint or requesting relief pursuant to Rule 60(b).[1]

¶ 79 Rule 60(b) is meant to relieve a party from a final judgment, order, or proceeding. N.C.G.S. § 1A-1, Rule 60(b). It strains credibility for this Court to contend that plaintiff's "inadvertent or mistaken voluntary dismissal" was in fact a Rule 60(b) motion as no final judgment had been entered, and plaintiff was ineligible for such relief under the plain wording of the rule. *See Robinson v. General Mills Restaurants, Inc.*, 110 N.C. App. 633, 637, 430 S.E.2d 696, 699, *review allowed* 334 N.C. 623, 435 S.E.2d 340 (1993), *review denied as improvidently granted* 335 N.C. 763, 440 S.E.2d 274 (1994) (holding that "once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of Rule 60(b)"); *see also* Wilson, 2 *North Carolina Civil Procedure* § 60-2 (footnotes omitted) (a voluntary dismissal is

[1] Treating plaintiff's voluntary dismissal as a new civil action disregards the filing requirements set forth in Rule 3; issuance of a summons as required by Rule 4; service requirements in Rule 5; and the fact that, if this were new action, the Clerk of Court would have assigned a separate file number.

not a "final adjudication subject to relief under [Rule 60(b)]" unless "a year has elapsed and the action cannot be refiled[.]").

¶ 80 In reaching their decision, the majority ignores that the Rules of Civil Procedure apply to Chapter 50B proceedings. N.C.G.S. § 1A-1, Rule 1; N.C.G.S. § 50B-2(a). Instead, the majority bases its reasoning on the purpose of Chapter 50B — "provid[ing] a method for trial court judges or magistrates to quickly provide protection from the risk of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." While the purpose of the statute is important, it does not provide a license to ignore the Rules of Civil Procedure, or the due process rights of an adverse party.

¶ 81 The majority proclaims that "[p]laintiff here is exactly the type of complainant that the *pro se* provisions of Chapter 50B contemplate: one who is navigating the complex arena of legal procedure for the first time, without the assistance of legal counsel, soon after experiencing significant trauma." Notably, however, the majority fails to discuss that plaintiff was represented by not one, but two attorneys at the hearing. *Cf. Brown v. Kindred Nursing Centers East, L.L.C.*, 364 N.C. 76, 84, 692 S.E.2d 87, 92 (2010) ("[I]t it well settled that 'the rules [of civil procedure] must be applied equally to all parties to a lawsuit, without regard to whether they are represented by counsel.' ").

¶ 82 Importantly, defendant never received notice that plaintiff had filed a

voluntary dismissal in the Chapter 50B action. In addition, and unsurprisingly, defendant had no notice that the trial court was considering a Rule 60(b) motion, again, because plaintiff's two attorneys did not make the motion and the trial court did not rule on any such motion. The majority's professed concern for pro se litigants does not seem to apply to this defendant, who was, ironically, the only party to appear pro se.

¶ 83 The law going forward appears to be that, even if the Rules of Civil Procedure yield a particular result, trial courts are free reach a contrary outcome so long as an "intelligent person understands [what] is meant[.]" *But see Goins v. Puleo*, 350 N.C. 277, 281, 512 S.E.2d 748, 751 (1999) (stating that "the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them"); *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E. 126, 127 (1930) ("When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary and must be observed[.]").

¶ 84 The Rules of Civil Procedure either apply or they don't. The rules provide certainty for all parties involved in civil litigation. By failing to adhere to these basic rules, the majority makes our system of justice less predictable and causes our law to become more unsettled. The majority's new "mistaken or inadvertent dismissal" rule is antithetical to our adversarial system and will disrupt the orderly flow of cases

through our trial courts under the guise of "facilitat[ing] access to justice[.]" This is not a case in which the record shows that the parties and trial court knew that relief under Rule 60(b) was sought or where the trial court granted relief under Rule 60(b). Thus, the majority's approach shifts appellate review from the text of the rules and the arguments of the parties in the trial court to allow reverse engineered arguments based on sympathies and desired results.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Court of Appeals rules that denying domestic violence protection to persons in same-sex dating relationships is unconstitutional

****After this entry was posted, the North Carolina Supreme Court affirmed the decision of the Court of Appeals in M.E. v. T.J. and left the holding of the Court of Appeals regarding same-sex dating relationships undisturbed.** M.E. v. T.J., _ N.C. _ (March 11, 2022), affirming as modified, 275 N.C. App. 528 (2020).

In this post on August 15, 2017, DVPOs for Same-Sex Dating Relationships?, my former colleague Jeff Welty discussed the constitutionality of G.S. 50B-1(b)(6) in light of recent rulings by the United States Supreme Court addressing the rights of same-sex couples and in light of a South Carolina appellate court ruling that providing domestic violence protection to persons in heterosexual dating relationships while denying protection to persons in same-sex dating relationships is unconstitutional. Like the South Carolina statute, N.C.G.S. 50B-1(b)(6) provides that while persons of the opposite sex in a dating relationship are eligible for a DVPO, persons of the same sex in a dating relationship are not eligible for protection. On December 31, 2020, in M.E. v. T.J., the North Carolina Court of Appeals held this provision unconstitutional as applied to deny a plaintiff protection from domestic violence simply because plaintiff and defendant had been in a same-sex dating relationship rather than a heterosexual relationship.

Definition of domestic violence

To obtain an ex parte DVPO, a plaintiff must establish there is a danger of acts of domestic violence at the time the request is made, G.S. 50B-2(c)(1), and to obtain a permanent DVPO, plaintiff must establish that an act of domestic violence occurred. G.S. 50B-3(a). G.S. 50B-1 defines domestic violence as one of the acts listed in G.S. 50B-1(a) committed by a person with whom plaintiff has or has had a personal relationship. Therefore, a plaintiff is entitled to protection pursuant to Chapter 50B only if the plaintiff can establish both a personal relationship with defendant and that defendant committed one of the specified acts against plaintiff or against a minor child residing with or in the custody or plaintiff. G.S. 50B-1(a).

Personal relationship is defined in G.S. 50B-1(b) and subsection 50B-1(b)(6) provides that personal relationship includes “persons of the opposite sex who are in a dating relationship or have been in a dating relationship.” Persons of the same sex who are in or have been in a dating relationship are not included in the definition of personal relationship. Therefore, persons who are in or have been in a same-sex dating relationship are not entitled to Chapter 50B protection unless those persons have one of the other personal relationships identified in G.S. 50B-1(b).

M.E. v. T.J.

Plaintiff M.E. filed a complaint seeking both an ex parte and a permanent DVPO pursuant to Chapter 50B alleging defendant T.J. had committed acts of domestic violence against her. Plaintiff alleged she had been in a dating relationship with defendant. The trial court denied plaintiff's request for ex parte relief, stating in the order that although plaintiff's allegations of violence were "significant", the trial court could not grant the ex parte DVPO because plaintiff did not establish a personal relationship with defendant. While plaintiff and defendant had been in a dating relationship, they were of the same sex. Following the hearing on plaintiff's request for a permanent relief, the trial court entered an order denying plaintiff's request, stating in the order that:

"[P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. …[H]ad the parties been of opposite genders, th[e] facts [presented] would have supported the entry of a Domestic Violence Protective Order (50B)."

Plaintiff appealed, arguing that the denial of her requests for both an ex parte DVPO and a permanent DVPO because she was in a same-sex relationship with defendant "violated her 14th Amendment and state constitutional rights to due process and equal protection of the laws." The court of appeals agreed, concluding that "[n]o matter the [level of constitutional] review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

The court of appeals held (emphasis added):

"We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. **The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act."**

There is much more to say about this opinion; the court of appeals engages in an extensive and thorough analysis of the due process and equal protection issues arising under both the federal and state constitutions because of the application of G.S. 50B-1(b)(6) in this case. That analysis will be the topic of future posts. In addition, there is a dissent by Judge Tyson arguing that the appellate court had no jurisdiction to consider the appeal in this case because plaintiff's appeal was not properly before the court due to several significant procedural problems. We may hear more from the Supreme Court on this matter soon.

Minor Parties in 50B Cases

It is not uncommon for persons under 18 to commit acts of domestic violence or need protection from domestic violence. Common questions that arise include:

- Can a minor be a defendant in a 50B proceeding?
- If so, how is the child served and what happens when the child violates the DVPO?
- Can a minor be a plaintiff?
- Does a minor need to be a plaintiff to be protected by a DVPO?

Minor defendants

The general rule is that any minor can sue or be sued in a civil proceeding, as long as the court appoints a Rule 17 GAL. This rule applies in 50B cases, with only one limitation**.** A defendant must be at least 16 years old when the personal relationship supporting the domestic violence claim is that found in GS 50B-1(b)(3), parties related as parents and children, or as grandparents and grandchildren.

When defendant is a minor, process must be served both upon the minor and also upon the child's parent, guardian or "person having care and control" of the minor. If defendant has none of those, service also must be made upon the GAL. GS 1A-1, Rule 4(j)(2)**.**

The clerk may appoint the GAL for a defendant if requested. If no request is made, the court must appoint a GAL on its own motion before proceeding with the trial. GS 1A-1, Rule 17(c) and (e)**.**

The role of the Rule 17 GAL is one of substitution. *See In re P.D.R.*, 737 S.E.2d 152 (2012). A minor is legally incompetent, so the GAL 'substitutes' for the minor party. Obviously this raises many issues about the specific duties of the GAL; a topic for a future blog post. Case law does not provide much guidance. However, appellate courts have stated that " [a]ppointment of a GAL under Rule 17 for an incompetent person 'will divest the [incompetent party] of their fundamental right to conduct his or her litigation according to their own judgment and inclination.' *In re J.A.A. & S.A.A.*, 175 N.C.App. 66, 71(2005)".

It is clear that a Rule 17 GAL is **not** the child's lawyer, *see NC State Bar Formal Ethics Opinion* 04 FEO 11, and any adult can serve in the role.

The cost of a Rule 17 GAL is apportioned as court costs between the parties. *See Van Every v. McGuire,* 125 N.C. App. 578 (1997). While GS 50B-2(a) states that "no court costs shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena," this provision does not prohibit the award of other costs authorized by GS 7A-305(d)(7)**.**

How is a DVPO enforced against a minor?

A DVPO can be enforced by contempt. GS 50B-4. Children age 16 and above are treated the same as adults for contempt. GS 5A-34. However, violations by children at least 6 but not yet 16 must be addressed in the juvenile justice system, unless the child:

- Is emancipated, or
- Before the act, has been convicted in superior court for any criminal offense.

GS 5A-34.

Violation of a DVPO also is a crime. GS 50B-4.1. Delinquent acts by a child under the age of 16 will be prosecuted through the juvenile justice process while a child 16 or 17 years old is prosecuted as an adult.

Minor plaintiffs

A minor can be a plaintiff in a Chapter 50 proceeding if the minor:

- Is an aggrieved party, meaning someone with a personal relationship with the defendant; and
- Is an alleged victim of domestic violence, or has a minor child residing with or in her custody who is an alleged victim of domestic violence.

GS 50B-1(a).

A Rule 17 GAL must be appointed for the minor plaintiff and, as in the case where defendant is a minor, the role of the GAL is one of substitution.

Generally, the clerk appoints the GAL at the time the complaint is filed. AOC Form CV-318.

It is important that the complaint show the name of the child as plaintiff rather than the name of the GAL. Significant confusion results when a DVPO refers to ‘plaintiff’ but the person listed on the face of the complaint is not actually the plaintiff. There is no need for the name of the GAL to appear anywhere on the face of the complaint. The order appointing the GAL is sufficient to inform the court and any other interested person that the appointment has been made.

Does a minor need to be a plaintiff to be protected by a DVPO?

Not always.

Chapter 50B allows an adult aggrieved party to seek protection for herself **and** a minor child

residing with her or in her custody, **or just for a minor child** residing with her or in her custody. GS 50B-1(a).

This allows an adult – a parent for example – to be the only plaintiff in a 50B action filed due to acts committed against both the parent and child or just against the child. As long as defendant is someone with whom the adult plaintiff has a personal relationship, the child does not need to be named as a party to be protected by the DVPO.

If the child is not a party, there is no need for a GAL.

However, in some circumstances the child must be a plaintiff to be protected by the DVPO.

If the parent does **not** have a relationship with the defendant, the parent does not meet the definition of aggrieved party and cannot file a 50B action. Then the child must be the party to receive protection. The most common example is teenagers in a dating relationship. Mom of teenager cannot be plaintiff because she is not an aggrieved party. However, mom can be appointed GAL for the teenager. In that situation, mom is NOT a party. To avoid confusion, the child should be named clearly as plaintiff rather than mom.

§ 14-277.3A. Stalking.

(a) Legislative Intent. - The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(b) Definitions. - The following definitions apply in this section:

(1) Course of conduct. - Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(2) Harasses or harassment. - Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

(3) Reasonable person. - A reasonable person in the victim's circumstances.

(4) Substantial emotional distress. - Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) Offense. - A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:

(1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

(d) Classification. - A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

(e) Jurisdiction. - Pursuant to G.S. 15A-134, if any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the

victim, then the defendant may be prosecuted in this State. (2008-167, s. 2.)

Article 7B.

Rape and Other Sex Offenses.

§ 14-27.20. Definitions.

The following definitions apply in this Article:

(1) Repealed by Session Laws 2018-47, s. 4(a), effective December 1, 2018.

(1a) Against the will of the other person. – Either of the following:

a. Without consent of the other person.

b. After consent is revoked by the other person, in a manner that would cause a reasonable person to believe consent is revoked.

(2) Mentally incapacitated. – A victim who due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(2a) Person who has a mental disability. – A victim who has an intellectual disability or a mental disorder that temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(3) Physically helpless. – Any of the following:

a. A victim who is unconscious.

b. A victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(4) Sexual act. – Cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. It is an affirmative defense that the penetration was for accepted medical purposes.

(5) Sexual contact. – Any of the following:

a. Touching the sexual organ, anus, breast, groin, or buttocks of any person.

b. A person touching another person with their own sexual organ, anus, breast, groin, or buttocks.

c. A person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person.

(6) Touching. – As used in subdivision (5) of this section, means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. (1979, c. 682, s. 1; 2002-159, s. 2(a); 2003-252, s. 1; 2006-247, s. 12(a); 2015-181, s. 2; 2018-47, s. 4(a); 2019-245, ss. 5(a), 6(c).)

§ 14-27.21. First-degree forcible rape.

(a) A person is guilty of first-degree forcible rape if the person engages in vaginal intercourse with another person by force and against the will of the other person, and does any of the following:

(1) Uses, threatens to use, or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
(2) Inflicts serious personal injury upon the victim or another person.
(3) The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

(c) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 63; c. 106, ss. 1, 2; c. 179, s. 14; 1983, c. 175, ss. 4, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 2; 2004-128, s. 7; 2015-181, ss. 3(a), (b); 2017-30, s. 1.)

§ 14-27.22. Second-degree forcible rape.

(a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
(1) By force and against the will of the other person; or
(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

(c) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child conceived during the commission of the rape, nor does the person have any rights related to the child under Chapter 48 of the General Statutes or Subchapter I of Chapter 7B of the General Statutes. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 5; 1981, cc. 63, 179; 1993, c. 539, s. 1130; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(b); 2004-128, s. 8; 2015-181, ss. 4(a), (b); 2018-47, s. 4(b).)

§ 14-27.23. Statutory rape of a child by an adult.

(a) A person is guilty of statutory rape of a child by an adult if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be subject to enrollment in satellite-based monitoring as provided in Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic

aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes.

(e) The offense under G.S. 14-27.24 is a lesser included offense of the offense in this section. (2008-117, s. 1; 2015-181, s. 5(a), 5(b); 2021-182, s. 2(k).)

§ 14-27.24. First-degree statutory rape.

(a) A person is guilty of first-degree statutory rape if the person engages in vaginal intercourse 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.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

(c) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 63; c. 106, ss. 1, 2; c. 179, s. 14; 1983, c. 175, ss. 4, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 2; 2004-128, s. 7; 2015-181, s. 6.)

§ 14-27.25. Statutory rape of person who is 15 years of age or younger.

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person.

(b) Unless the conduct is covered under some other provision of law providing greater punishment, a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and more than four but less than six years older than the person, except when the defendant is lawfully married to the person. (1995, c. 281, s. 1; 2015-62, s. 1(a); 2015-181, s. 7(a), (b).)

§ 14-27.26. First-degree forcible sexual offense.

(a) A person is guilty of a first degree forcible sexual offense if the person engages in a sexual act with another person by force and against the will of the other person, and does any of the following:

(1) Uses, threatens to use, or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
(2) Inflicts serious personal injury upon the victim or another person.
(3) The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 63; c. 106, ss. 3, 4; c. 179, s. 14; 1983, c. 175, ss. 5, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 3; 2015-181, ss. 8(a), (b); 2017-30, s. 2.)

§ 14-27.27. Second-degree forcible sexual offense.

(a) A person is guilty of second degree forcible sexual offense if the person engages in a sexual act with another person:
(1) By force and against the will of the other person; or
(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 7; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1131; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(c); 2015-181, ss. 9(a), (b); 2018-47, s. 4(c).)

§ 14-27.28. Statutory sexual offense with a child by an adult.

(a) A person is guilty of statutory sexual offense with a child by an adult 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.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be subject to enrollment in satellite-based monitoring as provided in Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) The offense under G.S. 14-27.29 is a lesser included offense of the offense in this section. (2008-117, s. 2; 2015-181, s. 10(a), (b); 2021-182, s. 2(*l*).)

§ 14-27.29. First-degree statutory sexual offense.

(a) A person is guilty of first-degree statutory sexual offense if the person engages in a sexual act 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.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 63; c. 106, ss. 3, 4; c. 179, s. 14; 1983, c. 175, ss. 5, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 3; 2015-181, s. 11.)

§ 14-27.30. Statutory sexual offense with a person who is 15 years of age or younger.

(a) A defendant is guilty of a Class B1 felony if the defendant engages in a sexual act with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person.

(b) Unless the conduct is covered under some other provision of law providing greater punishment, a defendant is guilty of a Class C felony if the defendant engages in a sexual act with another person who is 15 years of age or younger and the defendant is at least 12 years old and more than four but less than six years older than the person, except when the defendant is lawfully married to the person. (1995, c. 281, s. 1; 2015-181, s. 12.)

§ 14-27.31. Sexual activity by a substitute parent or custodian.

(a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, the defendant is guilty of a Class E felony.

(b) If a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony.

(c) Consent is not a defense to a charge under this section. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 9; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1132; 1994, Ex. Sess., c. 24, s. 14(c); 1999-300, s. 2; 2003-98, s. 1; 2015-181, ss. 13(a), (b).)

§ 14-27.32. Sexual activity with a student.

(a) If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony, except when the defendant is lawfully married to the student. The term "same school" means a school at which the student is enrolled and the defendant is employed, assigned, or volunteers.

(b) A defendant who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a victim who is a student, is guilty of a Class I felony.

(c) This section shall apply unless the conduct is covered under some other provision of law providing for greater punishment.

(d) Consent is not a defense to a charge under this section.

(e) For purposes of this section, the terms "school", "school personnel", and "student" shall have the same meaning as in G.S. 14-202.4(d). For purposes of this section, the term "school safety officer" shall include a school resource officer or any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 9; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1132; 1994, Ex. Sess., c. 24, s. 14(c); 1999-300, s. 2; 2003-98, s. 1; 2015-44, s. 2; 2015-181, s. 14(a), (b).)

§ 14-27.33. Sexual battery.

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person; or

(2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know that the other person has a mental disability or is mentally incapacitated or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class A1 misdemeanor. (2003-252, s. 2; 2015-181, s. 15; 2018-47, s. 4(d).)

§ 14-27.33A. Sexual contact or penetration under pretext of medical treatment.

(a) Definitions. – The following definitions apply in this section:

(1) Incapacitated. – A patient's incapability of appraising the nature of a medical treatment, either because the patient is unconscious or under the influence of an impairing substance, including, but not limited to, alcohol, anesthetics, controlled substances listed under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties.

(2) Medical treatment. – Includes an examination or a procedure.

(3) Patient. – A person who has undergone or is seeking to undergo medical treatment.

(4) Sexual contact. – The intentional touching of a person's intimate parts or the intentional touching of the clothing covering the immediate area of the person's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner.

(5) Sexual penetration. – Sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, regardless of whether semen is emitted, if that intrusion can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner.

(b) Offense; Penalty. – Unless the conduct is covered under some other provision of law providing greater punishment, a person who undertakes medical treatment of a patient is guilty of a Class C felony if the person does any of the following in the course of that medical treatment:

(1) Represents to the patient that sexual contact between the person and the patient is necessary or will be beneficial to the patient's health and induces the patient to engage in sexual contact with the person by means of the representation.

(2) Represents to the patient that sexual penetration between the person and the patient is necessary or will be beneficial to the patient's health and induces the patient to engage in sexual penetration with the person by means of the representation.

(3) Engages in sexual contact with the patient while the patient is incapacitated.

(4) Engages in sexual penetration with the patient while the patient is incapacitated.

(c) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law that is committed by that person while violating this section.

(d) The court may order a term of imprisonment imposed for a violation of this section to be served consecutively to a term of imprisonment imposed for any other crime, including any other violation of law arising out of the same transaction as the violation of this section. (2019-191, s. 43(a).)

§ 14-27.34. No defense that victim is spouse of person committing act.

A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense. (1979, c. 682, s. 1; 1987, c. 742; 1993, c. 274, s. 1; 2015-181, s. 15.)

§ 14-27.35. No presumption as to incapacity.

In prosecutions under this Article, there shall be no presumption that any person under the age of 14 years is physically incapable of committing a sex offense of any degree or physically incapable of committing rape, or that a male child under the age of 14 years is incapable of engaging in sexual intercourse. (1979, c. 682, s. 1; 2015-181, s. 15.)

§ 14-27.36. Evidence required in prosecutions under this Article.

It shall not be necessary upon the trial of any indictment for an offense under this Article where the sex act alleged is vaginal intercourse or anal intercourse to prove the actual emission of semen in order to constitute the offense; but the offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercourse. (1979, c. 682, s. 1; 2015-181, s. 15.)

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-596

No. COA21-459

Filed 6 September 2022

Yadkin County, Nos. 18CRS51657; 18CRS51656

STATE OF NORTH CAROLINA

v.

MICHAEL LEONARD ADAMS, JR., and VANESSA PENA, Defendants.

Appeal by defendants from judgments entered on or about 18 March 2021 by Judge Michael D. Duncan in Superior Court, Yadkin County. Heard in the Court of Appeals 22 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorneys General Ryan C. Zellar and Deborah M. Greene, for the State.

Michael E. Casterline, for defendant Michael Leonard Adams, Jr.

Gilda C. Rodriguez, for defendant Vanessa Pena.

STROUD, Chief Judge.

¶ 1 Defendants appeal from judgments entered upon jury verdicts finding them each guilty of misdemeanor child abuse. Defendant Adams argues the trial court erred (1) by denying his motion to dismiss at the close of all evidence; (2) by denying his motion to reopen *voir dire* of a juror after that juror expressed a potential bias toward defendants who do not testify on their own behalf; and (3) by ordering him to

complete conditions of his probation while this appeal was pending. Defendant Pena presents arguments for (1) and (2) above, but does not challenge the portion of the trial court's judgment ordering her to complete conditions of her probation while this appeal was pending. We find the trial court committed no error as to Defendants' motions to dismiss or motions to reopen *voir dire* but did err by ordering Defendant Adams to complete the special conditions of his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

I. Background

¶ 2 Defendants were tried on 1 May 2019 in Yadkin County District Court. Both Defendants were found guilty of misdemeanor child abuse. Both appealed to the Superior Court and were tried 15 March 2021.

¶ 3 During the unrecorded jury selection at the Superior Court trial, and after he had been passed upon by the State and by defense counsel for both Defendants, but before the jury was impaneled, one of the jurors, Juror Clark,[1] raised his hand and "indicated that he wanted to say something." The rest of the jurors were dismissed for the evening and Juror Clark was held back to speak to the trial court. Juror Clark told the trial court he could not hear one of the questions, and Defendant Adams's counsel repeated the question:

> The one about if they choose not to testify? Yes, sir. If --

[1] A pseudonym.

> the defendants have a choice not to testify in the trial. If they exercise that right and choose not to testify, do you believe that you can give the defendants a fair trial based on their choosing not to testify?

Juror Clark then indicated he thought both Defendants should be required to "answer the questions themselves." The trial court did not reopen *voir dire*, but examined Juror Clark regarding his opinion on the Defendants' rights not to testify, and told Juror Clark he "cannot hold that against them if they choose not to testify." After the trial court's questions and instructions, Juror Clark affirmed he understood the Defendants have a right not to testify and that he could follow the law as instructed by the trial court. Counsel for both Defendants made motions to reopen *voir dire* to question Juror Clark; the trial court heard arguments and then elected to "give it some thought overnight."

¶ 4 The following morning, the trial court heard additional arguments by all parties and brought Juror Clark back into the courtroom for additional examination. After a lengthy instruction, and after Juror Clark again affirmatively responded that he could follow the law as instructed by the trial court, the trial court denied Defendants' motions to reopen *voir dire*.

¶ 5 The trial proceeded, and only the State presented evidence. The State's evidence tended to show at approximately 6 p.m. on 21 September 2018 Detective Ryan Preslar with the Yadkinville Police Department was "walking out of the police

department to go home" when he heard "screaming and hollering." He "walked out to the parking lot to look, and . . . [saw] a man in the back driver's side door" of a vehicle across the street, "behind the driver's seat, half his body [was] in the car and he [was] coming in and out." Detective Preslar testified "[i]t was hard to tell . . . if he was hitting somebody or jerking on something." The vehicle was in the Sheriff's Office parking lot, across the street from the Yadkinville Police Department parking lot.

¶ 6 Detective Preslar radioed for help and ran toward the vehicle. As he approached, he noticed "[Defendant] Adams had the child out of the vehicle. He had [his arm] wrapped kind of around [the child's] upper torso and arm and he's pulling in one direction and [Defendant] Pena had [the child] by the bottom half of his body, his legs area and she's pulling in the opposite direction." Detective Preslar testified the Defendants were "violent[ly]" pulling the child in opposite directions, because "[t]hey were both wanting that child." The child was "hollering, crying out[,]" and appeared to be in pain. The "tug of war" continued for approximately 20 to 30 seconds while Detective Preslar approached the vehicle, and "[w]hen [he] [got] within feet of [the Defendants] they let go" of the child. Defendants did not drop the child, but quickly put him down on his feet. At about this time Deputy Nathaniel Hodges from the Yadkin County Sheriff's Office arrived and the Defendants were separated. Detective Preslar did not notice injuries on either Defendant or on the child, and the child calmed down significantly after Detective Preslar separated the Defendants.

Detective Preslar noticed that the car seat in the car "was actually pulled from its strapped-in position, and it was kind of set to the side."

¶ 7 Deputy Hodges interviewed the Defendants. Defendant Adams stated "he just wanted his child, that he was there to pick up their child . . . for a child custody exchange." Defendant Adams also told Deputy Hodges he was supposed to have someone with him to supervise the child custody exchange, but he still attended the custody exchange after his mother, the usual supervisor, could not attend. Defendant Pena stated she was putting shoes on the child when "[Defendant] Adams approached the vehicle and began trying to, in her words, rip the child out of the vehicle." Defendant Pena held on to the child and the "tug of war" ensued "due to the fact she did not want [Defendant] Adams to take the child" because he was "irate." Deputy Hodges charged both Defendants with child abuse under North Carolina General Statute § 14A-318.2 and arrested both Defendants. After Defendants were arrested, DSS was contacted and took temporary custody of the child.

¶ 8 At the close of State's evidence, both Defendants made motions to dismiss. These motions were renewed at the close of all evidence. The motions were denied, and the charges were submitted to the jury. The jury returned a guilty verdict for each Defendant, and the trial court proceeded to sentencing. Both Defendants were sentenced to serve 75 days of imprisonment, suspended for 18 months of supervised probation. As one of the special conditions of probation, each Defendant was ordered

to "enroll and complete any coparenting classes." In the written judgments, the trial court noted each Defendant had entered notice of appeal in open court but ordered as to each Defendant that "probation is to commence once the appeal decision is reached but the Defendant is to enroll [and] complete the co-parenting classes while the appeal is pending." (Capitalization altered.) Both Defendants appeal.

II. Analysis

¶ 9 Defendant Adams contends (1) the State presented insufficient evidence to convict him because the child suffered no injury and no substantial risk of injury was created by his conduct; (2) "the trial court abused its discretion when it denied [his] motion to reopen *voir dire* of Juror [Clark]," (capitalization altered), because good reason existed to reopen *voir dire*; and (3) the trial court violated North Carolina General Statute § 15A-1451(a)(4) when it ordered him to serve conditions of his probation while his appeal was pending. Defendant Pena presents substantially the same arguments for the first two issues. Defendant Adams alone asserts the trial court erred by ordering him to complete the conditions of his probation during the pendency of his appeal. Defendant Pena proposed this issue for review but did not address this error in her brief and it has been abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We will address each Defendant's argument regarding denial of the motions to dismiss separately. We will address their arguments regarding denial of the motion to re-

open *voir dire* together, and we will address Defendant Adams's argument regarding the special condition of his probation last.

A. Sufficiency of the Evidence

1. Standard of Review

¶ 10 This Court's standard of review of a trial court's ruling on a motion to dismiss is well-settled:

> A trial court's denial of a defendant's motion to dismiss is reviewed *de novo. State v. Smith,* 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch,* 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied,* 531 U.S. 890, 121 S. Ct. 213, 148 L.Ed.2d 150 (2000).
>
> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith,* 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose,* 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied,* 515 U.S. 1135, 115 S. Ct. 2565, 132 L.Ed.2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith,* 300 N.C. at 78, 265 S.E.2d at 169.

State v. Watkins, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (2016). "[T]he only question before us . . . is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury." *Id.* at 396, 785 S.E.2d at 178

(emphasis in original).

2. Analysis

¶ 11 Both Defendants were convicted under North Carolina General Statute § 14-318.2. Section 14-318.2 provides in relevant part:

> (a) Any parent of a child less than 16 year of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2 (2018). "[T]he State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury." *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. There is no dispute that Defendants are the parents of the child or that the child is less than 16 years old, and the State only sought a conviction on the substantial risk theory of misdemeanor child abuse. Therefore, the sole element of misdemeanor child abuse in dispute is whether each Defendant "creat[ed] or allow[ed] to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . . ." N.C. Gen. Stat. § 14-318.2; *id.*

a. Defendant Adams's Motion to Dismiss

¶ 12 This Court has recognized a "paucity of cases applying" the substantial risk

prong of § 14-318.2. *See Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177-78. Because "substantial risk of physical injury" is not defined by § 14-318.2, this Court engages in a fact-specific inquiry to determine if such risk exists. *See id.* at 395-96, 785 S.E.2d 177-78. Defendant Adams argues "*State v. Watkins* . . . appears to [be] the only precedential case where a parent was convicted of child abuse without proof of some injury, but instead for merely creating a substantial risk of injury." He also argues *Watkins* is distinguishable from this case and the State has not put forth substantial evidence Defendant Adams created a substantial risk of physical injury to the child by other than accidental means. He argues that the short duration of the incident cuts against any finding of a substantial risk. We hold there was sufficient evidence to submit the case to the jury, and the trial court did not err in denying Defendant Adams's motion.

¶ 13 Defendant Adams appears to be correct that *Watkins* is the sole reported case applying the "substantial risk" prong of § 14-318.2. In *Watkins*, the defendant parked her car outside the Madison County Sheriff's Office and left her 19-month-old son buckled in his car seat while she went inside the Sheriff's Office to leave money for an inmate in the jail. *Id.* at 392, 785 S.E.2d at 176. The State's evidence showed when she was in the lobby, she could not see her car, which was parked about 46 feet away from the front door. *Id.* A detective escorted the defendant out after she argued with employees in the lobby and saw the child in the car. *Id.* at 392-393, 785 S.E.2d

at 176.

¶ 14 The defendant in *Watkins* testified in her own defense. *Id.* at 393, 785 S.E.2d at 176. She testified the child was very warmly dressed in a "snowsuit . . . mittens, boots, a toboggan, pants, and a sweater." *Id.* She said the car had been running before she arrived at the Sheriff's Office with the heater on, and the car was "hotter than blazes" when she got out. *Id.* She claimed she left the windows closed when she went inside the Sheriff's Office, where she believed, based on past experience, it would only take "'three or four minutes' to purchase [a] calling card." *Id.* at 393, 785 S.E.2d at 177. She also claimed she could see the car from where she was standing in the lobby. *Id.*

¶ 15 The *Watkins* Court, viewing the evidence in the light most favorable to the State, analyzed the evidence as to substantial risk of physical injury in these circumstances:

> Here, viewing the evidence, as we must, in the light most favorable to the State with every inference drawn in the State's favor, James, who was under two years old, was left alone and helpless—outside of Defendant's line of sight—for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18–degree weather with accompanying sleet, snow, and wind. Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant "created a substantial risk of physical injury" to him by other than accidental means. *See* N.C.

Gen. Stat. § 14–318.2(a).

Id. at 395-96, 785 S.E.2d at 178.

¶ 16 In addition to *Watkins*, Defendant Adams argues several unreported cases from this Court are persuasive, even if they are not binding precedent, and they illustrate what constitutes a "substantial risk of physical injury" in violation of § 14-318.2. *See, e.g.*, *State v. Parker*, 278 N.C. App. 606, 2021-NCCOA-389, ¶ 24 (unpublished) ("[D]riving at sixty (60) miles per hour with a car door open creates a 'substantial risk of injury' for any passengers, including children, in the vehicle."); *State v. Miller*, 276 N.C. App. 276, 2021-NCCOA-84, ¶ 16 (unpublished) (Where defendant "'exceeded the speed limit for approximately one minute' before 'sometimes crossing the center line to pass pulled-over vehicles' with Deputy Rae in pursuit with his blue lights flashing"); *State v. Thomas*, 217 N.C. App. 198, 719 S.E.2d 254 (2011) (unpublished) (exposure to 41 grams of cocaine and a loaded firearm); *In re I.H.*, No. COA09-244, 2009 WL 2139096 (N.C. App. July 7, 2009) (unpublished) (high speed police chase resulting in accident where children were injured).

¶ 17 But the factual circumstances here Defendant Adams seeks to distinguish from *Watkins* and the unreported cases are instead similar in relevant ways. In all the cases, the potentially dangerous incidents were quite brief, just minutes, and in all but one case the children involved were fortunately unharmed. The question is whether the actions "created a substantial risk of physical injury" to the child by

"other than accidental means." Based upon these cases, a "substantial risk of physical injury" may arise in an incident lasting only moments, where the defendant has intentionally engaged in the activity presenting a risk of physical harm to the child and has exposed the child to the risk of injury—whether the child was exposed to illicit substances, or exposed to severe weather conditions, or risk of abduction, or in a speeding car driven in a manner creating a substantial risk of a crash. The circumstances in which a "substantial risk of physical injury" vary from case to case, based on the severity and length of the risky conduct, but presented a jury question sufficient to survive a motion to dismiss.

¶ 18 Thus, while illustrative, these cases "do not resolve the issue presently before us—that is, whether the State's evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat. § 14-318.2(a) by Defendant." *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178. Close questions are questions that must be resolved by the jury, and the question before us is "whether a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State." *Id.* (emphasis in original). Here, the State's evidence tended to show Defendant Adams attended the custody exchange of the parties' four-year-old son without a court-ordered supervisor. Defendant Adams then became incensed, for reasons undisclosed by the record, and attempted to forcibly remove the child from the vehicle. He grabbed the child around the child's upper torso and began to

violently pull the child out of the vehicle, which appears to have caused the child to "holler" or "cry out" in pain. Given the fact the car seat also appeared to have been "pulled from its strapped-in position[,]" a reasonable inference to be drawn from the evidence is that Defendant Adams pulled hard enough to move the car seat out while attempting to take the child. Then, for 20 to 30 seconds, Defendant Adams ignored police instructions and engaged in a "tug of war" with Defendant Pena, with the child serving as the "rope," placing the child at risk of physical injury from the fight between Defendants.

¶ 19 It is not difficult to conclude the child was at a substantial risk of being injured in many ways during the "tug of war." The evidence, viewed in the light most favorable to the State, shows that Defendant Adams "created a substantial risk of physical injury" to his child. *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. Many of these injuries may occur very quickly, and Defendant Adams's argument that the short duration of the incident cuts against a finding of "substantial risk of physical injury" is not persuasive. The evidence simply creates a question for the jury to resolve as to whether the duration of the incident was long enough to create a "substantial risk of physical injury." During the struggle, the child could have been dropped and suffered injury. The child could have been harmed by the mere act of pulling the child in two directions. Defendant Adams had wrapped his arm around the child's upper torso, and the child's neck or head could have been compressed or

contorted as a result of the struggle. If either parent lost their grip on the child, the child could have been thrown to the ground by the force exerted by the other parent and injured. And the record reflects that none of Defendant Adams's conduct was accidental. His attempts to wrest the child away from Defendant Pena were quite intentional, even though he did not intend to harm the child. There was no indication in *Watkins* or any of the unreported cases cited by Defendant Adams that the defendants had any intention or desire of harming the children in those situations; they intentionally engaged in risky activities in a time and manner that also placed a child at risk of injury. The State presented substantial evidence Defendant "create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [his] child by other than accidental means" in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying his motion to dismiss.

b. Defendant Pena's Motion to Dismiss

¶ 20 Much of the evidence presented by the State as to Defendant Adams's culpability under § 14-318.2 is equally applicable to the prosecution of Defendant Pena. Upon a *de novo* review of the evidence presented by the State, viewed "in the light most favorable to the State[,]" *Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177 (quotation omitted), the State's evidence was sufficient to show Defendant Pena "created or allowed to be created a substantial risk of physical injury" to the child and thus must be resolved by the jury. *See id.* at 395, 785 S.E.2d at 177.

¶ 21 The State's evidence tended to show Defendant Pena was an equal participant in the "tug of war" over the Defendants' child. When Detective Preslar was approaching the vehicle in the Sheriff's Office parking lot, he observed Defendant Pena with her arms around the "[m]iddle of the [child's] legs." As Detective Preslar approached, Defendant Pena also ignored his instructions to "put the child down" and continued to pull the child in the direction opposite Defendant Adams for approximately 20 to 30 seconds. Additionally, although Defendant Adams was not seriously injured, Defendant Adams told Detective Preslar that Defendant Pena became violent in close proximity to the child during the physical struggle and "bit [Defendant Adams] on the forearm and punched him in the face several times." Detective Preslar characterized Defendant Pena as pulling on the child "hard" or "violent[ly]." Even though Defendant Adams "was supposed to be getting custody of the child that day[,]" Defendant Pena resisted a cooperative custody exchange and instead engaged in a violent physical struggle over possession of the child, starting in the confines of a vehicle.

¶ 22 Defendant Pena cites *State v. Noffsinger*, 137 N.C. App. 418, 426, 528 S.E.2d 605, 611 (2000), and argues "'a parent owes a special duty to her child which has long been recognized by statute and by common law' and that 'a parent has a duty to take affirmative action to protect her child and may be held criminally liable if she is present when someone harms her child and she does not take reasonable steps to

prevent it.'" She frames the struggle over the child as "taking affirmative action to protect her son from [Defendant] Adams, who arrived without the court ordered custody [supervisor] and forcibly removed [the child] from her car, and [to] keep [Defendant] Adams from driving away with [the child] in the erratic and dangerous state in which he was in." But Defendant Pena does not address another possible interpretation of the evidence: that even though they met in the parking lot of the Sheriff's Office (and across the street from the Police Department), where she could have quickly summoned an officer to assist if Defendant Adams was in an "erratic and dangerous" state, she instead participated in an unreasonable struggle over physical possession of the child with the child's father. Instead of seeking help, she took affirmative action that placed the child in danger by engaging in the "tug of war" over him. Regardless, even though Defendant Pena "offered an innocent explanation for [her] conduct," the State's evidence need not "'rule out every hypothesis of innocence.'" *State v. Winkler*, 368 N.C. 572, 582, 780 S.E.2d 824, 830 (2015) (quoting *State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1999)). "[A] reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State." *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178 (emphasis in original).

¶ 23 The State presented substantial evidence to submit to the jury the question of whether Defendant Pena "create[d] or allow[ed] to be created a substantial risk of

physical injury, upon or to [her] child by other than accidental means" in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying Defendant Pena's motion to dismiss.

c. Conclusion

¶ 24 Because the State presented substantial evidence of each element of misdemeanor child abuse, *see Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177, "a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State." *Id.* at 396, 785 S.E.2d at 178 (emphasis in original). The trial court did not err by denying Defendants' motions to dismiss.

B. Defendants' Motions to Reopen *Voir Dire*

1. Standard of Review

¶ 25 "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *State v. Rodriguez*, 371 N.C. 295, 312, 814 S.E.2d 11, 23-24 (2018) (quotation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's

decision] was so arbitrary that it could not have been the result of a reasoned decision.").

2. Analysis

¶ 26 All parties agree North Carolina General Statute § 15A-1214 governs jury selection. Section 15A-1214(g) provides:

> (g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
>
> (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C. Gen. Stat. § 15A-1214(g) (2018). Section 15A-1214(g) gives the court "leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* . . . ." *State v. Boggess*, 358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004). "As part of this initial investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances."

Id.

¶ 27 Defendants argue there was "good reason . . . to challenge [Juror Clark] for cause or, alternatively, to exercise a peremptory challenge[.]" (Capitalization altered.) The State argues that even with good cause, "the trial court is permitted, but is not required to reopen *voir dire*." The trial court did not abuse its discretion, and Defendants' arguments are overruled.

¶ 28 Here, the trial court questioned Juror Clark after he offered his opinion that he thought Defendants should "answer the questions themselves." The trial court sought to clarify Juror Clark's opinion, then carefully instructed him "that [the Defendants] have a right to testify if they wish and they have a right not to testify if they wish, and you cannot hold that against them if they choose not to testify." The trial court stretched this examination over two days, allowing Juror Clark to think on his opinion overnight before reexamining him the next morning. The trial court also heard arguments from counsel on both days. The trial court "ha[d] discretion to reopen *voir dire* or take other steps suggested by the circumstances[]" after its initial inquiry, *Boggess*, 358 N.C. at 683, 600 S.E.2d at 457, and ultimately chose to question Juror Clark without reopening *voir dire*.

¶ 29 Both Defendants cite our decision in *Bond*. *See State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996). They argue a juror's equivocal statements as to the death penalty qualify as "good reason" to reopen *voir dire*, as were the juror's statements in *Bond*,

see id. at 20, 478 S.E.2d at 172, and Juror Clark's statement here is a similarly "good reason" to reopen *voir dire*. But *Bond* is distinguishable. In *Bond*, the trial court reopened the prosecution's *voir dire* after the juror appeared to have changed his mind regarding the death penalty between the State's and the defense's *voir dire*. *Id.* at 18-19, 478 S.E.2d at 171-72. *Voir dire* was still ongoing at the time of the trial court's ruling, and the juror had not yet been passed upon by both the prosecution and the defense. *Id.* Here, as far as the record reflects, Juror Clark did not make equivocal statements until after jury selection was completed.[2] Juror Clark made a single statement after both parties had passed on him and he had been seated in seat 2. *Bond* is not controlling. But, more importantly, even if equivocal statements like those by the juror in *Bond* or Juror Clark's statements volunteering an opinion can constitute "good cause" to reopen *voir dire*, the decision to reopen *voir dire* is still squarely within the discretion of the trial court. *See* N.C. Gen. Stat. § 15A-1214(g); *Rodriguez*, 371 N.C. at 312, 814 S.E.2d at 23-24; *see also Bond*, 345 N.C. at 19-20, 478 S.E.2d at 172 ("This Court has previously interpreted the language of N.C.G.S. § 15A-1214(g) and found that the decision to reopen *voir dire* rests in the trial court's discretion. . . . [A]bsent a showing of abuse of discretion, the trial court's decision to reopen the examination of prospective juror Robbins will not be disturbed."). We

[2] Because jury selection was unrecorded, our record is limited to statements made after *voir dire*, but there is no contention the issue arose earlier.

must still review the trial court's decision not to reopen *voir dire* for an abuse of discretion.

¶ 30 After examination of Juror Clark on the first day, the court expressed concerns about reopening *voir dire*:

> We've already passed on jurors. If you didn't ask them that question, you know that -- it concerns me obviously that you're going to have other jurors stepping up saying the same thing. That's the attorneys' responsibility from both sides to ask what questions they feel are necessary to get a picture of whether or not, in their own mindset a juror can be fair and impartial to both sides.
>
> I have great concerns about just starting back again with number two, and then even greater concerns if we were to do that in front of all the other jurors. It just opens a Pandora's box, and I'm not going to allow that to happen. I'll hear any further arguments in the morning if you want to go get me some case law or if you want to do a little research and you feel like you need to do a brief, any of those things are acceptable to the court.

The trial court reasoned that reopening *voir dire* would have a negative impact on the orderly disposition of Defendants' charges, possibly resulting in a lengthy delay, and instead opted to perform the extensive examination of Juror Clark, giving him overnight to continue to consider the trial court's instructions, to determine if his opinion would prevent him from serving as a fair and impartial juror. The trial court also allowed parties an additional opportunity to develop their arguments and be heard the next day. At the end of the first day, the trial court did not doubt Juror

Clark's ability to remain fair and impartial:

> The Court was satisfied when [Juror Clark] left yesterday that regardless of how he felt about the law, whether he liked it or disliked it, that he indicated that he would follow and obey the law as the Court instructed him.

And, after hearing additional arguments from counsel the next day, the trial court was still "satisfied with the answer of [Juror Clark]" and denied both Defendants' motions.

¶ 31 "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. The trial court in this case denied Defendants' motions after inquiring into Juror Clark's opinion and only after determining Juror Clark would be able to follow the law. Defendants' motions were denied because the trial court was concerned that reopening *voir dire* would "open[] a Pandora's box" and cause delays during Defendants' trial, Defense counsel for both parties had already passed on Juror Clark, and Juror Clark gave repeated affirmations that he understood and could apply the law. The trial court came to "a reasoned decision" when it denied Defendants' motions. *Id.*

¶ 32 We do not need to reach Defendants' alternative argument that, "if *voir dire* of [Juror Clark] had been reopened and the trial court did not dismiss him for cause,

[Defendants] could have used a peremptory challenge to remove him[,]" because the trial court did not abuse its discretion by refusing to reopen *voir dire*. *See* N.C. Gen. Stat. § 15A-1214(c)-(f) (2021) (establishing that peremptory challenges may only be exercised while *voir dire* is open). Because the trial court did not abuse its discretion by denying Defendants' motions after examining Juror Clark without reopening *voir dire*, the trial court committed no error and did not violate § 15A-1214(g).

C. Defendant Adams's Conditions of Probation

¶ 33 "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (quoting *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998)).

¶ 34 Defendant Adams asserts the trial judge violated North Carolina General Statute § 15A-1451(a)(4) by "order[ing] him to enroll in co-parenting classes and serve the active portion of his split sentence before the appeal was decided." The State concedes that this was an error. After a review of the judgment, we agree the trial court did err by ordering Defendant Adams to fulfill conditions of his probation while his appeal was pending. Although the trial court's judgment is identical as to Defendant Pena, she failed to argue this issue on appeal and it has been abandoned. *See* N.C. R. App. P. 28(a).

¶ 35 North Carolina General Statute § 15A-1451(a)(4) provides: "(a) When a

defendant has given notice of appeal: . . . (4) Probation or special probation is stayed." N.C. Gen. Stat. § 15A-1451(a)(4) (2018). Defendant Adams gave notice of appeal in open court after the trial court suspended his sentence and ordered the co-parenting classes as conditions of probation. Then, the trial court included the following in its written judgment: "Probation is to commence once the appeal decision is reached *but the Defendant is to enroll* [*and*] *complete the co-parenting classes while the appeal is pending* . . . ." (Capitalization altered and emphasis added.) Because Defendant Adams's probation was stayed by North Carolina General Statute § 15A-1451 upon his notice of appeal, the trial court erred when it ordered Defendant Adams to complete conditions of his probation while his appeal was pending. We remand for resentencing.

III. Conclusion

¶ 36 We conclude the trial court did not err by denying Defendants' motions to dismiss and motions to reopen *voir dire* of Juror Clark. We also conclude the trial court erred by ordering Defendant Adams to complete his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

NO ERROR IN PART; REMANDED IN PART.

Judges ARROWOOD and WOOD concur.

North Carolina Criminal Law

A UNC School of Government Blog

Criminal Violations of a DVPO

Posted on Feb. 2, 2021, 11:41 am by Brittany Bromell

In North Carolina, victims of domestic violence are protected by both civil and criminal laws. Our state's Domestic Violence Protective Order (DVPO) laws are in Chapter 50B of the General Statutes. A person seeking relief under Chapter 50B may file a civil action in district court alleging acts of domestic violence and seeking entry of a protective order. If the court enters a DVPO, a violation can have criminal consequences. This post reviews the criminal offenses involving violations of DVPOs.

Misdemeanor DVPO Violation

G.S. 50B-4.1 is the primary criminal provision and establishes several offenses. It provides, as a basic violation, that a person who knowingly violates a valid protective order is guilty of a Class A1 misdemeanor. The elements "knowledge" and "valid protective order" have been the subject of litigation over the years. *See State v. Tucker* ___ N.C. App. ___, 848 S.E.2d 265 (2020); S*tate v. Byrd,* 363 N.C. 214 (2009). However, a deep dive of the meaning of these elements is beyond the scope of this blog.

Felony DVPO Violations

In addition to the basic misdemeanor DVPO violation, G.S. 50B-4.1 creates four felony offenses that involve DVPO violations.

Committing felony while DVPO prohibits act. One offense is the commission of a felony in violation of a DVPO. A person is guilty of this offense if he or she commits a felony at a time when the person knows the behavior is prohibited by a valid protective order. The offense is a felony one class higher than the felony the person committed. G.S. 50B-4.1(d). For example, if a person is convicted of attempted second-degree kidnapping in violation of a valid DVPO, the punishment for the attempted kidnapping is enhanced from a Class F felony to a Class D felony. This enhancement provision does not apply to convictions of a Class A or B1 felony or other felony DVPO violations described below.

Third offense. A person is guilty of a Class H felony if he or she knowingly violates a valid protective order after having been previously convicted of two misdemeanor offenses under Chapter 50B. G.S. 50B-4.1(f).

Violation of stay-away condition with deadly weapon. A person is guilty of this offense if he or she knowingly violates a valid protective order by failing to stay away from a place, or a person, as directed under the terms of the order, while in possession of a deadly weapon. G.S. 50B-4.1(g). The offense is a Class H felony.

Entry of safe house where protected person resides. The final felony offense under G.S. 50B-4.1 is the entry into a safe house where the protected person resides. A person guilty of this offense is subject to a valid protective order and enters property operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing. G.S. 50B-4.1(g1). A person violates G.S. 50B-4.1(g1) regardless of whether the person protected under the order is present on the property. The offense is a Class H felony.

Other Offenses

G.S. 14-269.8 makes it a Class H felony for any person to possess, purchase, or receive or attempt to possess, purchase, or receive a firearm, machine gun, ammunition, or permits to purchase or carry concealed firearms while a DVPO is in effect.

Under the Cyberstalking statute G.S. 14-196.3(b)(5), it is a Class 2 misdemeanor to knowingly install, place, or use an electronic tracking device without consent, or cause an electronic tracking device to be installed, placed, or used without consent, to track the location of any person while subject to a DVPO.

If you have questions about any of these offenses, please feel free to email me at bwilliams@sog.unc.edu.

Category: Crimes and Elements, Uncategorized | Tags: domestic violence, DVPO

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North Carolina Criminal Law

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Domestic Violence Law and Procedure

Posted on Sep. 5, 2017, 10:43 am by John Rubin

In getting ready for the North Carolina magistrates' fall conference and a session that I'm teaching on issuing process in domestic violence cases, I began thinking about the ways that North Carolina criminal law addresses domestic violence. The North Carolina General Assembly has made numerous changes and additions in this area of criminal law, collected below. If I omitted some part of North Carolina criminal law involving domestic violence cases, please let me know.

Crimes Involving Domestic Violence

Several laws address crimes involving domestic relationships, although the relationship requirement varies. Some offenses require a romantic relationship of some kind. For example, domestic criminal trespass requires that the defendant trespass on premises occupied by the defendant's present or former spouse or a person with whom the defendant lives or has lived as if married. Others incorporate the broader definition of "personal relationship" for obtaining a domestic violence protective order (DVPO) in G.S. 50B-1, as for the offense of assault in the presence of a minor. Some offenses do not require a specific relationship but were evidently enacted with relationship violence in mind, such as assault by strangulation under G.S. 14-32.4(b) and stalking under G.S. 14-277A. Although the latter statute does not require a specific relationship, it opens with the statement that the General Assembly "recognizes . . . the strong connections between stalking and domestic violence . . . ."

The offenses requiring a specific relationship include:

- Domestic criminal trespass, G.S. 14-134.3
  - Simple, Class 1 misdemeanor
  - Entry of safe house with deadly weapon, Class G felony

- Assault with a deadly weapon or inflicting serious injury, a Class A1 misdemeanor, in the presence of a minor, G.S. 14-33(d)
  - First offense, supervised probation if active sentence not imposed
  - Subsequent offense, minimum 30 day active sentence

- Disclosure of private images (sometimes referred to as revenge porn), G.S. 14-190.5A
  - If the defendant is 18 or older at the time of the offense, Class H felony
  - If the defendant is under 18 at the time of the offense, Class 1 misdemeanor for the first offense and Class H felony for a subsequent offense
  - This offense has required a personal relationship between the defendant and victim, but the requirement does not apply to offenses committed on or after December 1, 2017

- Domestic violence homicide, G.S. 14-17(a1) (effective for offenses committed on or after December 1, 2017)
  - First-degree premeditated and deliberate murder, Class A felony
  - This crime is based on a rebuttable presumption that the defendant acted with premeditation and deliberation if he kills with malice as defined in G.S. 14-17(b)(1) and was in a certain type of relationship with the victim and had previously been convicted of a certain type of crime against the victim. As written, this presumption may not be enforceable because it bases premeditation and deliberation on the version of malice in G.S. 14-17(b)(1), which involves recklessness, not an intentional act. *See generally County Court of Ulster v. Allen*, 442 U.S. 140 (1979) (even if a presumption is considered permissive, there must be a "rational connection" between the facts proved and the fact to presumed); *see also State v. Coble*, 351 N.C. 448 (2000) (crime of attempted second-degree murder, which requires specific intent to commit underlying offense, does not exist because second-degree murder does not include specific intent to kill as element).

Several other offenses involve violations of domestic violence protective orders:

- DVPO violation, G.S. 50B-4.1
  - Simple, Class A1 misdemeanor
  - Third offense, Class H felony
  - Felony while DVPO prohibits act, one class higher than felony committed
  - Violation of stay-away condition with deadly weapon, Class H felony
  - Entry of safe house where protected person resides, Class H felony

- Possession of firearm while DVPO in effect, Class H felony, G.S. 14-269.8, G.S. 50B-3.1(j)
- Cyberstalking by electronic tracking device while subject to DVPO, Class 2 misdemeanor, G.S. 14-196.3(b)(5)

Arrest Procedures

Several provisions permit or require law enforcement officers to take action in cases involving domestic violence.

Warrantless arrests. G.S. 15A-401(b)(2) regulates an officer's authority to make a warrantless arrest for offenses committed outside the officer's presence. An officer has this authority when the officer has probable cause for any felony but only for certain misdemeanors. The statute gives officers this authority for the following misdemeanors involving domestic violence (as well as in cases in which the person will cause physical injury or property damage or will not be apprehended unless immediately arrested):

- Domestic criminal trespass
- Simple assault, assault with deadly weapon or inflicting serious injury, and assault by pointing a gun if a personal relationship exists as defined in G.S. 50B-1
- DVPO violation

An officer also may make a warrantless arrest for a violation of a pretrial release condition, whether committed in or outside the officer's presence. G.S. 15A-401(b)(1), (2). Originally, this statute concerned domestic violence cases only, allowing warrantless arrests for violations of pretrial release conditions under G.S. 15A-534.1(a)(2), which lists pretrial release conditions in domestic violence cases. The statute was later broadened to other pretrial release violations.

Mandatory arrests. An officer must arrest when the officer has probable cause that a person has violated a DVPO excluding the person from the residence or household of a domestic violence victim or directing the person to refrain from doing any act in G.S. 50B-3(a)(9), such as threatening the victim. G.S. 50B-4.1(b).

Fingerprinting and other information. The arresting law enforcement agency must take the fingerprints of a defendant for all felonies and certain misdemeanors, including the following domestic violence offenses: domestic criminal trespass; an offense involving domestic violence as described in G.S. 15A-1382.1 (discussed further below under Sentencing); a DVPO violation; and misdemeanor assault, stalking, or communicating a threat if the person is held under G.S. 15A-534.1 (discussed further below under Pretrial Release Procedures). G.S. 15A-502(a2), (a4). The arresting agency must provide the magistrate with available information about the defendant's relationship with the alleged victim and whether it is a personal relationship as defined in G.S. 50B-1, and the magistrate must enter the information into the court information system. G.S. 15A-502(a3), (a5).

Pretrial Release Procedures

G.S. 15A-534.1 contains several provisions on pretrial release in cases involving domestic violence:

- The most well-known provision is what has become known as the 48-hour law, which requires that a judge set pretrial release conditions in the first 48 hours after arrest. Over the years, the provision has been expanded to cover additional offenses and

relationships, such as dating relationships. *See* Jeff Welty, Recent Changes to the Pretrial Release Statutes, N.C. Crim. L. Blog (Nov. 19, 2015).
- The judicial official, whether a judge or magistrate, must consider the defendant's criminal history when setting pretrial release conditions. G.S. 15A-534.1(a); Conditions of Release for Person Charged with a Crime of Domestic Violence, AOC-CR-630 (Dec. 2015) (form release order with these conditions).
- The judicial official may impose the pretrial release conditions listed in G.S. 15A-534.1(a)(2), such as stay-away conditions.
- The judicial official may detain a defendant for a reasonable time if the judicial official determines that immediate release will pose a danger to the victim or other person or result in intimidation to the victim and an appearance bond will not reasonably avert this risk. G.S. 15A-534.1(a)(1). This provision predated the 48-hour procedure and allowed for a cooling-off period for the defendant and an opportunity for the alleged victim to take safety precautions.

Sentencing

The following provisions concern sentencing in cases involving domestic violence:

- If the conviction involves assault, communicating a threat, or any act in G.S. 50B-1(a), and the defendant and victim had a personal relationship, the judge must indicate in the judgment and the clerk of court must indicate in the official record that the offense involved domestic violence. G.S. 15A-1382.1(a).
- If the court finds the defendant responsible for acts of domestic violence and sentences the defendant to probation, a regular condition of probation is to attend and complete an abuser treatment program. G.S. 15A-1343(b)(12).
- The Department of Public Safety must establish a domestic violence treatment program for inmates whose official record includes a finding that they committed acts of domestic violence. G.S. 143B-704(e).

See also G.S. 15A-1340.16(d)(15) (aggravating factor at felony sentencing for the defendant to have taken advantage of a position of trust and confidence, including a domestic relationship, in committing the offense).

Victims' Rights

The North Carolina Crime Victims' Rights Act gives victims of certain offenses various rights, including the right to notice throughout the proceedings and the right to restitution and a civil judgment for damages greater than $250. G.S. 15A-830 through G.S. 15A-841, G.S. 15A-1340.34(b), G.S. 15A-1340.38. Many felonies are covered. The following misdemeanors, which involve domestic violence, are also covered:

- Simple assault, assault on female, assault with a deadly weapon or inflicting serious injury, assault by pointing a gun, domestic criminal trespass, and stalking if the

defendant and victim had a personal relationship as defined in G.S. 50B-1
- Violation of a DVPO

Firearm Consequences

Federal law imposes a firearms ban for felonies and misdemeanor crimes of domestic violence. State law follows suit, providing that a person may not obtain a permit to purchase or carry a concealed handgun if prohibited by state or federal law. G.S. 14-404(a)(1), G.S. 14-415.12(b)(1), (8b); *see also* Firearm Prohibition Notice, AOC-CR-617 (Dec. 2007) (form notice to convicted defendants that firearm possession may be unlawful under federal or state law). *But see* Jeff Welty, *Vinson, Voisine, and Misdemeanor Crimes of Domestic Violence* , N.C. Crim. L. Blog (July 18, 2016) (questioning whether North Carolina misdemeanor assaults constitute misdemeanor crimes of domestic violence under federal law as applied by Fourth Circuit, but suggesting that North Carolina courts should continue to consider using AOC form to notify convicted defendants that possession of firearms "may" be unlawful).

During the term of a DVPO, it is unlawful for the defendant to possess firearms (discussed above under Crimes Involving Domestic Violence). After the DVPO expires, a defendant may move for return of firearms surrendered during the term of the DVPO, but the court must deny the motion if the defendant is disqualified from possessing firearms under state or federal law or has pending charges for an offense against the person protected by the DVPO. G.S. 50B-3.1(f).

Category: Crimes and Elements, Procedure, Sentencing, Uncategorized | Tags: domestic violence, DVPO, personal relationship

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North Carolina Criminal Law

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May a Magistrate Impose Conditions on a Defendant's Conduct While in Pretrial Detention?

Posted on Nov. 13, 2017, 6:00 am by Jeff Welty

This question in the title of this post came up in a recent class. The specific context involved a domestic violence defendant who was in jail waiting for a judge to set conditions of release pursuant to the 48 hour rule established in G.S. 15A-534.1. But a similar issue arises whenever a magistrate sets conditions of release for a defendant who is unable to make bond and so remains in pretrial detention. An example of a common condition is that the defendant not contact the alleged victim.

[Update: The court of appeals ruled in *State v. Mitchell* (June 5, 2018), that a no-contact provision of a release order was "not conditioned on defendant's release or commitment [and] was required as long as the Order was in effect," including while the defendant was in pretrial detention. That condition formed the basis of a felony charge of stalking in violation of a court order. *Mitchell* is contrary to the analysis below and, unless reversed, is the law. Shea Denning posted about *Mitchell* here.]

I don't think that a magistrate is authorized to impose such a condition on an incarcerated defendant. No statute expressly allows a magistrate to impose conditions of detention on a defendant, whether during the period of time that a domestic violence defendant is waiting to appear before a judge for a bond hearing or during the period of time that a defendant has failed to satisfy financial or other conditions of his or her release. To the contrary, the various bond statutes consistently refer to the authority of various judicial officials to impose "conditions of pretrial release." G.S. 15A-534(a) (a judicial official may limit a defendant's travel, associations, conduct, etc., "as conditions of pretrial release"); G.S. 15A-534.1 (providing that in domestic violence cases, the "conditions of pretrial release" shall be set by a judge, unless one is not available within 48 hours, and listing various "conditions on pretrial release" that a judge may impose).

So long as a defendant remains in custody, any conditions of release would not apply. *See State v. Orlik*, 595 N.W.2d 468 (Wisc. Ct. App. 1999) (ruling that conditions of release set by a judicial official do not apply to a defendant who has not been released: "[T]he phrase 'conditions of release' . . . is used consistently and repeatedly in the [relevant statutes]. . . . We conclude the only reasonable interpretation of this language is that the conditions the court is authorized to impose . . . are conditions that govern

the release of the defendant from custody. The court may impose monetary conditions the defendant must meet before release and other conditions the defendant must meet when the defendant is released, but the statute does not suggest that the court has authority to enter orders governing the defendant's conduct if he is not released because he cannot post bail."); *State v. Ashley*, 632 A.2d 1368 (Vt. 1993) (reversing a pretrial detainee's conviction for violating a condition of release that prohibited him from contacting certain persons; the state could not establish "defendant's guilt on the charge of violation of a condition of his release when, in fact, he was still in custody at the time the alleged violation occurred"). *Cf. State v. Romero*, 687 P.2d 96 (N.M. Ct. App. 1984) (rejecting the state's argument that a defendant violated a pretrial release condition limiting him to a specific county when he was transported to another county during his pretrial detention, and stating that "[i]nasmuch as defendant was in custody at all pertinent times, the conditions of release are not applicable"). *But see State v. Gandhi*, 989 A.2d 256 (N.J. 2010) (where a defendant argued that "he never violated [a judicial no-contact order] because the no-contact provision was a condition of bail and [he] was never released on bail," the court found that "[t]he no-contact orders in defendant's bail orders did not lose their character as judicial no-contact orders merely because bail consequences could attach for their violation. As judicial no-contact orders, defendant was obligated to strictly comply with them."). A discussion of this issue may be found in the relevant section of the Defender Manual.

Of course, the relevant statutes could be amended to give the necessary authority to magistrates. That's what happened in Vermont, where the *Ashley* case cited above has since been effectively reversed by a statutory amendment. The law now provides that no-contact orders imposed as part of conditions of release "take effect immediately, regardless of whether the defendant is incarcerated or released." 13 V.S.A. § 7554(a)(3). *See State v. Tavis*, 978 A.2d 465 (Vt. 2009) (explaining that the statutory change was prompted by *Ashley*).

Perhaps one could argue that a magistrate has some inherent authority to regulate the behavior of a defendant in pretrial custody. I am not aware of authority for or against such an argument, but in light of the detailed statutes regarding pretrial release and related matters, it strikes me as a stretch. While judges perhaps have greater inherent authority than magistrates, the same basic analysis would appear to apply to judges as well.

Of course, none of this means that a defendant is free to contact an alleged victim without repercussions. Many jails have policies and procedures in place that limit inmates' ability to call victims of or witnesses to their alleged offenses. And, depending on the content of the communication, the defendant may violate the laws against communicating threats, harassing phone calls, stalking, obstruction of justice, or witness intimidation by contacting a person involved in the defendant's case. Finally, if threatening or otherwise inappropriate contact between the defendant and the alleged victim is brought to the attention of the judicial official who eventually sets, or has

authority to modify, the defendant's conditions of release, the conduct could support more restrictive conditions of release because it would suggest a greater safety concern.

It would be fair for a magistrate or other judicial official committing the defendant to jail or setting conditions of release to inform the defendant of these possible ramifications of the defendant's conduct. But as far as ordering the defendant not to contact the alleged victim or otherwise restricting the defendant's conduct while in pretrial detention, I don't see the authority for that.

Category: Uncategorized | Tags: bail, bond, conditions of detention, conditions of release, domestic violence, magistrate, pretrial release

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North Carolina Criminal Law

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Does a No Contact Order Apply While the Defendant Is in Jail?

Posted on Jun. 6, 2018, 12:38 pm by Shea Denning

When setting conditions of pretrial release in domestic violence cases, magistrates and judges often order a defendant not to contact the victim. Those directives clearly apply to a defendant once he is released from jail subject to those conditions. But what about a defendant who remains in jail? Is he also subject to a no contact condition included on a release order? The court of appeals addressed that issue yesterday in *State v. Mitchell*.

The court in *Mitchell* concluded that the no contact directive set forth on Mitchell's release orders (he was charged with more than one crime for allegedly assaulting his girlfriend) applied to Mitchell while he was confined in jail. Thus, Mitchell's mailing of letters to his girlfriend from jail violated a court order. And because the letters amounted to stalking, Mitchell's conduct was felonious since there was a court order in effect (the pretrial release orders) prohibiting his conduct.

Facts. Mitchell was arrested for assault on a female on December 26, 2014 after he allegedly punched his girlfriend, "Nancy," in the face. At his initial appearance, the magistrate wrote on the AOC-CR-200, Conditions of Release and Release Order form, that he was "NOT TO HAVE ANY CONTACT WITH [NANCY]." Mitchell's release was not authorized that evening because he was charged with a domestic violence offense for which only a judge could set pretrial release conditions during the first 48 hours following his arrest. Two days later, a judge authorized Mitchell's release upon the posting of a secured bond. The judge, like the magistrate, ordered that Mitchell have no contact with the victim.

A week later, while Mitchell remained in jail, he was charged in an arrest warrant with habitual misdemeanor assault for the alleged December 26 assault of Nancy. The Conditions of Release and Release Order issued in connection with this charge imposed a secured bond and ordered Mitchell "NOT TO HAVE ANY CONTACT WITH [NANCY]." Mitchell did not post bond and remained jailed on both charges.

Mitchell wrote six letters to Nancy from jail while he was subject to conditions of release orders for one or both of these charges. The first letters were "cordial," but the later letters "escalated to threats when she did not respond or reply." Slip op. at 5. Nancy also received a letter marked "return to sender" that listed her return address.The letter was

addressed to the Federal Building on Fayetteville Street in Raleigh and contained a bomb threat and demand for $1 million, purportedly written by Nancy. The defendant later admitted to writing the letter.

In March 2015, the Wake County District Attorney's Office received a letter through "jail mail" from the Wake County Detention Center that purported to be written by Nancy. The letter stated that Nancy had falsely accused Mitchell and threatened to place explosives in the Wake County Courthouse. Nancy denied sending the letter.

Mitchell was charged with felony stalking while a court order was in effect for the letters to Nancy and with two counts of felony obstruction of justice based on the letters to the Federal Building and the District Attorney's office.

Felony stalking. G.S. 14-277.3A defines the offense of stalking, which generally is a Class A1 misdemeanor. If, however, stalking is committed "when there is a court order in effect prohibiting the conduct described under [G.S. 14-277.3A] by the defendant against the victim," the offense is elevated to a Class H felony.

Defendant's argument. Mitchell moved to dismiss the felony stalking charges on the basis that he was not subject to the conditions of pretrial release that prohibited him from having contact with Nancy because he never posted his bond. Instead, he remained in jail during the entire time the letters were sent. Since he was not released, he said that the order did not apply to him.

Court's analysis. Calling Mitchell's argument "deceptively simple," the court rejected it. Slip op. at 9. The court noted that the orders, titled "Conditions of Release and Release Order," contained more than their title suggested. In addition to establishing conditions of release, the orders committed Mitchell to a detention facility (as required by G.S. 15A-521(a)), noted that he was subject to a domestic violence hold, directed when the defendant was to again be produced before a judicial official (as required by G.S. 15A-521(b) and G.S. 15A-534.1), and, for one of the orders, required that Mitchell provide fingerprints.

Such orders, the court of appeals said, "memorialize[] the trial court's determinations governing the defendant, whether the defendant is held in a detention facility or released." Slip op. at 12. Some of the terms of such an order, the court explained, apply whether a defendant is committed or released, while others apply only in one circumstance or another.

The court stated that the directive in the *Mitchell* orders that Mitchell have no contact with Nancy contained no language indicating that the provision applied only upon Mitchell's release. Thus, the court concluded, contact with Nancy was barred as long as the orders were in effect. And the orders were in effect until the charges were disposed of, whether Mitchell remained confined in jail or was released.

The stalking enhancement. The court further held that Mitchell's stalking was felonious because the pre-trial release orders barring Mitchell from contacting Nancy "prohibit[ed] the conduct described under [G.S. 14-277.3A] by the defendant against the victim."

The court reasoned: Conduct described in G.S. 14-277.3A includes harassment, which requires "[k]nowing contact" that may consist of "written or printed communication." Mitchell was ordered not to contact Nancy. Because harassment under G.S. 14-277.3A requires contact, the orders prohibited conduct under G.S. 14-277.3A, even though they did not specifically mention stalking.

The court said its view that the no contact order prohibited conduct described in the stalking statute was "in keeping with the intent" of the stalking statute, which provides in part: "'[T]he General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct.'" Slip op. at 15 (citing G.S. 14-277.3A(a)).

Practical effect. The *Mitchell* court did not identify the source of a judicial official's authority to impose conditions upon a person that apply while the person is detained, but its analysis assumes such authority exists. *Cf.* Baker v. United States, 891 A.2d 208 (D.C. Cir. 2006) (declining to decide whether trial court that ordered defendant preventatively detained had the authority to issue a no-contact order under the bail statute or pursuant to the court's inherent authority). That issue has been the subject of considerable debate in the trenches (see Jeff's post here), so its resolution is significant, particularly given the frequency with which no contact conditions are imposed.

The court also did not address what limitations exist on a judicial official's authority to impose such conditions. While Mitchell's post-arrest conduct leaves little doubt about the need for such a restriction in his case, it is not clear what standard judicial officials are to use in crafting general conditions regulating the conduct of a defendant both in and out of jail. *Cf.* G.S. 15A-534(a) (permitting a judicial official to "place restrictions on the travel, associations, conduct, or place of abode of the defendant ***as conditions of pretrial release***" (emphasis added); G.S. 15A-534.1(a)(2)(permitting a judge to impose, among other "pretrial release" conditions, a condition that the defendant "stay away from the home, school, business or place of employment of the alleged victim").

Most violations of no contact orders do not, of course, result in statutorily enhanced charges like those in *Mitchell*. Instead, they are more often addressed through contempt proceedings under Chapter 5A. *Cf. Baker*, 891 A.2d at 212 (stating that "even assuming for the sake of argument that the trial court's no-contact order was invalid, Baker's conviction for contempt must be upheld for his failure to comply with that order" which he did not challenge or appeal). After *Mitchell*, I expect that magistrates and judges will

continue to impose such conditions (though they may wish to specify whether they apply in jail as well as upon release) and that contempt proceedings will continue to be initiated for defendants who do not follow them.

Thanks to my colleague John Rubin for helping me think through the issues in State v. Mitchell and for teaching me everything I know about pretrial release.

Category: Crimes and Elements, Procedure | Tags: 15A-534, contempt, domestic violence, nancy, no contact, stalking, state v. mitchell

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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-212

Filed: 5 June 2018

Wake County, No. 15 CRS 4737, 15 CRS 347, 15 CRS 200503, 15 CRS 5831-32

STATE OF NORTH CAROLINA,

v.

KEVIN JONATHAN MITCHELL, Defendant.

Appeal by defendant from judgments entered on or about 13 January 2016 and 15 January 2016 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Court of Appeals 27 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant.

STROUD, Judge.

Defendant Kevin Jonathan Mitchell ("defendant") appeals from his convictions of felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. On appeal, defendant argues that the trial court erred by finding that the "Conditions of Release and Release Order" were in effect while defendant was in custody of the Wake County Detention Center and denying his motion to dismiss the felony stalking charge. He further argues that the court erred by denying his motion to dismiss the felony obstruction of justice charges. For reasons stated below, we find no error with the trial court's judgment.

Background

The State's evidence at trial showed these facts. On 26 December 2014, defendant was in a romantic relationship and living with Nancy[1] and her four children. Defendant is the father of Nancy's youngest son. That evening, Nancy's daughters used her cell phone to text their father. The girls gave the phone back to their mother, and Nancy walked to the bedroom to read the texts. Defendant then entered the room, snatched the phone from Nancy's hand, read the text, and jumped on her. He choked Nancy and pushed her down on the bed. Nancy took the phone back from defendant, and then he asked her for keys to the house. While Nancy was looking for her set of keys, defendant sucker punched her in the face. Defendant left and Nancy called the police, who took photographs of Nancy's injuries and eventually spotted defendant walking down the road nearby. Defendant was arrested for assault on a female[2] and taken to the Wake County Detention Center.

On 26 December 2014, after defendant was arrested, a magistrate judge entered an order entitled "Conditions of Release and Release Order" (AOC-CR-200, Rev. 12/12) ("Order 1"), which denied bond and placed defendant on a 48-hour

[1] A pseudonym is used to protect the victim's identity and for ease of reading.

[2] The parties stipulated in the record on appeal that defendant was charged with assault on a female on 26 December 2014 in Wake County File No. 14-CR-229975 and then "[s]ubsequently, on January 7, 2015, [defendant] was charged with habitual misdemeanor assault in Wake County File No. 15-CR-200503, the basis of this charge being the December 26, 2014 assault on a female charge in Wake County File No. 14-CR-229975." The parties also stipulated that "[n]one of the documents in Wake County File No. 14-CR-229975 have been included in this Record on Appeal."

domestic violence hold.[3] In the top portion of the form, the preprinted language states:

> To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. You also may be arrested without a warrant if you violate any condition of release in this Order or in any document incorporated by reference."

Just below this statement, the following statement was typed into a blank area of the form: "NOT TO HAVE ANY CONTACT WITH [NANCY]." Below this, the magistrate checked the box with this language: "Your release is not authorized."

The lower section of the form is entitled: "ORDER OF COMMITMENT." This portion of the form directed the Wake County Detention Center to hold defendant "for the following purpose: DV HOLD." It also stated that defendant was to be produced "at the first session of District or Superior Court held in this county after entry of this Order or, if no session is held before" 28 December 2014, then he must be brought before a magistrate "at that time to determine conditions of pretrial release."

The back of the Order has four sections which are filled in by either a Judicial Official or Jailer for each court appearance of the defendant. The four sections, from top to bottom, are:

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[3] *See* N.C. Gen. Stat. § 15A-534.1(b) (2017), "Crimes of domestic violence; bail and pretrial release" ("A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.").

CONDITIONS OF RELEASE MODIFICATIONS
SUPPLEMENTAL ORDERS FOR COMMITMENT
DEFENDANT RECEIVED BY DETENTION FACILITY
DEFENDANT RELEASED FOR COURT APPEARANCE

The first handwritten notes by the judge under "CONDITIONS OF RELEASE MODIFICATIONS" state that defendant's conditions of release were modified on 28 December 2014 to an $8,000.00 secured bond and "NCWV," an acronym for "no contact with victim." The next modification was on 29 December 2014, when the secured bond was increased to $10,000.00 and "no contact with victim."[4]

Nancy filed a complaint for a Domestic Violence Protective Order under N.C. General Statutes Chapter 50B against defendant alleging he had committed acts of domestic violence against her, and an ex parte domestic violence protective order ("ex parte DVPO") was issued on 29 December 2014, effective until a hearing scheduled on 5 January 2015. Defendant was served with the ex parte DVPO in jail. Nancy did not appear at the 5 January 2015 hearing, so the complaint was dismissed and the ex parte order expired on that date.

On 7 January 2015, a warrant was issued for defendant's arrest for habitual misdemeanor assault in File No. 15 CRS 200503 and another order entitled "Conditions of Release and Release Order" ("Order 2") was entered on the same AOC

[4] On 25 September 2017, the State filed a motion to amend the record on appeal, noted that the original record contains only the front page of the Conditions of Release and Release Orders, and asked this Court to allow the record on appeal to be amended so that the back side of these orders may be included. We grant this motion so that we may fully address this issue on appeal.

form as Order 1. In Order 2, defendant's release was authorized upon execution of a secured bond in the amount of $20,000.00. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1. He was also required to provide fingerprints. In the portion of the form entitled "Additional Information" was "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." On the back of Order 2, in "Conditions of Release Modifications," defendant's conditions of release were modified on 8 January 2015 to a $40,000.00 secured bond and no contact with victim.

On 29 January 2015, the assault on a female charge in File No. 14 CR 229965 was apparently dismissed, so Order 1 was no longer in effect[5]. Nancy received six letters from defendant between 2 January 2015 and 23 February 2015. The first letters were cordial but escalated to threats when she did not respond or reply. Nancy testified at trial that the letters led her to file for a second domestic violence protective order against defendant, although there is no Chapter 50B order other than the one issued on 29 December 2014 in the record on appeal. Nancy also received an envelope

[5] As noted above, the parties stipulated that the record on appeal contains no further documents from File No. 14 CR 229975. The back side of Order 1 contains the modification entry: "Dismissed" and is dated 29 January 2015, so with no additional information available, we can only presume that this means that file itself must have been dismissed at that time.

marked "Return to Sender. Not Deliverable as Addressed. Unable to Forward" addressed to the Federal Building on Fayetteville Street in Raleigh with her address as the return address. Nancy testified that she did not write this letter or know anything about it before it arrived at her house. The letter contained a bomb threat and demand for one million dollars, purportedly made by Nancy. Defendant was later questioned and eventually admitted to writing the letter and confirmed to investigators there was no bomb in the building. Defendant was indicted for assault on a female and habitual misdemeanor assault on 23 February 2015 in Wake County File No. 15 CRS 200503.

Another letter purportedly written by Nancy was delivered to the Wake County District Attorney's Office on 25 March 2015. An investigator in the office was told the letter had been sent by way of "jail mail," which means that it was sent by an inmate from the Wake County Detention Center. This letter stated that Nancy had made false allegations of assault against defendant and made demands and threats of committing a crime or terrorist attack if those demands were not met. Investigators spoke with Nancy about the letter, and she denied writing or sending it. Defendant was charged with felony stalking while a court order is in effect based upon the letters to Nancy and two counts of felony obstruction of justice based upon the letters to the Federal Building and the District Attorney's office.

A jury trial was held on these charges on 11 January 2016 in Wake County Superior Court. At the close of all the evidence but before the case went to the jury, the trial court granted defendant's motion to dismiss the original obstruction of justice charge in 15 CRS 5832 regarding the Federal Building bomb threat, since the evidence showed the letter was not addressed properly, so the offense was never completed. Instead, the trial court allowed the lesser included offense of attempted obstruction of justice to be submitted to the jury in its place. The jury found defendant guilty of assault on a female, felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. Defendant admitted to his status as a habitual felon. The trial court entered judgment on or about 13 January 2016 and an amended judgment on or about 15 January 2016. Defendant timely appealed to this Court.

Analysis

I. Motion to Dismiss Felony Stalking While Court Order in Effect Charge

Defendant's first argument on appeal is that the trial court erred in denying defendant's motion to dismiss the felony stalking charge by finding Orders 1 and 2 were in effect while defendant was in custody. The trial court concluded that when defendant sent the letters, he was subject to three orders: (1) Order 1; (2) Nancy's first ex parte DVPO; and (3) Order 2. Defendant argues that conditions of release

stated in Orders 1 and 2 do not apply *until* the person has been released from custody, and since defendant was in jail when he wrote the letters, the orders did not apply.

As the issue is whether the trial court reached a proper conclusion of law, we review *de novo*. *See, e.g., State v. Barnhill*, 166 N.C. App. 228, 230-31, 601 S.E.2d 215, 217 (2004) ("Although the trial court's findings of fact are generally deemed conclusive when supported by competent evidence, a trial court's conclusions of law . . . [are] reviewable *de novo*. . . . [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." (Citations and quotation marks omitted)).

Defendant was charged with felonious stalking under subsection (d) of N.C. Gen. Stat. § 14-277.3A (2017): "A defendant who commits the offense of stalking when *there is a court order in effect prohibiting the conduct* described under this section by the defendant against the victim is guilty of a Class H felony." N.C. Gen. Stat. § 14-277.3A(d) (emphasis added). The offense of stalking is defined by N.C. Gen. Stat. § 14-277.3A(c):

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
> (2) Suffer substantial emotional distress by placing that

> person in fear of death, bodily injury, or continued harassment.

Defendant does not argue the trial court should have dismissed the charge of stalking under N.C. Gen. Stat. § 14-277.3A(c), which is a Class A1 misdemeanor. Defendant challenges only the elevation of the charge to a Class H felony based upon the existence of a "court order in effect prohibiting the conduct described." N.C. Gen. Stat. § 14-277.3A(d).

Under N.C. Gen. Stat. § 15A-534(a) (2017), a judicial official may place various restrictions on a defendant as "conditions of pretrial release[,]" including "restrictions on the travel, associations, *conduct*, or place of abode of the defendant[.]" (Emphasis added). And under N.C. Gen. Stat. § 15A-534.1, additional conditions may be placed on a defendant charged with various crimes of domestic violence. On appeal, defendant argues that he was not subject to the conditions of pretrial release in Orders 1 and 2 because he never posted his bond and instead remained in jail during the entire time period when the letters were sent. He argues he was not "released" so a "condition of release" could not apply to him.

Defendant's argument is deceptively simple and focused on the title of the Orders and on the word "release," while ignoring the substance of the detailed provisions of the Orders. Although Orders 1 and 2 are each titled as "Conditions of Release and Release Order," we look to the entirety of an order when interpreting it and focus on the content, rather than the title, of the order. *See, e.g.*, *Cleveland*

Constr., Inc. v. Ellis-Don Constr. Inc., 210 N.C. App. 522, 535, 709 S.E.2d 512, 522 (2011)("Court judgments and orders must be interpreted like other written documents, not by focusing on isolated parts, but as a whole." (Citation and quotation marks omitted)); *McNair v. Goodwin*, 262 N.C. 1, 5, 136 S.E.2d 218, 221 (1964) ("The effect of an order or judgment is not determined by its recitals, but by what may or must be done pursuant thereto.").

The trial court's form orders in this case, despite the title, contain much more than just conditions of release. Under the title of the form is a reference to two articles of Chapter 15A of the North Carolina General Statutes: Article 25, which deals with pretrial commitment to a detention facility, and Article 26, which contains provisions related to bail and pretrial release. The top portion of the form includes provisions based upon Article 25, and the bottom portion of the form, entitled "Order of Commitment," includes provisions based upon Article 26.

Under N.C. Gen. Stat. § 15A-521(a) (2017):

> Every person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility as provided in this section.

Section (b) describes what must be in the order of commitment:

> (b) Order of Commitment; Modification. -- The order of commitment must:
> (1) State the name of the person charged or identify him if

> his name cannot be ascertained.
> (2) Specify the offense charged.
> (3) Designate the place of confinement.
> (4) If release is authorized pursuant to Article 26 of this Chapter, Bail, state the conditions of release. If a separate order stating the conditions has been entered, the commitment may make reference to that order, a copy of which must be attached to the commitment.
> (5) Subject to the provisions of subdivision (4), direct, as appropriate, that the defendant be:
> a. Produced before a district court judge pursuant to-under Article 29 of this Chapter, First Appearance before District Court Judge,
> b. Produced before a district court judge for a probable cause hearing as provided in Article 30 of this Chapter, Probable-Cause Hearing,
> c. Produced for trial in the district or superior court, or
> d. Held for other specified purposes.
> (6) State the name and office of the judicial official making the order and be signed by him.

N.C. Gen. Stat. § 15A-521(b).

"Form AOC-CR-200, Rev. 12/12," the form order the trial court used for Orders 1 and 2, is a comprehensive order which includes both conditions of release and commitment. This order can be modified but remains in effect from the time a defendant is arrested until the charges upon which the order is based are dismissed or the defendant is convicted of the crime. *See generally* N.C. Gen. Stat. §§ 15A-521; 15A-534. Upon conviction, the trial court would enter a judgment or other disposition as appropriate under N.C. General Statutes Chapter 15A, Subchapter XIII. But the order remains *in effect* during the entire prosecution. At each step of the process, this

order memorializes the trial court's determinations governing the defendant, whether the defendant is held in a detention facility or released.

Some of the terms of the order would apply whether the defendant is committed or released, while others would apply only in one circumstance or the other. For example, if a defendant posts the bond set for his release, he is released. If he does not post the bond, he is not released, but the order remains *in effect*. Some preprinted options of the order are procedural facts that could apply in a particular case and are not pretrial release conditions, although they are relevant to the types of conditions which may be placed upon a defendant. Here, the trial court's typed addition "NOT TO HAVE ANY CONTACT WITH [NANCY]" contains no additional language to indicate this provision would only apply after defendant had met conditions of release and was released. But the order remains *in effect* until the charges are disposed of, whether the defendant is committed or released.

Order 1 was "in effect" as of 26 December 2014 until 29 January 2015, when the assault on a female charges in File No. 14 CR 229975 were apparently dismissed. On 26 December 2014, the magistrate added a provision to Order 1 stating "NOT TO HAVE ANY CONTACT WITH [NANCY]." This provision had no conditions or limitations; none of the preprinted provisions on the form above this addition were checked and they did not apply to defendant. Below the added provisions, the magistrate checked the box indicating "[y]our release is not authorized" and ordered

the Wake County Detention Center to hold defendant for a "DV hold," or domestic violence hold under N.C. Gen. Stat. § 15A-534.1(b).

Order 1 was modified several times by the trial court, as indicated by the handwritten notations on the back. On 28 December 2014, defendant's bond was set at $8,000.00 secured and on 29 December 2014, it was increased to $10,000.00, but both modifications included "NCWV." Thus, the "CONDITION OF RELEASE MODIFICATIONS" were the setting of the bond and increase of the bond; there was no modification to the no-contact provision originally stated on the front of the form, since the trial court noted "NCWV" on the reverse side of the order to show that this original provision remained in effect. As explained above, the charges for which this Order was entered were apparently dismissed on 29 January 2015, so Order 1 ceased to be "in effect" on that date.

Order 2 was based upon charges of habitual misdemeanor assault in File No. 15 CR 200503. It was entered by the magistrate judge on 7 January 2015. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1 , in the same place on the form and not subject to any other conditions. On Order 2, defendant was also required to provide fingerprints. In the portion of the form entitled "Additional Information" the court entered: "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not

presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." Order 2 remained in effect until 13 January 2016, when the charge of habitual misdemeanor assault was "consolidated with 15 CRS 4737," the habitual felon charges.

Therefore, either Order 1, Order 2, or both were "in effect" from 26 December 2014 until 13 January 2016.[6] Defendant sent the first letter to Nancy on 2 January 2015 and the last letters were sent on 23 February 2015, so all the letters to Nancy were sent when an order was "in effect." N.C. Gen. Stat. § 14-277.3A(d). We must now determine whether the orders also "prohibit[ed] the conduct described under this section by the defendant against the victim[.]" *Id*.

The "conduct described under this section" in N.C. Gen. Stat. § 14-277.3A(d) includes "harassment" and the definition of harassment includes contacting a person in any manner "including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions…." N.C. Gen. Stat. § 14-277.3A(b)(2). Defendant was

[6] Defendant does not dispute that the ex parte DVPO which was in effect from 26 December 2014 to 5 January 2015 would be a "court order in effect prohibiting the conduct described under" N.C. Gen. Stat. § 14-277.3A. In addition, this time period was also covered by Order 1, so the additional prohibition of the ex parte DVPO is superfluous.

ordered not to contact Nancy, and "contact," including written contact by a letter, is "conduct described under this section." N.C. Gen. Stat. § 14-277.3A(d).

In addition, defendant's argument focusing on just the word "release" in Orders 1 and 2 is not consistent with the specific terms or legislative intent of the stalking offense punishable under N.C. Gen. Stat. § 14-277.3A. We interpret the prohibition on "contact" with Nancy in Orders 1 and 2 in a manner in keeping with the intent of N.C. Gen. Stat. § 14-277.3A, which is set forth within the statute:

> a) Legislative Intent.--The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.
>
> The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. *Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct.* The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

N.C. Gen. Stat. § 14-277.3A(a) (emphasis added).

Both orders stated "NOT TO HAVE ANY CONTACT WITH [NANCY]." Defendant does not argue that the threatening letters to Nancy do not fall under the type of communication prohibited by N.C. Gen. Stat. § 14-277.3A; he argues only that the requirement that he was "NOT TO HAVE ANY CONTACT WITH [NANCY]" did not apply to him while he was in detention. As discussed above, the requirement as stated on Order 1 and Order 2 was an independent provision prohibiting certain conduct: contacting Nancy. By its terms, the prohibition was not conditioned on defendant's release or commitment but was required as long as the Order was in effect. We hold that the trial court did not err in denying defendant's motion to dismiss the felony stalking charge.

II. Motion to Dismiss Felony Obstruction of Justice Charges

Defendant's second and final argument on appeal is that the trial court erred by denying his motion to dismiss the felony obstruction of justice charges because the crimes can be committed without deceit and intent to defraud. Defendant claims that the trial court concluded that deceit and intent to defraud are not necessary and inherent elements of obstruction of justice.

The indictment in 15 CRS 4737 alleged that defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally giving false information to the District Attorney's Office by writing a letter purporting to be from the victim in Wake

> County case 15 CRS 200503 recanting her earlier statements, implicating the charging officer in highly unethical and illegal behavior, and threatening to place explosives in the Wake County Courthouse. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

Similarly, the indictment in 15 CRS 5832 alleged defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally sending a letter purporting to be from the victim in his pending court cases and containing a bomb threat to the personnel of the United States Federal Courthouse located on New Bern Avenue, Raleigh, NC 27601. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

At trial, defendant argued that the obstruction of justice charges should be misdemeanors, not felonies, based on *State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986). The trial court granted defendant's motion to dismiss the obstruction of justice charge in 15 CRS 5832, since the evidence showed that the offense was never completed -- the letter never reached the Federal Building -- and instead instructed on the lesser included offense of attempted obstruction of justice, a class I felony. But the court refused to dismiss the remaining obstruction of justice felony charges based upon defendant's argument that to be a felony, the offense must always involve deceit and fraud. Defendant now argues this was error and that the North Carolina Supreme Court mandated a definitional test to elevate misdemeanor offenses to

felonies under N.C. Gen. Stat. § 14-3(b) (2017).[7], and the obstruction of justice offenses at issue here -- which involved sending threatening letters -- should not have been elevated to a felony because such offense "does not by its definition include the elements of secrecy and malice[.]"

Glidden, which defendant relies on, is inapposite to the present case. In *Glidden*, "[t]he issue before this Court [was] whether the misdemeanor of transmitting an unsigned threatening letter in violation of N.C.G.S. § 14-394 is an offense which is made a felony by N.C.G.S. § 14-3(b)." *Glidden*, 317 N.C. at 558, 346 S.E.2d at 470. The defendant in *Glidden* was charged under N.C. Gen. Stat. § 14-394 (2017), which makes transmission of an anonymous threatening letter a Class 1 misdemeanor; the State then sought to elevate the charge to a felony based upon N.C. Gen. Stat. § 14-3(b). The North Carolina Supreme Court held that the offense of transmitting an unsigned letter did not fall within the class of misdemeanors under N.C. Gen. Stat. § 14-3(b) punishable as felonies because "the offense of transmitting unsigned threatening letters does not by definition include the elements of secrecy *and* malice." *Glidden*, 317 N.C. at 561, 346 S.E.2d at 473.

Here, defendant was charged with common law obstruction of justice; he was not charged under N.C. Gen. Stat. § 14-394 (2017). While it is true that at common

[7] N.C. Gen. Stat. Ann. § 14-3(b): "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony."

law, obstruction of justice was ordinarily treated as a misdemeanor offense, this Court has repeatedly recognized felony obstruction of justice as a crime under N.C. Gen. Stat. § 14-3(b). *See, e.g.*, *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014) ("The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud."); *State v. Blount*, 209 N.C. App. 340, 343, 703 S.E.2d 921, 924 (2011) ("Common law obstruction of justice, the offense with which defendant was charged, is ordinarily a misdemeanor. N.C. Gen. Stat. § 14-3(b) provides that a misdemeanor may be elevated to a felony if the indictment alleges that the offense is infamous, done in secrecy and malice, or done with deceit and intent to defraud." (Citations, quotation marks, brackets, and ellipses omitted)). We are bound by prior decisions of this Court. S*ee, e.g., In re Civil Penalty*, 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 court.").

The indictments here properly alleged all necessary elements of felonious obstruction of justice. We hold that the trial court properly denied defendant's motion to dismiss the charges of felony obstruction of justice and felony attempted obstruction of justice.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges HUNTER and DAVIS concur.

Domestic Violence Crimes and the 48-Hour Rule

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Overview

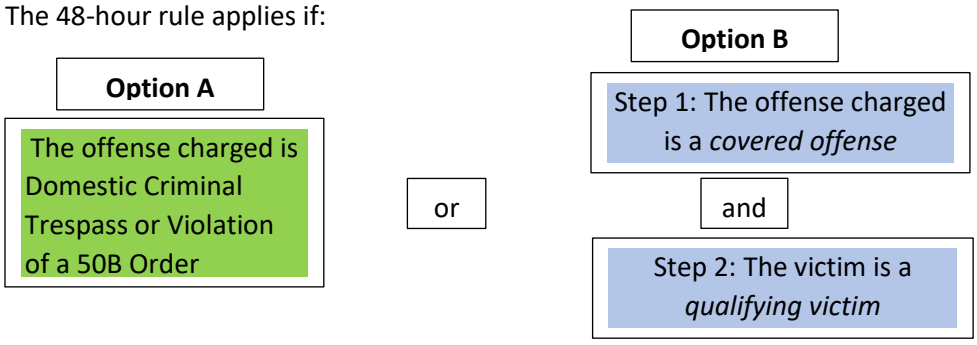
G.S. 15A-534.1 provides that, for certain domestic violence crimes, only a judge may set conditions of release in the first 48 hours after the defendant's arrest. A magistrate is empowered to set conditions only if 48 hours pass without a judge setting conditions. For example, if a defendant is arrested on Friday night and no judge is available during the weekend, a magistrate could set conditions on Sunday night. This provision is known across the state as "the 48-hour rule." Note that the rule does not require or permit the defendant to be held for 48 hours if a judge is available to set conditions of release sooner. If a judge is available and the defendant is not presented to him or her, the case may be dismissed. *See State v. Thomspon*, 349 N.C. 483 (1998) (finding a due process violation where a defendant was held despite several judges being available). Thus, the rule is *not* a "48-hour hold."

The rule applies "[i]n all cases in which the defendant is charged with assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7B, 8, 10, or 15 of Chapter 14 of the General Statutes upon a spouse or former spouse, a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6), with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes." G.S. 15A-534.1.

This document is intended to assist magistrates and others in applying the 48-hour rule. It is current as of December 1, 2019. It does not address the similar rule contained in G.S. 15A-534.7 regarding defendants charged with communicating certain threats of mass violence.[1]

48-Hour Rule Flow Chart

The 48-hour rule applies if:



[1] Previous versions of this document also addressed whether certain offenses were covered by the Crime Victims' Rights Act, Article 46 of Chapter 15A of the General Statutes. However, the victims' rights statutes were substantially revised by the General Assembly during the 2019 legislative session. Whether an offense is covered by the victims' rights statutes now depends exclusively on the offense charged, regardless of the relationship between the defendant and the victim, and thus is an entirely separate question from whether the 48-hour rule applies. A complete list of offenses covered by the new victims' rights statutes may be found at Jamie Markham, *Crimes Covered under the New Victims' Rights Law*, N.C. CRIM. L. BLOG (Sept. 27, 2019), https://nccriminallaw.sog.unc.edu/crimes-covered-under-the-new-victims-rights-law/.

Option A: When the offense charged is domestic criminal trespass or violation of a 50B order

The 48-hour rule *always* applies when the defendant is charged with

- G.S. 14-134.3: Domestic criminal trespass
- G.S. 50B-4.1: Violation of valid protective order (note that although G.S. 50B-4.1 addresses violations of both North Carolina protective orders and out-of-state orders, G.S. 15A-534.1 applies only to defendants charged with "violation of an order entered pursuant to Chapter 50B," i.e., to defendants charged with violating North Carolina protective orders)

When one of these crimes is charged, no further inquiry into the relationship between the defendant and the victim is required.

Option B: When there is a covered offense and a qualifying victim

The 48-hour rule also applies when the defendant is charged with committing what this paper will call a *covered offense* against what this paper will call a *qualifying victim*. Both a covered offense and a qualifying victim are required for the rule to apply. This paper will address the existence of a covered offense as step 1 of the analysis, then will proceed to address the existence of a qualifying victim as step 2.

Step 1: Covered offenses

Covered offenses include charges of "assault on, stalking, communicating a threat to, or committing a felony provided in Articles 7B, 8, 10, or 15 of Chapter 14 of the General Statutes upon" a victim. G.S. 15A-534.1. A list of each offense that is covered by the statute is below, organized by the word or clause within G.S. 15A-534.1 that covers the offense.

Assaults

The 48-hour rule applies to "assault[s]."[2] Many assault crimes are contained in Article 8 of Chapter 14 of the General Statutes, and the 48-hour rule also applies to all "felon[ies] provided in Article . . . 8," so the list of assault crimes set forth below is partly redundant with the list of felonies contained in Article 8 that is set forth later in this document.

The list below includes many assault crimes that are unlikely to arise in a domestic violence context and normally will not involve a qualifying victim. For example, G.S. 14-16.6 makes it unlawful to assault certain executive, legislative, and court officials "because of the exercise of that officer's duties." Such an assault normally will be committed by a disgruntled citizen with no personal relationship to the official in question. But the offense is an assault crime and therefore is a covered offense under the terms of the 48-hour rule, so it is included below.[3]

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[2] Is sexual battery, G.S. 14-27.33, an "assault"? Probably not under *State v. Corbett*, 196 N.C. App. 508 (2009) (ruling in part that "assault is not a lesser included offense of sexual battery"). *But see In re K.C.,* 226 N.C. App. 452 (2013) (stating, in the course of finding insufficient evidence of sexual battery but sufficient evidence of simple assault, that "[a] battery always includes an assault").

[3] It is possible to imagine unusual circumstances under which the offense would involve a qualifying victim. For example, suppose that a district court judge finds a DWI defendant guilty and imposes an active sentence. The

- G.S. 14-16.6: Assault on executive, legislative, or court officer (including with a firearm and inflicting serious bodily injury)
- G.S. 14-23.5: Assault inflicting serious bodily injury on an unborn child (note that it appears to be impossible for an unborn child to be a qualifying victim, but the statute requires "a battery on the mother of the unborn child," and the mother could be a qualifying victim)
- G.S. 14-23.6: Battery on an unborn child (same note as for G.S. 14-23.5)
- G.S. 14-28: Malicious castration (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does appear to require unconsented contact; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-29: Castration or other maiming without malice aforethought (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does appear to require unconsented contact; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-30: Malicious maiming (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does appear to require unconsented contact; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-30.1: Malicious throwing of corrosive acid or alkali (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does appear to require unconsented contact; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-31: Maliciously assaulting in a secret manner
- G.S. 14-32: Felonious assault with deadly weapon with intent to kill or inflicting serious injury
- G.S. 14-32.1: Assaults on individuals with a disability
- G.S. 14-32.2: Patient abuse and neglect (includes several gradations depending on the defendant's intent and the severity of the injury inflicted; it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does require physical abuse; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-32.3: Domestic abuse, neglect, and exploitation of disabled or elder adults (note that "assault" is one way of establishing the element of abuse but not the only way, so the assault provisions of the 48-hour rule might apply to some offenses under this statute but not others; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-32.4: Assault inflicting serious bodily injury; strangulation
- G.S. 14-33: Misdemeanor assaults, batteries, and affrays, simple and aggravated (this statute includes simple assault, assault inflicting serious injury, assault on a female, and assault on a child under 12, as well as several other assault offenses less likely to arise in a domestic violence context)
- G.S. 14-33.2: Habitual misdemeanor assault
- G.S. 14-34: Assaulting by pointing gun
- G.S. 14-34.1: Discharging certain barreled weapons or a firearm into occupied property (includes several gradations; it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does require discharging a firearm into occupied property, which

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defendant is angry and assaults the judge. If, years ago, the defendant and the judge had engaged in a dating relationship, the 48-hour rule would apply.

arguably inherently amounts to an assault; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)

- G.S. 14-34.2: Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers
- G.S. 14-34.5: Assault with a firearm on a law enforcement, probation, or parole officer, or on a member of the North Carolina National Guard, or on a person employed at a State or local detention facility
- G.S. 14-34.6: Assault or affray on a firefighter, an emergency medical technician, medical responder, and hospital personnel
- G.S. 14-34.7: Certain assaults on a law enforcement, probation, or parole officer, or on a member of the North Carolina National Guard, or on a person employed at a State or local detention facility
- G.S. 14-34.9: Discharging a firearm from within an enclosure (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does require discharging a firearm toward a person; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-34.10: Discharge firearm within enclosure to incite fear (it is not entirely clear whether this is an assault crime; the statute does not require an "assault" but it does require discharging a firearm with the intent to incite fear in another person; in any event, this is a covered offense because it is a felony in Article 8 of Chapter 14)
- G.S. 14-288.9: Assault on emergency personnel

Stalking

The only offense that is clearly covered under this provision is

- G.S. 14-277.3A: Stalking

A frequent question is whether cyberstalking, as defined in G.S. 14-196.3, is a covered offense. At least under most circumstances, it probably is not for the reasons given in Jeff Welty, *Cyberstalking and the 48-Hour Rule*, N.C. CRIM. L. BLOG (Nov. 28, 2012), https://nccriminallaw.sog.unc.edu/cyberstalking-and-the-48-hour-rule/.

Communicating threats

As with the list of assault crimes, above, the list below includes several offenses that are unlikely to arise in a domestic violence context and normally will not involve a qualifying victim.

- G.S. 14-16.7: Threats against executive, legislative, or court officers
- G.S. 14-277.1: Communicating threats
- G.S. 14-277.6: Communicating a threat of mass violence on educational property[4]
- G.S. 14-277.7: Communicating a threat of mass violence at a place of religious worship[5]

[4] Note that when charging this offense, the 48-hour rule set forth in G.S. 15A-534.7 will apply regardless of whether there is a qualifying victim.

[5] Note that when charging this offense, the 48-hour rule set forth in G.S. 15A-534.7 will apply regardless of whether there is a qualifying victim.

- G.S. 14-394: Anonymous or threatening letters, mailing or transmitting

A frequent question is whether harassing phone calls, as defined in G.S. 14-196, is a covered offense. At least under most circumstances, it probably is not as discussed in Jeff Welty, *Cyberstalking and the 48-Hour Rule*, N.C. CRIM. L. BLOG (Nov. 28, 2012), https://nccriminallaw.sog.unc.edu/cyberstalking-and-the-48-hour-rule/.

Felonies in Article 7B ("Rape and Other Sex Offenses")

The following felonies are contained in Article 7B. As with several other categories of offenses addressed in this paper, some crimes on this list may be unlikely to involve a qualifying victim and so may rarely require the application of the 48-hour rule.

- G.S. 14-27.21: First-degree forcible rape
- G.S. 14-27.22: Second-degree forcible rape
- G.S. 14-27.23: Statutory rape of a child by an adult
- G.S. 14-27.24: First-degree statutory rape
- G.S. 14-27.25: Statutory rape of person who is 15 years of age or younger
- G.S. 14-27.26: First-degree forcible sexual offense
- G.S. 14-27.27: Second-degree forcible sexual offense
- G.S. 14-27.28: Statutory sexual offense with a child by an adult
- G.S. 14-27.29: First-degree statutory sexual offense
- G.S. 14-27.30: Statutory sexual offense with a person who is 15 years of age or younger
- G.S. 14-27.31: Sexual activity by a substitute parent or custodian
- G.S. 14-27.32: Sexual activity with a student

Felonies in Article 8 ("Assaults")

The following felonies are contained in Article 8. As noted above, many of these crimes are also assault offenses, making this list partly duplicative of the above list of assault crimes. As with several other categories of offenses addressed in this paper, some crimes on this list may be unlikely to involve a qualifying victim and so may rarely require the application of the 48-hour rule.

- G.S. 14-28: Malicious castration
- G.S. 14-29: Castration or other maiming without malice aforethought
- G.S. 14-30: Malicious maiming
- G.S. 14-30.1: Malicious throwing of corrosive acid or alkali
- G.S. 14-31: Maliciously assaulting in a secret manner
- G.S. 14-32: Felonious assault with deadly weapon with intent to kill or inflicting serious injury
- G.S. 14-32.1: Assaults on individuals with a disability (note, not all offenses defined in this statute are felonies)
- G.S. 14-32.2: Patient abuse and neglect
- G.S. 14-32.3: Domestic abuse, neglect, and exploitation of disabled or elder adults
- G.S. 14-32.4: Assault inflicting serious bodily injury; strangulation
- G.S. 14-33.2: Habitual misdemeanor assault
- G.S. 14-34.1: Discharging certain barreled weapons or a firearm into occupied property

- G.S. 14-34.2: Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers
- G.S. 14-34.4: Adulterated or misbranded food, drugs, or cosmetics; intent to cause serious injury or death; intent to extort
- G.S. 14-34.5: Assault with a firearm on a law enforcement, probation, or parole officer, or on a member of the North Carolina National Guard, or on a person employed at a State or local detention facility
- G.S. 14-34.6: Assault or affray on a firefighter, an emergency medical technician, medical responder, and hospital personnel
- G.S. 14-34.7: Certain assaults on a law enforcement, probation, or parole officer, or on a member of the North Carolina National Guard, or on a person employed at a State or local detention facility
- G.S. 14-34.9: Discharging a firearm from within an enclosure
- G.S. 14-34.10: Discharge firearm within enclosure to incite fear

Felonies in Article 10 ("Kidnapping and Abduction")

The following felonies are contained in Article 10. As with several other categories of offenses addressed in this paper, some crimes on this list may be unlikely to involve a qualifying victim and so may rarely require the application of the 48-hour rule.

- G.S. 14-39: Kidnapping
- G.S. 14-41: Abduction of children
- G.S. 14-43.3: Felonious restraint

Felonies in Article 15 ("Arson and Other Burnings")

The following felonies are contained in Article 15. As with several other categories of offenses addressed in this paper, some crimes on this list may be unlikely to involve a qualifying victim and so may rarely require the application of the 48-hour rule. Additionally, for several of the offenses in this Article, it may be difficult to determine whether the offense was committed "upon" a qualifying victim because the principal target of the offense is property, not a person. For example, if A burns B's residence, has A committed an offense "upon" B? What if A burns a residence that does not belong to B but B is injured in the fire? There is no case law explaining when an arson offense is committed "upon" a person for purposes of G.S. 15A-534.1.

- G.S. 14-58: Punishment for arson (note that this statute defines the punishment class for first- and second-degree arson; perhaps an argument could be made that because arson is a common law offense, arson is not a "felony provided in" Article 15 notwithstanding this statute; no case law addresses this issue)
- G.S. 14-58.2: Burning of mobile home, manufactured-type house or recreational trailer home
- G.S. 14-59: Burning of certain public buildings
- G.S. 14-60: Burning of schoolhouses or buildings of educational institutions
- G.S. 14-61: Burning of certain bridges and buildings
- G.S. 14-62: Burning of certain buildings
- G.S. 14-62.1: Burning of building or structure in process of construction
- G.S. 14-62.2: Burning of churches and certain other religious buildings

- G.S. 14-63: Burning of boats and barges
- G.S. 14-64: Burning of ginhouses and tobacco houses
- G.S. 14-65: Fraudulently setting fire to dwelling houses
- G.S. 14-66: Burning of personal property
- G.S. 14-67.1: Burning other buildings
- G.S. 14-67.2: Burning caused during commission of another felony
- G.S. 14-69.1: Making a false report concerning destructive device
- G.S. 14-69.2: Perpetrating hoax by use of false bomb or other device
- G.S. 14-69.3: Arson or other unlawful burning that results in serious bodily injury to a firefighter, law enforcement officer, fire investigator, or emergency medical technician

Step 2: Qualifying victims

If a defendant is charged with a covered offense, the applicability of the 48-hour rule depends on the existence of a qualifying victim. The statute provides that such a victim is "a spouse or former spouse [of the defendant], a person with whom the defendant lives or has lived as if married, or a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6)." Thus, a qualifying victim must have one of the following relationships to the defendant:

- *Spouse.* Presumably this applies when the victim and the defendant are legally married, even if separated or in the process of divorce.
- *Former spouse.* There is no time limit in the statute, so this provision appears to apply even if the defendant and the victim divorced years or decades ago.
- *Person with whom the defendant lives as if married.* Although this term is not defined in the statute, presumably this provision applies when the victim and the defendant live together and have a romantic or sexual relationship.
- *Person with whom the defendant has lived as if married.* As with the category "former spouse," there is no time limit in the statute regarding when the defendant and the victim must have lived together.
- *Person with whom the defendant is in a dating relationship as defined in G.S. 50B-1(b)(6).* Under G.S. 50B-1(b)(6), a "a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship."
- *Person with whom the defendant has been in a dating relationship as defined in G.S. 50B-1(b)(6).* Again, there is no time limit in the statute regarding when the dating relationship must have existed.

It is not relevant whether the defendant and the victim are the same sex or different sexes. Persons of the same sex or of different sexes may be "spouses," may "live together as if married," and may have a "dating relationship." Confusion sometimes arises on this point because of the reference to G.S. 50B-1(b)(6). If one looks at G.S. 50B-1(b) generally, rather than at (b)(6) specifically, one might focus on the definition of the term "personal relationship." G.S. 50B-1(b)(6) states that a "personal relationship" includes:

> persons of the opposite sex who are in a dating relationship or have been in a dating relationship. A dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

Note that nothing in the definition of "dating relationship" requires the parties to be of different sexes. Under the statute, a "dating relationship" is a "personal relationship" only if the parties are of different sexes, but the applicability of the 48-hour rule turns on the existence of a "dating relationship," not the existence of a "personal relationship."[6]

Conclusion

To sum up, the 48-hour rule always applies when the offense charged is domestic criminal trespass or violation of a 50B order. It also applies when a defendant is charged with committing a covered offense against a qualifying victim.

[6] Whether it would be constitutional to apply the 48-hour rule only to different-sex couples might be questioned under *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (holding that laws limiting marriage to same-sex couples are unconstitutional, in part on equal protection grounds).

North Carolina Criminal Law

A UNC School of Government Blog

I've Been Arrested . . . But Committed No Crime

Posted on Feb. 25, 2015, 12:01 pm by Shea Denning

[*Author's Note: This post has been substantively edited to make corrections in response to helpful comments from readers.*]

A person generally may not lawfully be arrested unless there is probable cause to believe he has committed a crime. But there are several exceptions to this rule. Most involve arrests made pursuant to an order for arrest issued by a judicial official. A judicial official may, for example, issue an order for the arrest of a defendant who fails to appear in court or who violates conditions of probation. *See* G.S. 15A-305(b). And there is one circumstance in which a law enforcement officer may, without a judicial order or warrant for the defendant's arrest and without probable cause to believe a crime has been committed, arrest a defendant. That's when the officer has probable cause to believe the defendant has violated a condition of pretrial release. G.S. 15A-401(b)(1),(b)(2)(f.).

Arrests for violations of pretrial release conditions. The General Assembly amended G.S. 15A-401(b) in 2011 to authorize officers to make warrantless arrests of a defendant based on probable cause that the person had violated a condition of pretrial release, regardless of whether the violation occurred in or out of the officer's presence. Those amendments were effective for violations of pretrial release conditions that occurred on or after December 1, 2011. Before that time, officers were authorized to make warrantless arrests for defendants who were charged with crimes of domestic violence and who violated a condition of release for that crime, but were not permitted to arrest defendants who were charged with other types of crimes for a violation of their pretrial release conditions. See S.L. 2004-186, Sections 13.1 -.2. Under current law, officers may arrest for any pretrial release violation, regardless of the nature of the underlying offense. See G.S. 15A-401(b)(1), (b)(2)(f.) (authorizing arrest based on probable cause that defendant has violated pretrial release order under G.S. 15A-534 (which governs the determination of conditions of pretrial release for crimes generally) or G.S. 15A-534.1(which governs the setting of pretrial release conditions for crimes of domestic violence)).

What happens when a person is arrested? Upon arresting a defendant for a violation of a pretrial release order, an officer must take the defendant before a

magistrate for an initial appearance. G.S. 15A-501(2); 15A-511(a). The magistrate must first determine whether there is probable cause to believe that the defendant violated the conditions of release. Then, if the magistrate finds probable cause, he or she must set new conditions of initial release. The magistrate does *not* modify his or her earlier release order; instead he or she imposes new conditions of release, which supersede the prior release order.

No authority to hold. There is no statutory authority authorizing a magistrate to hold a defendant charged with violating a condition of pretrial release without setting new conditions of release. Confusion about this issue abounds when a defendant who was initially charged with a crime of domestic violence is arrested for violation of the pretrial release order. This might occur if, for example, the defendant was ordered to have no contact with the victim and he is later discovered in the victim's home with the victim's consent. An officer who learns of the defendant's presence may arrest the defendant based on probable cause that the defendant has violated the pretrial release order. The defendant in this circumstance has not, however, committed a new crime, much less a crime of domestic violence. Thus, a magistrate must set conditions of release at the defendant's initial appearance following his arrest.

Is this constitutional? Some defendants have complained that being arrested for a violation of an order based on conduct that is not itself a crime is unconstitutional. None of those complaints appear to have reached our appellate courts. If and when they do, I'm skeptical about their prospects for success. Other courts have recognized that when a defendant "breach[es] a condition of the bond originally set by the court, [he] forfeits the right to continued release under the terms of that bond." State v. Paul, 783 So.2d 1042 (Fla. 2001). That same sort of reasoning appears to underlie the legislature's authorizing of officers to arrest for violations of pretrial release orders.

Category: Procedure | Tags: arrest, conditions of release, domestic violence, Initial appearance, pretrial release

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North Carolina Criminal Law

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Raise the Age and Enforcement of Domestic Violence Protective Orders and Civil No-Contact Orders

Posted on Jul. 27, 2021, 12:14 pm by Jacquelyn Greene

The Juvenile Justice Reinvestment Act and its subsequent corresponding legislation raised the age of juvenile jurisdiction to 18 for most offenses committed at ages 16 or 17 that would otherwise be crimes. S.L. 2017-57, §§ 16.D.4.(a)-16.D.4.(tt) and S.L. 2019-186. Last summer, the legislature enacted changes to the criminal law to ensure that minors who fall outside of raise the age and continue to be tried as adults are not housed in adult jails. S.L. 2020-83, §§ 8.(a)-8.(p). While it may feel like these changes must mean that the age of 18 is now consistently the legal demarcation for being treated as an adult, the law continues to use the age of 16 as a defining line in some instances. For example, Chapter 50B (Domestic Violence) and Chapter 50C (Civil No-Contact Orders) continue to provide that domestic violence protective orders (DVPOs) and Civil No-Contact Orders can be obtained against youth once they reach the age of 16. This blog addresses how enforcement of these orders against youth who are ages 16 and 17 is affected by raise the age and by the removal of minors from jails.

Enforcement of Domestic Violence Protective Orders Against 16- and 17-Year-Olds

Chapter 50B provides that, "[f]or purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16." G.S. 50B-1(b)(3). Therefore, an order of protection can be obtained against a child or grandchild who is age 16 or 17. The initial issuance of such an order is accomplished through a civil action. G.S. 50B-2(a). Because the issuance of a DVPO does not constitute a crime, infraction, or indirect contempt by a juvenile, it does not fall under the definition of delinquent juvenile. G.S. 7B-1501(7). Raise the age therefore has no impact on the initial issuance of the DVPO.

The interaction between raise the age and Chapter 50B becomes complicated on enforcement of a violation of the DVPO. Pursuant to G.S. 50B-4, a party is allowed to file a motion for contempt for violation of a DVPO. In addition, G.S. 50B-4.1 connects knowing violations of a valid DVPO with criminal law by making such violation a Class A1 misdemeanor, subjecting the violator to arrest, and requiring arrest for a knowing violation when the DVPO excludes the person from the residence or household occupied

by the victim or requires the person to refrain from any of the acts listed in G.S. 50B-3(a)(9).

The Crime of Violating a Valid DVPO and Raise the Age

Any 16- or 17-year-old who is charged with violating a valid DVPO is charged with a crime. The law regarding juvenile jurisdiction for crimes committed at those ages therefore applies. These charges must be analyzed in the same way that all criminal charges for offense committed at ages 16 and 17 must be analyzed under the raise the age legal framework.

1. S. 7B-1501(7)(b) provides that crimes committed at ages 16 and 17 are under the original jurisdiction of the district court as delinquency matters unless they are Chapter 20 motor vehicle offenses. Violation of a DVPO is not a Chapter 20 motor vehicle offense, so these charges fall under juvenile jurisdiction.
2. A youth may be excluded from juvenile jurisdiction for charges that would otherwise fall under juvenile jurisdiction if they meet criteria under S. 7B-1604, which include:
   A. being emancipated; or
   B. receiving a disqualifying criminal conviction (anything other than a misdemeanor motor vehicle offense that did not involve impaired driving) before committing the new offense. This is often referred to as once an adult, always an adult. You can find more about these requirements in one of my previous blogs.

In the occasional instance in which the youth is barred from juvenile jurisdiction under G.S. 7B-1604, the charge of violating the DVPO should proceed as a criminal matter. However, most youth will not fall under exceptions to juvenile jurisdiction. For most youth, the charge of violating the DVPO must be brought as a juvenile matter. This means that the usual process for filing a complaint, going through the juvenile intake process, and potentially moving to district court through the petition process must be followed. These cases will largely be misdemeanor delinquency matters.

DVPO Violations and Mandatory Arrest in the Juvenile Context

Chapter 50B's mandatory arrest provision on a violation of a DVPO is subject to the new reality that most violations committed at ages 16 and 17 are now juvenile matters. Law enforcement officers *must* follow the requirements regarding taking custody of juveniles that are contained in Article 19 of Chapter 7B.

Pursuant to G.S. 7B-1900, a law enforcement officer can take a juvenile into temporary custody when grounds exist for the arrest of an adult in identical circumstances, including when the person has committed the misdemeanor offense of violating a valid DVPO.

The process for taking the juvenile into custody should be the process outlined in Article 19 of Chapter 7B, that is:

- notification to the juvenile's parent, guardian, or custodian pursuant to S. 7B-1901(a)(1); and
- either release to the juvenile's parent, guardian, or custodian or submission of a petition and a determination of the need for continued custody. S. 7B-1901(a)(2), -(3).

A juvenile can only be held in temporary custody for up to 12 hours (or up to 24 hours if any of the 12 hours falls on a Saturday, Sunday, or legal holiday). An order for secure or nonsecure custody must be entered in order for the juvenile to be held beyond those time limits. G.S. 7B-1901(b).

Construing the mandatory arrest provisions and the juvenile provisions together, it appears that law enforcement must take the juvenile into custody for violations of a DVPO that require arrest but must follow the Juvenile Code process for temporary custody for juveniles.

Secure Custody Orders Based on the Offense of Violating a DVPO

G.S. 7B-1903 provides specific circumstances in which a secure custody order—that is, an order detaining the juvenile in custody—can be issued in a juvenile proceeding. A secure custody order can only be issued in a juvenile matter alleging the violation of a DVPO if one of these statutory criteria is met. If the juvenile is charged with only the Class A1 misdemeanor of violation of the DVPO, they will not meet the statutory criteria for the issuance of a secure custody order unless there is reasonable cause to believe that they will not appear in court or they willfully fail to appear on the charge. It is unlikely that juveniles charged only with a violation of a DVPO will meet the statutory criteria for the issuance of a secure custody order.

Enforcement of Civil No-Contact Orders Against 16- and 17-Year-Olds

Pursuant to G.S. 50C-1(7), the definition of unlawful contact that provides the basis for the issuance of a civil no-contact order is limited to the listed acts when committed by a person 16 years of age or older. As discussed above for DVPO proceedings, proceedings related to the issuance of a civil no-contact order against a youth who is age 16 or 17 do not trigger raise the age in any way because there is no allegation of a crime, infraction, or indirect contempt by a juvenile. Instead, 16- or 17-year-olds are subject to Chapter 50C in the same manner as people who are age 18 or over.

Enforcement of a knowing violation of a civil no-contact order is different than enforcement of a violation of a DVPO because Chapter 50C does not make violation of a civil no-contact order a crime. Instead, the remedy provided in Chapter 50C is civil or

criminal contempt. G.S. 50C-10. However, use of criminal contempt as the remedy will again involve raise the age.

Criminal Contempt and Raise the Age

G.S. 5A-31 defines contempt by a juvenile. That definition applies when an unemancipated minor between the ages six and 18, who has not been convicted of any crime in superior court, engages in any of the listed behaviors. One listed behavior is any "act or omission specified in another Chapter of the General Statutes as grounds for criminal contempt." Because G.S. 50C-10 provides that a knowing violation of a civil no-contact order is punishable by criminal contempt, violation of a civil no-contact order at the ages of 16 and 17 falls under the definition of contempt by a juvenile. As long as the violation occurs outside of the courthouse, it will fall under the definition of indirect contempt by a juvenile provided in G.S. 5A-31. Indirect contempt by a juvenile is included in the definition of delinquent juvenile. G.S. 7B-1501(b).

Putting all of this together may remind you of a logic game:

If violation of a civil no-contact order at ages 16 and 17 is indirect criminal contempt (A = B) and if indirect criminal contempt at ages 16 and 17 is subject to juvenile jurisdiction (B = C), then a violation of a civil no-contact order at ages 16 and 17 is subject to juvenile jurisdiction (A = C).

After reading all the statutes together, this appears to the case—use of indirect criminal contempt as the remedy constitutes an act of delinquency. Pursuant to G.S. 5A-33, the process to pursue indirect contempt by a juvenile is to file a new delinquency petition that alleges the indirect criminal contempt.

Civil Contempt

Civil contempt can be used as a remedy for a violation of a civil no-contact order and it can also be used as a remedy for violation of a DVPO. Use of civil contempt does not trigger the same requirement for a delinquency proceeding because it is not subject to the definition of a delinquent juvenile in G.S. 7B-1501(7)b. Holding the youth in civil contempt will therefore follow the same process as holding someone age 18 or older in civil contempt, with one major exception: place of confinement.

G.S. 5A-21 allows for imprisonment of a person held in civil contempt under certain circumstances. These provisions apply to a 16- or 17-year-old held in civil contempt for violation of a civil no-contact order in the same way that they apply to older adults. However, if a 16- or 17-year-old is imprisoned pursuant to civil contempt, they must be housed in a juvenile detention setting. S.L. 2020-83 (H 593) amended G.S. 15-6 to provide that:

> *If the person being imprisoned is under the age of 18, that person shall be imprisoned in a detention facility approved by the Juvenile Justice Section of the Division of Adult Correction and Juvenile Justice to provide secure confinement and care for juveniles, or to a holdover facility as defined in G.S. 7B-1501(11).*

Therefore, any person under the age of 18 who would otherwise be confined in an adult jail must now be confined in a juvenile facility. This includes youth who are imprisoned as a result of being held in civil contempt for violation of a civil no-contact order.

Coordination Challenges

The variation between how civil and criminal contempt can be used may raise practice challenges because civil and criminal contempt are often considered in the same proceeding. For youth who are 16 and 17, they cannot now be considered simultaneously. The civil contempt can be considered in the existing civil no-contact order proceeding and the criminal contempt can be considered in a delinquency proceeding.

If You Remember Nothing Else

This post got into weeds that may seem somewhat strange. Shifting the age of juvenile jurisdiction without shifting the age at which one can be the subject of a DVPO or a civil no-contact order resulted in these muddled enforcement pathways. If it all feels too much, remember these three main themes:

1. Youth who are 16 and 17 continue to be eligible to be subjected to DVPOs and civil no-contact orders and those initial proceedings are not related to the increased age of delinquency jurisdiction.
2. Enforcement of violations of DVPOs and civil no-contact orders are affected by raise the age when new criminal charges are brought or youth are alleged to be in indirect criminal contempt.
3. No youth under the age of 18 should be held in an adult jail even if they are being imprisoned as the result of being held in civil contempt outside of a delinquency proceeding.

Category: Uncategorized | Tags: civil no-contact order, DVPO, juvenile justice, raise the age