IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA13-586-2

Filed: 20 November 2018

Wake County, No. 09 CRS 19207

STATE OF NORTH CAROLINA

v.

JASON LYNN YOUNG, Defendant.

Appeal by Defendant from judgment entered 5 March 2012 by Judge Donald W. Stephens and order entered 29 August 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard originally in the Court of Appeals 12 December 2013 and opinion filed 1 April 2014. Reversed and remanded to the Court of Appeals by the North Carolina Supreme Court in an opinion rendered on 21 August 2015 for consideration of unresolved issues and Defendant's motion for appropriate relief. Following the opinion of the Supreme Court and because this Court lacked appropriate findings of fact to resolve Defendant's motion for appropriate relief, this Court ordered the trial court to conduct a hearing on Defendant's motion for appropriate relief filed in his original appeal and report its findings to this Court. We held this matter in abeyance pending receipt of the trial court's resolution of Defendant's motion for appropriate relief. This Court received the trial court's

resolution on the motion for appropriate relief, and the matter is ripe for determination.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien, Special Deputy Attorney General Amy Kunstling Irene and Special Deputy Attorney General Robert C. Montgomery for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green and Assistant Appellate Defender Barbara S. Blackman for defendant-appellant.

HUNTER, JR., Robert N., Judge.

A Wake County Grand Jury indicted Jason Lynn Young ("Defendant") on 14 December 2009 for the 3 November 2006 first-degree murder of his wife, Michelle Young. This case was first tried during the 31 May 2011 Wake County Superior Court session before the Honorable Donald W. Stephens and resulted in a mistrial when the jury deadlocked eight to four to acquit Defendant. The retrial began during the 17 January 2012 Wake County Superior Court session, with Judge Stephens presiding, and on 5 March 2012, the jury found Defendant guilty. The trial court sentenced him to life imprisonment without parole. Defendant appealed, and this Court reversed and remanded for a new trial in part, and found no error in part. *State v. Young*, 233 N.C. App. 207, 756 S.E.2d 768 (2014), *rev'd*, 368 N.C. 188, 775 S.E.2d 291 (2015) ("*Young I*"). The State petitioned our Supreme Court for discretionary review, and the Supreme Court granted review and heard the case on 19 May 2015.

In an opinion filed 21 August 2015, our Supreme Court reversed the portions of *Young I* where this Court granted Defendant a new trial, and remanded the case for this Court to address issues left unresolved in our prior opinion and the pending motion for appropriate relief. *State v. Young*, 368 N.C. 188, 775 S.E.2d 291 (2015) ("*Young II*").

Because our prior opinion granted Defendant a new trial, at the time, this Court concluded it need not specifically address two remaining issues: (1) whether the State deprived Defendant of a fair trial by the expression of judicial opinion when a prosecutor elicited testimony and informed the jury Judge Stephens entered the wrongful death and slayer judgment; and (2) whether the trial court erred in denying Defendant's motions to dismiss due to insufficient evidence. Because we granted Defendant a new trial, we did not initially address his motion for appropriate relief for ineffective assistance of counsel.

On remand from our Court, the Honorable Paul C. Ridgeway held an evidentiary hearing and heard arguments on Defendant's motion for appropriate relief. On 29 August 2017, Judge Ridgeway issued his opinion containing findings of fact and conclusions of law denying Defendant's motion for appropriate relief. The parties to this appeal filed supplemental briefs in this Court. We find no error in part and affirm in part.

I. Factual and Procedural History

The factual history of this case has been discussed twice in the Appellate Division in *Young I* and *Young II*, *supra*. We refer the reader to these cases for the details of the murder of Michelle Young and the history of the underlying trials. We adopt the factual and procedural history outlined in those cases and add herein only such additional facts as are needed to understand the legal issues discussed.

II. Analysis of Remaining Issues to be Determined[1]

A. When a prosecutor informed the jury and elicited testimony that Judge Stephens entered the wrongful death and slayer judgment, was Defendant deprived of a fair trial by the expression of judicial opinion?

Defendant argues "when the prosecutor informed the jury and elicited testimony that Judge Stephens entered the wrongful death and slayer judgment, Mr. Young was deprived of a fair trial by the expression of judicial opinion." (All capitalized in original). In support of this contention, Defendant cites N.C. Gen. Stat. § 15A-1222 and cases in which the Appellate Division has applied this statute. *See* N.C. Gen. Stat. § 15-1222 (2017); *see also State v. Duke*, 360 N.C. 110, 122-23, 623

[1] Our opinion limits its discussion to issues raised in Defendant's initial brief and the appeal of Defendant's motion for appropriate relief filed in the Court of Appeals in his initial appeal. This Court has limited jurisdiction to consider issues, as directed by the Supreme Court. While we decide only these issues, we have considered all arguments of counsel provided in the supplemental briefs in reaching our determination to the extent such arguments are relevant. Because we have the ability to disregard arguments on any matters beyond our jurisdiction, we dismiss the motion to strike by the State as moot in a separate order filed simultaneously with this opinion. Any additional issues not originally brought in Defendant's appeal or initial motion for appropriate relief, are beyond this Court's jurisdiction. So issues raised in Defendant's additional motion for appropriate relief, filed in the Supreme Court on 29 December 2014, will not be addressed and, by separate order, this motion will be dismissed without prejudice to bring these issues before the trial court in a second motion for appropriate relief, unless these issues are procedurally barred.

S.E.2d 11, 19-20 (2005); *State v. Allen*, 353 N.C. 504, 508-11, 546 S.E.2d 372, 374-76 (2001); *State v. Wilson*, 217 N.C. 123, 126-27, 7 S.E.2d 11, 12-13 (1940); *State v. Wade*, 198 N.C. App. 257, 271-73, 679 S.E.2d 484, 493-94 (2009).

In his supplemental brief, Defendant modifies the issue to read, "[w]hether the presiding judge's opinion on a material issue of fact was conveyed to the jury is reviewed *de novo* regardless of objection." *See State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (citations omitted) ("*William Young*"). *See also* N.C. Gen. Stat. § 15A-1446(d)(14)(2017). In addition, he expands his arguments to include new material not included in his original appeal, including N.C. Gen. Stat. § 15A-1232 and *State v. Cantrell*. *See* N.C. Gen. Stat. § 15A-1232 (2017); *State v. Cantrell*, 230 N.C. 46, 48, 51 S.E.2d 887, 889 (1949) (citations omitted) ("No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility."). In its briefs, the State does not dispute the language of N.C. Gen. Stat. § 15A-1222 or relevance of Defendant's legal citations to the cases interpreting this statute.

1. Standard of Review

On this issue, Defendant contends the expression of impermissible judicial opinion raises violations of statutory mandates and is reviewable *de novo* without objection. *William Young*, 324 N.C. at 494, 380 S.E.2d at 97; *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citation omitted) (stating we review

statutory errors *de novo*). *See also Duke*, 360 N.C. at 123, 623 S.E.2d at 20 (citation omitted) (stating defendant need not object at trial to raise this issue on appeal, "due to the mandatory nature of th[is] statutory provision[ ]"); *William Young*, 324 N.C. at 494, 380 S.E.2d at 97 (citation omitted). Defendant has the burden of showing prejudicial error. *State v. Jones*, 347 N.C. 193, 211, 491 S.E.2d 641, 652 (1997); *State v. McNeil*, 209 N.C. App. 654, 666, 707 S.E.2d 674, 683 (2011) (citations omitted).

2. Discussion

As discussed *infra,* the offense involved in this case does not involve direct testimony by any witness, a comment made by the trial judge, or an exhibit introduced into evidence, but, instead, concerns improper questioning of a witness by the prosecution. This kind of conduct can violate the statute because, as *Allen* teaches, "[p]arties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court," including by a prosecutor, through questioning or argument, placing before the jury a trial court's opinion as to the credibility of evidence. *Allen*, 353 N.C. at 509-10, 546 S.E.2d at 375.

Although the Supreme Court in *William Young* held N.C. Gen. Stat. 15A-1222 to be "mandatory", both parties agree we use a "totality of the circumstances" test to determine whether a judge's opinion has been impermissibly revealed. 324 N.C. at 494, 380 S.E.2d at 97; *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citations omitted). There is no bright line test to apply this statute. Our

Court, for example, has held some improper remarks by a judge do not automatically require a new trial. *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979). In applying this statute, context is the matrix of meaning.

To support Defendant's contention he was prejudiced, Defendant refers to two sections of the transcript in which the jury heard from a prosecutor that Judge Stephens, the presiding judge in the criminal trial, was the judge who entered the default judgment in the wrongful death case.[2] Both prosecutorial questions came during the questioning of Lorrin Freeman, who, as Clerk of Court at the time the default judgment and the child custody case were filed, was the custodian of the public records.

As a predicate to the testimony of Lorrin Freeman and the admission of the language of the civil judgment, Judge Stephens previously raised the issue with the litigants, heard objections on the record and in chambers, and, after considering the relevance and probative value of the two civil judgments in Defendant's criminal trial, crafted a instruction informing the jury of the use of the judgments in their deliberations. *See Young II*, 368 N.C. 188, 775 S.E.2d 291.

[2] Defendant argues, "The prosecutor then informed the jury that the judge who had determined 'this defendant, Jason Young, to be the slayer, that is, that he unlawfully killed Michelle,' was none other than presiding Judge Stephens. 'This judgment . . . is signed actually by Judge Stephens . . . " and "The State again referred to the default judgment as 'Judge Stephens' order under the Slayer statute,' and as 'the determination under the Slayer statute.' " (Emphases in original).

Defendant directs us to the following sections of the transcript which mention "Judge Stephens":

> [Prosecutor:] Okay. And backing up just a little bit, and I'm reading from this judgment *which is signed by actually by Judge Stephens*, in paragraph three beginning on the first page of that judgment, would you read that paragraph, please, which begins although in default?
>
> [Freeman:] Right. Paragraph three: Although in default, the defendant has been provided with notice of this hearing and a copy of plaintiff's motion for default judgment by plaintiff's counsel through hand and facsimile delivery of same to Attorney Roger Smith, Jr. Further, the undersigned provided Mr. Smith with a copy of the order setting this hearing. In providing these documents to Mr. Smith the Court is not assuming or finding that Mr. Smith represents the defendant in this civil action. The Court simply took judicial notice of the public fact that Mr. Smith has at times represented the defendant with regard to the criminal investigation of the death of Michelle Young and therefore believed that the best way to give the defendant notice of plaintiff's motion in this matter was through Mr. Smith.
>
> . . . .
>
> [Prosecutor:] Okay. And in that judgment is it part of the language that was reflected *in Judge Stephens' order under the Slayer statute* with respect to making sure, or well, however that might be characterized, but what we just talked about as far as the abundance of caution in making sure that the defendant knew, is that reflected in this next judgment as well in the first paragraph of it?
>
> [Freeman:] Judge Smith's judgment also reflects, recounts basically the same language as to notice to Mr. Smith concerning the hearings so that it indicates that as to the particular issue in this request for judgement that

> the defendant was serviced by mail with notice of this hearing and a copy of the plaintiff's application for judgment as well as plaintiff's counsel also mailed a copy of same to Attorney Roger Smith, Jr.
>
> [Prosecutor:] Okay. And then the last sentence of that opening paragraph, would you read that, please?
>
> [Freeman:] Defendant did not appear to defend plaintiff's application for this judgment either personally or through counsel.

(Emphasis added).

What concerns this Court is the language of the prosecutor's questions. The prohibition on judicial expression is designed to prevent jurors from hearing evidence which preempts their role in determining factual issues. Credibility of witnesses is an inherently a jury issue. Here, the prosecutor framed the questions to Lorrin Freeman in a manner which appears to introduce to the jury the fact that Judge Stephens, the presiding trial judge, signed the default judgment finding Defendant to be a slayer. The prosecutor did not ask this question directly to the witness. He did not seek to introduce the judgment as an exhibit. Nevertheless, this type of questioning violates the learning of *Allen*.

We note defense counsel objected to this "line of questioning" in general at its beginning, but the specific impropriety of these particular exchanges was not brought to the attention of Judge Stephens by objection. Because the limiting instruction was crafted so as to avoid the jurors reaching the conclusion that civil liability equals

criminal guilt, the question further undermined the limiting instruction, which was given to the jury before counsel examined Lorrin Freeman.

To be clear, Judge Stephens never directly told the jury he found Defendant to be the slayer in the wrongful death case or commented on Defendant's credibility. Furthermore, Judge Stephens was never requested to recuse himself, if this judgment may have made him a witness in the case. It does not appear, from our review of the exhibits, either party admitted the civil judgment Judge Stephens signed as an exhibit or published the judgment to the jury during the trial. Indeed, Defendant concedes from December 16th through the questions shown above, there is no indication in the record Judge Stephens realized he was the judge who heard the motion for default judgment. We note Lorrin Freeman neither affirmatively responded to the prosecutor's assertions nor identified the judgment as the one Judge Stephens signed.

Given the Supreme Court affirmed the trial judge's decisions to admit the facts surrounding Defendant's reaction for the limited purposes Judge Stephens allowed, the testimony the State elicited through Lorrin Freeman was free from prejudice, so far as Judge Stephens and the witness were concerned. Furthermore, it does not appear to us the prosecutors, to their credit, pressed this information mentioned in the improper questions or the inferences arising therefrom during closing arguments.

The State argues an improper expression of judicial opinion can be cured by a limiting or curative instruction to the jury. *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004). Defendant's briefs make no reply to this argument.

We recognize the prejudice Judge Stephen's curative instructions were designed to combat is not quite the same as the prejudice from which Defendant suffered due to the improper questions asked by the prosecutor. However, they are substantially similar and involve some of the same fundamental questions. In applying the "totality of the circumstances" test, this case is somewhat repetitive because the same arguments used here are the same arguments used in the original case involving the introduction of the civil pleadings in the first instance.

Because the explicit information linking Judge Stephens to the default judgment was made only twice in unintelligible questions asked by a prosecutor, we conclude any prejudice Defendant suffered to be unlikely to have persuaded a juror to vote otherwise. In support of this conclusion, we note there was no emphasis on this point at the closing arguments. *Allen*, 353 N.C. at 509-11, 546 S.E.2d at 375-76 (awarding a new trial because prosecutors "traveled well beyond the record" in closing argument and told the jury the trial court "found" a witness's statements to be "trustworthy and reliable"). We further note Judge Stephens made was no improper comment. *See* N.C. Gen. Stat. § 15A-1222 ("*The judge* may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be

decided by the jury.") (emphasis added). Finally, neither party introduced the default judgment containing the signature and name of Judge Stephens. Even if we were to add this minor prejudice to the prejudice Defendant suffered as a result of the entry of the judgments at all, we cannot say it would amount to prejudicial error. *Jones*, 347 N.C. at 211, 491 S.E.2d at 652 (citation omitted) ("Assuming *arguendo* that any of the above comments . . . constitute the expression of an opinion, every such impropriety does not result in prejudicial error.").

At this point in the proceedings, our Court is not resolving these competing inferences for the first time. Our Court initially resolved these inferences in reaching its earlier decision to grant Defendant a new trial in *Young I*, because we held the admission of this evidence violated N.C. Gen. Stat. § 1-149, which sought at its core to achieve the same goals as Rule 403 of the Rules of Evidence, and avoid highly prejudicial information from compromising the confidence of a jury verdict. 233 N.C. App. at 221-30, 778-84. *See also* N.C. Gen. Stat. § 1-149 (2017); N.C. R. Evid. 403 (2017). Even if the jury knew Judge Stephens wrote the default judgment and made the findings, we doubt our Supreme Court would have altered its decision in this case, given the weight of the evidence against Defendant.

In overruling this Court, our Supreme Court addressed these inferences in reaching its decision reversing this Court when it made these conclusions:

> We recognize that the admission of evidence that defendant failed to respond to the allegations advanced

against him in the wrongful death and declaratory judgment action posed a significant risk of unfair prejudice to defendant. This risk of unfair prejudice was heightened by the fact that the trial court had heard the estate's motion for the entry of a default judgment in the declaratory judgment action and found that defendant had "unlawfully" killed Ms. Young. In recognition of this risk, the trial court explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that "[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense." As a result of the fact that the jury is presumed to have followed the trial court's instructions, *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 535 (2004) (citation omitted), *cert. denied*[,] 544 U.S. 909, 125 S. Ct. 1600, 161 L.Ed.2d 285 (2005), the record reflects that the trial court took action that is presumed to have been effective to protect defendant against the exact harm about which he expresses concern.

Although the members of this Court might well have reached a different result from the trial court after balancing the probative value of the evidence concerning defendant's failure to respond to the wrongful death and declaratory judgment action against the risk of unfair prejudice associated with the admission of that evidence, the applicable standard of review requires us to simply determine whether the trial court could have made a reasoned decision to allow the admission of the evidence in question. *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 302-03 (2009) (stating that, "[i]n our review, we consider not whether we might disagree" with the trial court but whether "the trial court's actions are fairly supported by the record" (quoting *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008))). In view of the fact that the evidence concerning defendant's response to the wrongful death and declaratory judgment action had material probative value and the fact that the trial court

> recognized and made a serious attempt to address the risk of unfair prejudice that would inevitably flow from the admission of that evidence, we cannot conclude that the trial court erred in determining that the risk of unfair prejudice resulting from the introduction of the challenged evidence did not substantially outweigh its probative value.

Young II, 368 N.C. at 213-14, 775 S.E.2d at 308 (footnote omitted) (alterations in original).

Even though the law of the case doctrine may not technically apply to this question, the thrust of the Supreme Court's opinion is persuasive. Our Court need not reweigh this issue, even if we have the jurisdictional ability to do so. *See Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956). In addition to the other factors discussed *supra*, the Supreme Court's weighing of these similar issues in this case on the use of civil judgments applies to application of N. C. Gen. Stat. § 15A-1222 by implication to the issue of prejudice inherent in the judge's expression of opinion. Accordingly, we conclude, despite the prosecutor's conduct, Defendant received a trial unmarred by prejudicial error.

B. Did the trial court err in denying Defendant's motions to dismiss due to insufficient evidence?

The next issue is whether the State presented sufficient evidence to send the case to the jury for resolution. Defendant argues the State's case in chief presented only circumstantial evidence, hearsay, and innuendo to connect him to the crime. Defendant describes this evidence as failing to rise above conjecture; thus, the State

failed to produce substantial evidence he committed murder and asks this Court to reverse the trial court's decision to submit this matter to the jury and vacate this conviction.

1. Standard of Review

This issue is also reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). Under the *de novo* standard, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

Any court deciding whether to dismiss a criminal proceeding must apply well settled law to resolve this issue. The evidence must be viewed in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). In doing so, the Court should draw all reasonable inferences in the State's favor. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted). All evidence admitted, both competent and incompetent, favorable to the State must be considered. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984) (citation omitted). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 160, 322 S.E.2d at 387 (citation omitted).

The State's brief reminds the Court "[m]ost murder cases are proved through circumstantial evidence." *State v. Carver*, 221 N.C. App. 120, 122, 725 S.E.2d 902, 904 (2012) (quotation marks and citation omitted). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted). Circumstantial evidence will withstand a motion to dismiss, even if the evidence does not exclude every hypothesis of innocence. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (citations omitted).

2. Discussion

Applying this well settled law, we hold the State produced sufficient evidence to require jury resolution of the factual conflicts presented. Taken in the light most favorable to the State, the State's substantive evidence portrays the following. Defendant and his wife had a troubled marriage, during which Defendant engaged in extra marital affairs, prior to the time of the events and leading up to the date of the murder. Defendant had a history of violence with one other woman, with whom he had a sexual relationship. Defendant chose to testify at his initial trial, and his alibi evidence was subject to detailed examination in the second trial, which could infer his testimony in the first trial was incredible and led a reasonable juror to conclude he falsely testified. Defendant expressed to witnesses he was "done" with the

marriage and had "fallen in love" with another woman with whom he exchanged over four hundred calls or text messages.

Defendant testified on the night of the murder he was in his room in the Hampton Inn in Hillsville, Virginia, arriving early in the evening and not departing until the next morning. The State introduced evidence that a video camera, which filmed the hall in which Defendant's room was located, was unplugged during the night. Furthermore, a rock was found the morning of the murder, placed on a security door, keeping the door in an open position.

Defendant drove a white Ford Explorer. In the early morning hours before Michelle Young's body was discovered, a newspaper deliveryman saw lights on in the Young home, lights on in driveway, and a light-colored SUV in the driveway. Ms. Calhoun, an employee of a BP Station in Hillsville, Virginia, testified Defendant drove a white SUV when he bought gas at her station in the early morning hours of the date of the murder. Furthermore, Defendant's decision to testify provided the State with the opportunity to attack his credibility.

Moreover, there is other circumstantial evidence the trial court admitted to which we have not cited. This additional evidence tends to incriminate Defendant. A complete narrative of this evidence has been reported by both the Supreme Court and our Court in prior opinions and need not be repeated here, other than to say all

the evidence comprises more than a scintilla of evidence a reasonable juror could conclude Defendant committed the crime.

Although Defendant vigorously contested the State's evidence and has strong arguments that some prior jurors accepted that the circumstantial evidence lacked merit, judges do not make factual conclusions in determining whether or not to grant a motion to dismiss. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1998). These competing theories and the evidence supporting them, in our view, require jury resolution. We hold the trial court properly denied Defendant's motions to dismiss.[3]

C. Did the trial court err in denying Defendant's motion for appropriate relief?

The final question for our review is the motion for appropriate relief filed in the Court of Appeals and remanded for a hearing in the trial division.

1. Standard of Review

In reviewing a denial of a motion for appropriate relief, this Court examines the trial court's order to determine if the findings of fact are supported by competent evidence, and, if so, these findings are binding on appeal and we may only strike a finding upon a showing of abuse of discretion. *State v. Hyman*, ___ N.C. ___, ___, 817 S.E.2d 157, ___ (2018) (citations omitted); *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted). If the findings of fact are supported by

[3] Even without considering the evidence of the civil proceedings introduced in this case, the State produced substantial evidence requiring jury resolution.

competent evidence or are unchallenged upon appeal, we employ a *de novo* review to examine whether the findings of fact support the conclusions of law. *Id.* at ___, 817 S.E.2d at 169 (citation omitted). *See also State v. Mbacke*, 365 N.C. 403, 406, 721 S.E.2d 218, 220 (2012) (quotation marks, citation, and alteration omitted) ("If no exceptions are taken to findings of fact made in a ruling on a motion for appropriate relief, such findings are presumed to be supported by competent evidence and are binding on appeal.").

In post-conviction motions for appropriate relief, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion[,]" including the facts necessary to establish materiality. N.C. Gen. Stat. § 15A-1420(c)(5) (2017). *See also State v. Stevens*, 305 N.C. 712, 719, 291 S.E.2d 585, 591 (1982) (citation omitted).

2. Evidence Following this Court's Remand

In *Young II*, the North Carolina Supreme Court remanded Defendant's appeal to our Court and ordered us to resolve Defendant's motion for appropriate relief and other issues we previously did not reach. 368 N.C. at 216, 775 S.E.2d at 309. This Court determined the motion for appropriate relief could not be resolved without trial court resolution of factual disputes, which the motion for appropriate relief contained. Thus, we remanded to the trial court for resolution and held the other matters in abeyance, pending the trial court's resolution of the motion for appropriate relief. The

trial court held an evidentiary hearing on 15 June 2017, which Defendant attended and was represented by counsel. In support of his motion, Defendant called the following: (1) trial counsel, G. Bryan Collins; (2) member of the defense team, Caroline Elliott; and (3) local attorney and expert in criminal defense trial representation, Joseph Zeszotarski. The following testimony, relevant to the challenged findings of fact, was adduced.

G. Bryan Collins testified he received official notice of the State's intent to introduce additional evidence at the second trial when he received the State's disclosure notice dated 11 October 2011, listing John A. Michaels, an attorney representing Michelle Young's estate. Collins recognized evidence which would be presented from the wrongful death action would be damaging to Defendant, and his biggest concern was Judge Stephens entered an order declaring Defendant to be a "slayer." As a result of this and other affidavits, Collins requested the court order all of the attorney's files to be disclosed. At the hearing on the matter on 16 December 2011, Collins realized Judge Stephens might admit all records in the wrongful death action if the court, "deemed it relevant[.]" Similar evidence concerning the child custody hearing was adduced. During this time, Collins admitted he did no legal research on the question of admissibility of the civil pleadings and was unaware as to whether or not his co-counsel conducted such research. He also admitted he did not call the Capital Defender's Office or Appellate Defender's Office to seek advice.

He admitted the failure to do legal research was not part of a "tactical or strategic decision[.]"

At trial, before the evidence of the wrongful death decision was reached, Judge Stephens held a bench conference, during which Collins's objections to the admission of the wrongful death evidence were discussed. The transcript from the motion for appropriate relief hearing about this issue reads as follows:

> Q. And do you recall the events surrounding that colloquy prior to the admission of the evidence?
>
> A. My memory is that we had a chambers conference. It would have been Mr. Cummings and Ms. Holt and Mr. Klinkosum and myself and Judge Stephens, and that I did the best I could to convince Judge Stephens to exclude this testimony, made my arguments, and he had a limiting instruction already prepared. It wasn't anything that we asked for or had any input into. He did that on his own.
>
> And my memory is that he told me that he was going to let this into evidence and that I could go outside and make my objection and let's move on. That is what we did.
>
> Q. And so he had an instruction prepared before there had been any argument about the admissibility of that evidence?
>
> A. I don't know when he did it, but it was there in that chambers conference.
>
> Q. And you were aware that that chambers conference was not recorded?
>
> A. Sure.
>
> Q. And so any argument you made to preserve an issue would have to be made actually on the record, correct?

A. Yes.

Q. And on page -- in that page 5045 of that transcript, line 22, and going on to the next page, could you read for the Court, the extent of your objection?

A. This is me talking: "Your Honor, we object to the entire line of questioning about the wrongful death case."

> "The Court: All right."
>
> Me: "And we will cite basically Rule 403. We believe that to the extent that it's probative of anything, that the danger of confusing, misleading, undue prejudice to the defendant substantially outweigh the probative value, and I don't don't wish to be heard further."
>
> And then the Court --

Q. Let me stop you for just a second. So you limited your objection to Rule 403 and to the -- you made it to the entire line of questioning?

A. Only that I limited it to everything, but that is all I could think of, so that is what I said.

Q. Now, as far as the chambers conversation, do you recall if you actually recall if you made an argument back there, or is that just you feel like you would have, but you don't really recall whether you did or did not?

A. Well, the thing --

[THE STATE]: I object. This is not part of the record in this case.

[DEFENSE COUNSEL]: Well, that is not the issue, whether it's part of the record. He is allowed to testify

about matters outside the record because that is why it is--

THE COURT: I am going to allow -- I am going to sustain the form of the question, but you can ask him about the substance of the conference in chambers, if he has a memory of it.

[THE STATE]:
Q. Judge Collins, do you recall whether you made an actual legal argument back in chambers against the admissibility of this evidence?

….

A. I remember trying to keep it out, and that the way that I did it was to say this just isn't fair and it was obvious to me at that time that it was coming in.

Q. And other than 403, you did not object to North Carolina General--under North Carolina General Statute 1-149?

A. I did not.

Q. You did not object under grounds of relevancy or constitutional grounds?

A. Not relevancy, per se, no; and constitutional grounds, no.

Q. You did not seek a voir dire of the witness at that point?

A. No.

Q. W[as] your failure to state any of those other grounds for objection as a result of a tactical decision, strategic decision, or a result of failure to do legal research to be aware of those?

A. It was not a tactical decision and I didn't know any other

> way to keep it out. So if you want to call that my failure to do research, then that is what it was.

Caroline Elliot, an assistant public defender in Wake County working as co-counsel, similarly testified the defense team tried to keep the civil default evidence out, but did not find N.C. Gen. Stat. § 1-149. Elliot also testified the defense team tried to mitigate the damage caused to Defendant's defense by the admission of the civil cases. Specifically, Elliot testified, "The conversations at first were to try to keep it out, and at some point we became aware or convinced that it was coming in and the conversation shifted to try to -- how try to mitigate that."

Joseph Zeszotarski, an experienced Wake County criminal defense attorney qualified to handle death penalty cases, testified he was familiar with prevailing norms of criminal law practice for defense attorneys in Wake County. In his opinion, under prevailing norms, counsel should have filed a motion *in limine* to try to keep the civil matters out or limit the Clerk's testimony to the minimum admissible evidence. He also opined counsel's lack of research, and the Rule 403 objection alone, constituted deficient performance.

Following briefing by counsel and arguments, the trial court took the matter under advisement. On 29 August 2017, the court announced its decision and denied Defendant's motion for appropriate relief for ineffective assistance of counsel. The order contained fifty-eight findings of fact and forty-eight conclusions of law.

3. Discussion

On appeal, Defendant seems to challenge findings of fact 8, 10, 14, 15, 20, and 30 as lacking evidentiary support. Defendant contends the trial court's findings about his trial counsel's "accurate perception of the State's theory of prosecution" and "their accurate understanding of the law" are in error, because counsel was unaware of relevant law, and, thus, counsel could neither have perceived the State's theory of prosecution or accurately assess whether the evidence would be admissible. (Emphases omitted). Thus, any conclusion of law holding Defendant's counsel's belief on admissibility of the civil matters could not be "reasonable[.]" Defendant also contends finding of fact 54 both lacks evidentiary support and should properly be characterized as a conclusion of law. Defendant further challenges conclusion of law 96 as not supported by the findings of fact.

The challenged findings of fact, and other relevant findings, are as follows:

> 8. After the December 16, 2011 hearing, defendant's counsel was aware that the State intended to introduce the entire civil court file, and further, that Judge Stephens believed that, if relevant, it might be admissible.
>
> ….
>
> 10. Defendant was also on notice that the State, in the second trial, intended to seek to introduce a complaint filed on December 17, 2008 against defendant by Michelle Young's mother and sister for child custody of Jason and Michelle's minor daughter.
>
> ….
>
> 14. Mr. Collins, at the time of defendant's second trial, was

one of the State's most highly-qualified criminal defense trial lawyers. After being licensed in 1985, he spent 20 years in private practice doing mostly criminal defense work. He was appointed to the Capital Defender's list in 1999. In 2005, Mr. Collins was named as Wake County's Chief Public Defender. In January 2013, Mr. Collins became a Superior Court Judge. During his years in practice, he handled between 20 to 30 first degree homicide cases, picked seven juries in capital cases, and tried to verdict approximately five or six non-capital homicides. He was certified as a criminal defense specialist by the N.C. State Bar since 2006. Mr. Collins served on the faculty of the N.C. Public Defender Trial School, where he taught trial skills to young lawyers.

15. Co-counsel Mike Klinkosum, at the time of the second trial, was equally well-qualified. For nearly 15 years prior to this trial, Mr. Klinkosum practiced exclusively as a criminal defense trial lawyer. He was also certified as a specialist in state criminal law by the N.C. State Bar, and a specialist in criminal trial advocacy by the National Board of Trial Advocacy. He spent several years prior to entering private practice as an Assistant Public Defender and then as an Assistant Capital Defender. He has participated as lead counsel in the successful exoneration proceedings of an individual before the N.C. Innocence Commission. He is [the] author of *Klinkosum on Criminal Defense Motions*, published by Lexis and has taught Criminal Procedure Litigation Skills as an adjunct professor at UNC School of Law.

….

19. The Court finds, based upon a careful examination of the evidence of record, that following the December 16, 2011 hearing, part of which was in chambers, and part of which was of record, that Mr. Collins and Mr. Klinkosum had formed an opinion that Judge Stephens was likely to allow the admission in trial of the civil wrongful death file contents, and that a similar analysis by Judge Stephens

> would likely lead him to allow the admission of the child custody complaint.
>
> 20. The Court further finds that this opinion that Judge Stephens was likely to allow the admission of this evidence was a reasonable opinion of Mr. Collins and Mr. Klinkosum based upon their accurate perception of the State's theory of prosecution for the second trial, their accurate understanding that the law permits such evidence for purposes other than merely proving facts alleged in the civil pleadings, the probative value of the evidence as it related to the State's theory, their direct interaction with Judge Stephens, and their collective years of experience as criminal trial lawyers.
>
> ….
>
> 30. Following that conference, Mr. Collins knew that further arguments would be futile – when asked "what did you interpret that Judge Stephens' ruling was as far as the entire contents of that wrongful death file," Mr. Collins testified: "I don't know if I had an understanding other that this was coming in."

(Footnote omitted).

We carefully examined hearing transcripts and the record—specifically the portions of record Defendant, the State, and, where applicable, Judge Ridgeway cited—and conclude each challenged finding of fact is supported by competent evidence.[4] In drawing this conclusion, we apply the abuse of discretion standard of

[4] Defendant also challenges finding of fact 38, which states: "The State, through redirect examination, then sought to challenge the insinuation raised in cross-examination that the investigation performed by counsel in the civil action was unreliable, biased, or motivated by monetary gain." We conclude this finding is also supported by competent evidence and is not relevant to any ultimate conclusion of law or review issue this Court must make.

review, noting while this Court may have made a different finding below, if from the testimony presented at trial the inferences drawn by the reviewing judge are within the reasonable bounds of judicial discretion and not totally lacking logic, then we are to hold these inferences as supported by the evidence. *State v. Garris*, 191 N.C. App. 276, 286, 663 S.E.2d 340, 348 (2008) (citation omitted) (explaining an abuse of discretion occurs where a decision is manifestly unsupported by reason or so arbitrary it could not have been the result of a reasoned decision). Therefore, based on our review of the record, the findings of fact, both challenged and unchallenged, are binding on this Court.

We agree with Defendant that finding of fact 54 is a conclusion of law, and, pursuant to our ability to reclassify determinations improperly labeled by the trial court as factual, we review this finding as a conclusion of law.[5] *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010) (citation omitted).

Defendant challenges the following conclusions of law:

> 54. As with the admission of the civil wrongful death action, defendant's counsel, in their preparation for trial, had formed an opinion, based upon Judge Stephens' comments at the December 16, 2011 hearing that Judge Stephens was likely to allow the admission of the child custody complaint under a similar analysis that the Judge had forecast with respect to the civil wrongful death action. This opinion was a reasonable opinion of Mr. Collins and Mr. Klinkosum based upon their accurate perception of the

[5] We note finding of fact 20 and finding of fact 54 are substantially similar. Defendant did not argue finding of fact 20 was actually a conclusion of law. Regardless of the designation of either finding, our holding would not change.

> State's theory of prosecution for the second trial, their accurate understanding that the law permits such evidence for purposes other than merely proving facts alleged in the civil pleadings, the probative value of the evidence as it related to the State's theory, their direct interaction with Judge Stephens, and their collective years of experience as criminal trial lawyers.
>
> ….
>
> 96. In pursuance of that strategy, it was through cross-examination of the Lorrin Freeman conducted by Mr. Klinkosum that the affidavit of Jack Michaels was read to the jury to demonstrate bias and the absence of a thorough investigation by the personal injury lawyers, and through cross-examination that the door was opened to the State's further inquiry into the detailed and voluminous investigatory materials reviewed by those lawyers—evidence that, in hindsight, defendant now contends was prejudicial.

We note, however, the findings of fact and conclusions of law challenged by Defendant do not go to the issue which is outcome determinative in this case—prejudice to Defendant. All of these findings, in our view, go to the legal issue of whether or not the attorneys' actions were deficient. The trial court made the following findings with regard to this issue:

> 68. There is no doubt that counsel for defendant failed to make themselves aware, through research or consultation with other experienced practitioners in the field, of several pertinent legal grounds to challenge the admission of the contents of the civil wrongful death action or the child custody action. Among other things, defendant's counsel failed to make themselves aware of N.C. Gen. Stat. [§] 1-149 ("No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in

it") or N.C. Gen. Stat. [§] 15A-1222 ("The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury.") Further, there is no doubt that, by not making themselves aware of this law, counsel did not assert timely objections to the admission of this evidence, and consequently, did not preserve certain arguments for appeal.

69. However, rather than addressing whether these failures amount to errors so fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment, the Court first considers the second prong of the *Strickland* analysis – whether defendant has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694.

70. First, the failure to assert proper objections, or even the failure to object at all, to evidence offered at a jury trial does not necessarily equate to "prejudice" rising to the level to establish an ineff[ective] assistance of counsel claim. *See, e.g., State v. Beaver*, 785 S.E.2d 186 (N.C. Ct. App., 2016) ("Even if defense counsel's failure to object to [the witness's] testimony amounted to a deficient performance so serious that counsel was not functioning as the counsel guaranteed to Defendant by the Sixth Amendment, Defendant has failed to meet the second prong of *Strickland*: showing the deficient performance was so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Citations omitted)).

71. Rather, in order to properly evaluate the degree of prejudice, if any, resulting from the failure of counsel to assert appropriate objections to proffered evidence, this court now undertakes to two-step analysis: *first*, the court closely examines the evidence that defendant contends should have been challenged through objection and the legal basis for the objections that defendant asserts should have been made, and tests those objections against

> prevailing law to determine whether the objections would have been sustained by the trial court; and *second*, after sifting the evidence as described in the first step, the court examines the evidence that remains – namely evidence that, had a proper objection been made, would have likely been excluded by the trial court – and reviews that evidence to determine whether it is sufficient to meet defendant's burden of showing that there is a reasonable probability that, but for counsel's errors in allowing the admission of this evidence, the result of the proceeding would have been different.

(Footnotes omitted) (Fourth alteration in original).

By failing to resolve the issue of deficient counsel, this Court cannot review a conclusion of law not made by the trial court or used to resolve this issue.

In his original motion for appropriate relief, Defendant made four arguments which base his prayer for relief. First, he argued counsel took no steps prior to trial to exclude evidence about the wrongful death and slayer disqualification complaint, his default, or entry of default judgment by Judge Stephens. Next, he argued counsel lodged few objections during trial and opened the door to the admission of additional inadmissible evidence. Defendant then contended counsel's deficient performance undermined the reliability of the verdict. Finally, he contended counsel's deficient performance limited and shaped the issues which could be raised on appeal.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). *Strickland*

set out a two part test a defendant must satisfy to prove ineffective assistance of counsel:

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

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

Central to the issue of ineffective assistance of counsel in this case is the issue of "prejudice" Defendant suffered in receiving a fair trial because of the admission of civil pleadings. In reviewing this issue in its hearing on the motion for appropriate relief, the trial court noted the holding of our Supreme Court in this case on the issue of admissibility of the civil litigation.

Like the trial court, we are similarly constrained by this language from the Supreme Court, which has become the law of the case. The trial court relied on a presumption of regularity or competency of experienced trial counsel to buttress its conclusion Defendant suffered no *Strickland* prejudice from counsel's failure to research the law of North Carolina or the failure of counsel to correct the misimpression Judge Stephens held that a different judge entered the civil slayer statute default judgment.

We do not hold the view that the ruling in this case should be any encouragement to criminal defense counsel not to research evidentiary law or to correct misimpressions of fact of trial judges at a trial. The irregularities of counsel here are some evidence of subpar conduct. Nevertheless, because the trial court made no conclusions of law on the issue of deficiency of counsel, there is nothing for us to review on this first *Strickland* prong.

We are only left to the review the issue of prejudice in the admission of the civil litigation. The court's conclusion of law 105 best summarizes the trial court's conclusions. As to whether Defendant was prejudiced by admission of the civil judgments, we hold the trial court's conclusion following the Supreme Court's holding in this case to be supporting by findings of fact, which are based on competent evidence and supported by law in this case. Accordingly, we conclude the trial court did not err in denying Defendant's motion for appropriate relief, and we affirm this order.

III. Conclusion

For the foregoing reasons, we find no error in the judgment and affirm the trial court's order on Defendant's motion for appropriate relief.[6]

NO ERROR IN PART; AFFIRMED IN PART.

Judges STROUD and DILLON concur.

[6] At the end of his supplemental brief, Defendant raises several plain error arguments. We considered all arguments in the brief and conclude they lack merit.

Report per Rule 30(e).