IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-884

Filed: 1 October 2019

Gaston County, No. 15 CRS 62458; 17 CRS 845

STATE OF NORTH CAROLINA

v.

THOMAS ALLEN CHEEKS

Appeal by defendant from judgment entered 1 November 2017 by Judge Hugh B. Lewis in Superior Court, Gaston County. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his conviction following a bench trial for first degree murder by starvation under North Carolina General Statute § 14-17(a) and negligent child abuse under North Carolina General Statute § 14-318.4(a4), both arising from the mistreatment and death of his four-year-old stepson, Malachi Golden. There was sufficient competent evidence to support the trial court's conclusion that defendant intentionally starved his four-year-old stepson Malachi and that starvation was the proximate cause of his death. As to his conviction for negligent child abuse, there

was no fatal variance between the evidence presented at trial and the indictment. After careful review of Defendant's arguments and all of the evidence, we find no error in the trial court's judgment.

I. Procedural and Factual Background

Defendant Thomas Allen Cheeks was charged with first degree murder, negligent child abuse resulting in serious injury, and intentional child abuse resulting in serious injury, all arising from the death of Malachi Golden. He waived jury trial, and a five-day bench trial was conducted starting on 23 October 2017 before the Superior Court, Gaston County. On 1 November 2017, the trial court entered verdicts finding defendant not guilty of intentional child abuse, guilty of negligent child abuse, and guilty of first degree murder by starving but not guilty of murder "with premeditation and deliberation where a deadly weapon is used," felony murder, or murder by torture.[1] Defendant was sentenced to life imprisonment without parole. Defendant gave notice of appeal in open court.

The evidence showed that Malachi Golden was born on 15 November 2010. At the time of his death, Malachi lived with his mother, Tiffany Cheeks, his stepfather, Defendant, and his two younger half-sisters, both the biological children of Mrs. Cheeks and Defendant. Malachi's biological father was never involved in his life. His

[1] Based upon its verdict of first degree murder by starving, the trial court noted that second degree murder was moot.

mother began living with Defendant in 2012, and they were married on 1 November 2013.

Malachi began having "infantile spasms" when he was about 4 months old, and Mrs. Cheeks took him to see his pediatrician, who referred Malachi to a pediatric neurologist, Dr. Robinett. Dr. Robinett determined he was suffering from seizures and prescribed an anti-epileptic medication, Zonisamide. Upon further testing, physicians determined Malachi had a chromosomal abnormality, a microdeletion in chromosome 22. They recommended additional testing to determine whether the abnormality was inherited and likely insignificant, or a new mutation that may be clinically significant, but Mrs. Cheeks never returned to have additional testing done. Mrs. Cheeks stopped taking Malachi to the pediatric neurologist in June 2013, one month after her first child with Defendant was born. Sometime in 2014, without consulting a physician, Mrs. Cheeks stopped giving Malachi his medication.

Malachi had trouble walking and was referred to the Child Development Services Agency (CDSA), which began therapy services. With therapy, his fine motor skills improved, his walking improved, and he was learning to feed himself. At age 3, on 15 November 2013, he aged out of the CDSA therapy services in the home and began to receive therapy at a local elementary school, but Mrs. Cheeks often failed to take him to his therapy appointments because she "just didn't feel like going" and

stopped completely in December 2014, one month after the birth of her second child with Defendant.

The therapists mentioned in the trial court's findings of fact below had come to the home to provide services to Malachi's younger sisters, not Malachi, since Mrs. Cheeks had stopped taking him to therapy appointments. 5 February 2015, was the last day a therapist saw Malachi in the home, although she was there to provide therapy for his sister. The therapist commented about how thin Malachi was becoming. The therapist returned to the home for appointments in April but did not see Malachi. After the April appointments, Mrs. Cheeks cancelled therapy for her daughter.

At about 10:00 p.m. on 11 May 2015, Ms. Cheeks called 911 regarding Malachi. When EMS arrived, they found Malachi lying dead in an undecorated room. Malachi was extraordinarily emaciated. Although he was nearly five years old, he was wearing clothing sized for 24 months and 3T, and the clothes were hanging off of him. His bones protruded, his stomach and face were taunt, and his head disproportionately large for his body. The doctor that performed the autopsy estimated that Malachi had been lying on his back after death from a few hours to one or two days.

Besides his obvious emaciation, Malachi had other injuries and signs of severe and protracted neglect. He had head injuries and pressure ulcers where his bones

had laid against one another; injuries to his groin and genital area, including sores in various stages of healing, some beyond the point of septic infection. Specialist Justin Kirkland, crime scene investigator for the Gaston County Police Department, had investigated crime scenes for almost 10 years. He was one of the first investigators on the scene and took many of the photographs. Upon examining Malachi, he noted that Malachi had

> a large sore on his right groin area. When we turned him over there was -- I would call it large sores, but it was severe diaper rash as well on his bottom. He had large sores on his bottom, something I have never seen before on a child in a death investigation.

The medical examiner also testified had never seen anything like Malachi's pressure sores and extreme diaper rash in a child.[2] Neither of the other children were visibly malnourished, and police found plenty of food in the home, in both the kitchen cabinets and refrigerator.

After Malachi's death, officers from the Gaston County Police Department interviewed both Defendant and Mrs. Cheeks several times regarding Malachi and the events surrounding his death. Defendant made several conflicting statements to police regarding Malachi's death and his condition leading up to his death. Defendant was not working and was the primary caregiver for Malachi for at least two months before his death. On 11 May 2015, he initially told police he had fed Malachi

[2] These photographs are in our record, and, as the trial court put it, the "photographs of Malachi Golden speak more volumes than any words ever could."

Spaghettios but he had thrown up, and he had checked on him several times during the day he died. In the second interview, on 14 May 2015, he gave a different timeline of events and said he had fed Malachi a "Kid Cuisine," a "grape-apple pouch[] squeeze food," and water. His third and final interview was on 30 October 2015 by Detective Brienza. Detective Brienza received the original, unamended autopsy report on 15 October 2015.[3] He then met with Defendant and Mrs. Cheeks again because the "inconsistencies were too great at this point based on the autopsy report." He found inconsistencies in the medication Malachi should have been receiving for his seizure disorder (since Mrs. Cheeks and Defendant claimed his doctors had taken him off medication, but the medical records showed his physician had actually increased the dosage), in the percentages of caretaking responsibilities between Defendant and Mrs. Cheeks, the "huge discrepancy" as to the food Defendant had claimed to have given Malachi and what was found on the autopsy, and evidence of head injuries.

At the third interview, Defendant "had a couple different versions of killing Malachi." His first version was that "Malachi drowned because he gave him too much fluid while in the bath tub" and Malachi had been dead for two days before the 911 call. Detective Brienza noted that the autopsy did not indicate Malachi had drowned. Defendant then said he had put his hands around Malachi's neck to keep him quiet.

[3] As discussed in detail below, the original autopsy report concluded Malachi had died from starvation and dehydration. The autopsy report was amended after the medical examiner reviewed Defendant's third interview with Detective Brienza.

He said Malachi's moaning "frustrated him greatly." His "method of operation" was to

> put his hands around Malachi's throat and pick him up by his neck and choke him enough to quiet him. . . . Once Malachi would become limp, he would physically throw him in the Pack N Play from a distance, walk to the doorway, turn around to see if he was okay, if he was going to make any sound or movement. Once he saw that movement he then left.

Defendant claimed he did this to Malachi "five times a week for the last two months" and had been "throwing him around, smacking him, whooping him almost on a daily basis[.]" Defendant said he was frustrated over Malachi's moaning again on 11 May 2015, so after using his regular "method of operation" to quiet him, he also hit him several times on the head with a hard object. He said he watched Malachi "take his last few gasps of breath." He claimed "he bathed Malachi after he was dead for a long period of time," washing his hair and body as if he were alive, and then he put clothing and a new diaper on him and placed him in his bed with a blanket over him.

Defendant testified at trial and gave yet another entirely different story of what happened prior to Malachi's death. He testified that after Mrs. Cheeks left for work around noon, he changed Malachi's diaper, applied diaper rash cream, and fed him lunch. He could not recall exactly what Malachi ate, but it was "normal food" such as "Kid Cuisine, Hungy-Man, hot dogs, chicken nuggets, french fries." He also

gave him juice and put him back in his playpen. He then went to take care of the other two children. Around 4:30 p.m., Malachi woke up and Defendant heard his normal moaning sounds. His diaper was dry, so he did not need to be changed, and he then fed Malachi some fruit snacks. He testified that Malachi "grabs as much as he can and stuffs them in the mouth" but most of them he would end up missing his mouth, so he would then give him more. He also fed him a Kid Cuisine, string cheese, and yogurt bites at about 4:30 p.m. After Malachi ate, Defendant testified he gave him a bath, changed his diaper, and put him back in his playpen. Defendant fed the two girls as well, and by 5:30 p.m. all three children were sleeping, and he went outside to smoke a cigarette. Defendant then came back inside and took a nap until about 7:30 p.m. He then checked on Malachi, changed his diaper, and fed him again, not a "whole meal" but string cheese and a Juicy Juice box. He then put Malachi back in his playpen and tended to the other children. Sometime around 8:00 p.m. he checked on Malachi again, and he appeared to be sleeping. He was not moaning, but Defendant could hear him breathing. He went outside to smoke again, and Mrs. Cheeks got home around 10:00 p.m. She went to check on Malachi and then called for Defendant, saying, "There is something wrong with Malachi. I think he is dead." Defendant told her, "There is no way because I just checked on him hours before." Defendant said he took Malachi out of the playpen and laid him on the floor while Mrs. Cheeks called 911. The 911 operator told them to administer CPR, so he tried

to administer CPR but did not want to use too much pressure, since he had only been trained to do CPR on adults when he was in the military.

Defendant testified at trial his statements to Detective Brienza were lies and he had said what he did because "he told me we have this autopsy" but did not tell him what the autopsy said. He said he drowned Malachi but Detective Brienza said that was a lie based on the autopsy so Defendant "gave him another option saying I hit him in the head." Defendant denied that he had ever choked Malachi or thrown him into the playpen to make him be quiet. Defendant claimed he told Detective Brienza the things he did because "I was going to take the blame" to protect Mrs. Cheeks. In response to the photographs of Malachi, Defendant testified, "I can't explain that. I know I fed my son." He testified that his ribs did not look like they did in the photographs, and his diaper rash was just regular diaper rash.

Mrs. Cheeks also gave several different versions of events. In her initial statement, she claimed she did not know what had happened to Malachi and neither she nor Defendant realized he was dead until she found him and called 911. She then gave a statement implicating Defendant on 2 November 2015, regarding his abuse of Malachi and stating that she knew Defendant had killed Malachi. She said she already knew Malachi was dead before she called 911, and she did not perform CPR because she did not know how. Based upon her statement implicating Defendant, she entered into a plea arrangement with the State and plead guilty to a reduced

charge of accessory after the fact of first degree murder and negligent child abuse resulting in serious injury. But at trial, she recanted her prior statements against Defendant and agreed that she "pretty much would do anything" for Defendant "to be found not guilty."[4]

The trial court entered an order with findings of fact, and Defendant does not challenge the findings of fact as unsupported by the record, so we will quote the trial court's order as to the facts[5] of this case:

> 1. The deceased victim was Malachi Golden, a four-year-old boy.
>
> 2. Malachi Golden's caregivers were his mother, Tiffany Cheeks, and Defendant.
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> 3. Tiffany Cheeks and Defendant married in November of 2013.
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> 4. Defendant, Tiffany Cheeks, Malachi Golden and the two younger female half-siblings lived in an apartment in High Shoals.
>
> 5. Malachi Golden's younger half-siblings were the children of Defendant and Tiffany Cheeks.

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[4] Mrs. Cheeks had made statements regarding Malachi's death to many people since his death, but stated for the first time in her trial testimony that all of her prior statements were false: "Q. At what point between the last time we talked and today did you decide you were going to come in here and say that what you told in the past to me, people in the DA's office, Detective Brienza, DSS workers, that you were going to come in here and say that was all just a lie. A. Today."

[5] Because several of the trial court's conclusions of law are actually findings of fact, we have quoted those as well. *See State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

6. Malachi Golden died on May 11, 2015.

7. Malachi was discovered laying on the floor in a room that appeared more like a storage room than a child's bedroom with materials piled in the comers and along the walls.

8. Inside the room was a "Pack and Play" a portable playpen for infants.

9. Malachi Golden spent the majority of the time during the last five months of his life in the "Pack and Play."

10. At the time of death, Malachi Golden had a plastic appearance with sunken eyes, collarbones, protruding spine, protruding joints and protruding ribs.

11. At the time of death, Malachi Golden had very little body fat or muscle tissue.

12. At the time of death, Malachi Golden's internal organs were about half the average size for a four-year-old boy.

13. Dehydration caused the abnormal size of the internal organs.

14. The dehydration occurred over several weeks.

I5. The autopsy revealed that Malachi Golden was malnourished and dehydrated.

16. At the time of death, Malachi Golden weighed 19 pounds compared to the average weight of a [sic] 38-40 pounds for a four-year-old boy.

17. At the time of death, Malachi Golden's skin exhibited

"tenting" a sign of acute dehydration.[6]

18. At the time of death, Malachi Golden had a very wasted appearance.

19. At the time of death, Malachi Golden's skin also exhibited acute wrinkling in the armpit and hip joint areas which is a sign of severe malnutrition.

20. Malachi Golden suffered acute diaper rash with extensive inflammation on his buttocks and groin.

21. Some of the ulcers, or wounds, caused by the diaper rash were healing while others were open sores that exhibited bleeding.

22. Malachi Golden suffered from the acute diaper rash for an extended period without proper treatment.

23. Staying in soiled diapers for long periods of time caused the diaper rash.

24. Malachi Golden also suffered from bed sores on his legs and knees from his lying in the "Pack and Play" for extensive periods of time without being moved or given proper attention.

25. Doctors diagnosed Malachi Golden with a genetic disorder and seizure disorder shortly after birth.

26. The seizures consisted of Malachi Golden losing control of his body and dropping to the ground.

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[6] We note that the word "acute" has an ordinary meaning which is different from its medical definition. In the ordinary sense, acute means "very serious; critical; crucial." Webster's New World College Dictionary (5th ed. 2014). In the medical sense, acute means "severe but of short duration; not chronic: said of some diseases." *Id.* In the findings, the trial court was clearly using "acute" in the ordinary sense and not in the medical sense. The evidence showed the conditions described as "acute" in the findings were serious, but all of the medical evidence characterized them as both serious (in the ordinary sense) and chronic (in the medical sense).

27. Seizures would only last for a few seconds to a few minutes.

28. There was no danger that the seizures would cause death in and of themselves.

29. For Malachi Golden's safety, he wore a helmet to protect his head when he dropped to the ground during a seizure.

30. Malachi Golden did not wear the helmet when he was in his "Pack and Play."

31. Malachi Golden took the prescribed medication called Zonegram Zonisamide for his seizures.

32. Malachi Golden did well on medication and responded positively to therapy.

33. With medication and therapy, Malachi Golden began walking some and was feeding himself with supervision.

34. Malachi Golden's walking improved from a few feet to the length of the courtroom by the time the caregivers stopped allowing the child to have therapy in December of 2014.

35. The caregivers ceased Malachi Golden's medication, medical care and therapy sessions at, or near, December of 2014.

36. The caregivers ceased all medication, medical care, and therapy sessions without consulting Malachi Golden's physicians.

37. For the last few months of his life, Malachi Golden was cloistered from all adults except Tiffany Cheeks and Defendant.

38. During this period, Defendant became the primary caregiver for Malachi Golden and provided up to 80 percent of the child's care.

39. Defendant spent most of his time sleeping, watching movies or playing video games.

40. Defendant rarely fed Malachi Golden more than one time a day.

41. Neither Defendant nor Ms. Tiffany Cheeks ever took Malachi Golden to the doctor because of the weight loss.

42. Ms. Tiffany Cheeks was afraid that one day Defendant would hurt her.

43. Malachi Golden was a "chubby" child before October 2013.

44. In December of 20l4, Malachi Golden was hungry when he met with the therapist at the school.

45. In January of 20l5, the home therapist working with Malachi Golden's sibling commented to Ms. Tiffany Cheeks that the [sic] Malachi Golden appeared thin.

46. Ms. Tiffany Cheeks told the therapist that the doctor was taking care of it, when in fact Malachi had not seen a doctor for a long time.

47. Ms. Tiffany Cheeks canceled the sibling's appointments with the therapist shortly after the above conversation during the January 2015 visit.

48. The caregivers had transportation to get Malachi Golden to a doctor's office.

49. Both Defendant and Ms. Tiffany Cheeks recanted their interviews with the police where they admitted

wrongdoing regarding the care of Malachi Golden.

50. Defendant contradicted himself several times on the stand during his testimony during the trial.

Based upon the above FINDINGS OF FACT, the Court concludes as a MATTER OF LAW that:

1. Dehydration causes the reduced size of internal organs.

2. "Tenting" demonstrates acute dehydration.

3. Acute wrinkling in the armpit and hip joint areas demonstrates severe malnutrition.

4. Staying in soiled diapers for long periods of time causes the diaper rash.

5. Acute diaper rash without proper treatment over an extended period will cause ulcers or wounds.

6. Defendant was a person providing care and supervision for Malachi Golden.

7. Defendant committed a grossly wanton negligent omission with reckless disregard for the safety of Malachi Golden by:

   a. Allowing the child to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and

   b. Keeping the child in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees;

8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

9. To starve someone is to "kill with hunger."

10. A reasonably careful and prudent person could foresee that failing to provide for a child's nutritional needs would cause death.

11. By feeding Malachi Golden typically only once a day and watching the child waste away to skin and bones, the Defendant intentionally starved the four-year old boy.

12. Malachi Golden perished from the lack of food and life-sustaining liquids.

13. Defendant's starving Malachi Golden was the proximate cause of the child's death.

14. Defendant's failure to take any action to seek medical help, through any means possible, for Malachi Golden as the child wasted away from lack of nutrients needed for the maintenance of life was the commission of a homicide.

The trial court then entered a verdict based upon the findings of fact and conclusions of law as follows:

1. Negligent Child Abuse - Resulting in Serious Bodily Injury

GUILTY

2. Child Abuse - Inflicting Serious Bodily Injury

NOT GUILTY

3. First Degree Murder with Premeditation and Deliberation Where a Deadly Weapon is Used
NOT GUILTY

4. First Degree Murder Committed in Perpetration of a Felony

NOT GUILTY

5. First Degree Murder by Torture

NOT GUILTY

6. First Degree Murder by Starving

GUILTY

SECOND DEGREE MURDER IS MOOT

The trial court sentenced defendant to life imprisonment without parole for first degree murder and consolidated the negligent child abuse conviction into this sentence. Defendant gave notice of appeal in open court.

II. Trial Procedure

We begin by addressing the trial court's procedure in the case since no prior appellate case addresses the hybrid procedure used by the trial court. Because of this unusual procedure, the state makes various arguments regarding waiver of some issues and both parties make arguments based upon different standards of review for various issues, based upon either a bench trial or jury trial.

Defendant waived trial by jury and elected to have a bench trial under North Carolina General Statute § 15A-1201(b). In a criminal bench trial, the trial court is not required to set forth the law it will follow in the form of jury instructions or to

make detailed findings of fact and conclusions of law. The trial court may enter a general verdict, just as a jury would in a jury trial.

> Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise. We follow this presumption in many contexts. For example, in a jury trial, if the trial court allows the jury to hear inadmissible evidence, this may be reason for reversal and a new trial, if such errors were material and prejudicial. But in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise. We presume the trial court has followed "basic rules of procedure" in bench trials.

State v. Jones, ___ N.C. App. ___, ___, 816 S.E.2d 921, 924-25 (2018) (citations omitted).

In a *civil* bench trial, the trial court must make findings of fact and conclusions of law to support its ruling, as required by North Carolina General Statute § 1A-A, Rule 52. On appeal, the appellant must challenge specific findings of fact as unsupported by the evidence. N.C. R. App. P. 28(b)(6). Where a trial court makes findings of fact after a bench trial, appellate review is based upon those findings, and not upon potential findings the trial court could have made based upon the evidence but did not. But in a criminal jury trial, there is no requirement for findings of fact, just a general jury verdict, so a defendant who appeals may challenge the sufficiency of the evidence to support the jury's verdict; there are no findings of fact to consider

on appeal. On appeal in a criminal jury trial, we view the evidence in the light most favorable to the State and may draw any reasonable inferences based upon that evidence to determine if the evidence is sufficient to support the verdict. *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007).

Here, the trial court elected to follow a hybrid procedure by adopting "jury instructions" setting forth the law it would apply to the case, as required in a jury trial, but also made detailed findings of fact and conclusions of law supporting the verdict, as is typical in a *civil* bench trial. The trial court explained why it requested the parties to request jury instructions as they would in a jury trial:

> The reason I am asking for those patterned jury instructions. All I need is the substantive ones for the charges because, and please understand that having presided over bench trials for higher felonies before as well as discussing how to handle a bench trial with other superior court judges across the state that have also held them, it is our feeling that basically we operate the same as if there were 12 people in that box. Therefore, when it comes time for me to deliberate, we will actually have a conference over those three substantive charges. I will not go through the preliminary ones, the function of the jury and all that, but I do need the substantive charges, and that way we can all have a discussion so we know what the State has met on and what has not, and also, you all will know what I am deliberating with myself about.
>
> Also, throughout the trial, if we are moving from finder of fact to judge of law, I will place that on the record so the appellate courts will have the opportunity to know which role I was standing in when I was making certain comments.
>
> . . . .
>
> . . .We will actually have a conference just like we would if

> there was a jury here as to what the wording would be, and basically, it will be read or presented into the record as a document.[7]

During the conference regarding the jury instructions, the trial court also informed counsel it would not enter a general verdict as would be done by a jury, but instead the trial court would enter a detailed order with findings of fact, conclusions of law, and a verdict:

> THE COURT: . . .What you will find in the bench trial, the fact finder will produce a set of findings of fact and conclusions, and finally, its decision so that the appellate courts will know what facts it took. . . .
>
> MR. RATCHFORD: Your Honor, if I may, if I can go back to your statement. Is that going to be delineated on the verdict sheet?
>
> THE COURT: Well, there is not really a verdict sheet as such. There will be a judgment. In other words, each of the charges will be found to be either guilty or not guilty at the end of the judgment. It will have the equivalence of the verdict sheets, but it is going to be all in one document. You will have the findings of fact that I used and conclusions of law that I made and then my verdict.
>
> MR. RATCHFORD: So I am trying to think through this. As findings of fact as a trier of the fact, would that be delineated out such as the medicine or the lack of nutrition?
>
> THE COURT: Or strangulation or hitting on the head.

[7] Instead of reading the instructions into the record, the trial court included in the record Court's Exhibit 1, which is a copy of the jury instructions as modified by the trial court during the charge conference. Both parties agreed there was no need for the trial court to read the instructions aloud to itself in open court.

> MR. RATCHFORD: Thank you.
>
> THE COURT: The judgment part of it, instead of having like, for instance, you would normally have a verdict sheet for first degree murder and then it would have guilty not guilty. It will have first degree murder based on whatever the elements are and so forth that are found. That would also cover whether it is a B1 or B2 when I am finding in that. It will be stated out so that Court of Appeals knows which one I was considering based on the findings of fact.

After further discussion of the process and order, which would take the place of a verdict sheet, counsel for defendant stated:

> MR. RATCHFORD: I think what Ms. Hamlin and I are thinking, we are trying to still make this a jury trial. I think what your Honor is looking at doing basically negate[s] the necessity of a verdict sheet.
>
> THE COURT: I will be quite honest with you, having the record overloaded gives the Court of Appeals much more of an understanding of what we were doing here.
>
> MS. HAMLIN: I guess the one question -- and I am fine with whatever Mr. Ratchford -- if he wants to have these verdict sheets. Sometimes in other cases I have had we have submitted on say two, P & D, specific intent, and then felony murder say. When we submit those, there is situations where they find them guilty on both. Does that make sense? That's what I was wondering. When you go down you are going to do each?
>
> THE COURT: Anything I find the individual guilty of will be completely.

We appreciate the trial court's attention to detail and effort to provide this Court with a full understanding of the law applied and the facts it determined to be true. Charges of murder by starvation are rare; this is an unusual case, and the trial court handled it carefully. The additional procedural steps used by the trial court are fully within the trial court's discretion, but we note they are not required by the North Carolina Rules of Criminal Procedure or Chapter 15A, Article 73 of North Carolina's General Statutes.

III. Standard of Review

Here, because the trial court made detailed findings of fact, our manner of review of Defendant's challenge to sufficiency of the evidence differs somewhat from most criminal cases. We will review the trial court's order based upon the standards of review as set forth for findings of fact in criminal cases regarding motions to suppress and motions for a new trial, since we have been unable to find any cases addressing review of an order with findings of fact in a criminal bench trial.

> Findings of fact are binding and are conclusive on appeal when they are supported by competent evidence. The findings of fact must support and justify the conclusion of law.

State v. Saults, 299 N.C. 319, 322, 261 S.E.2d 839, 840-41 (1980) (citations omitted).

Although there may be evidence which would support different findings of fact, if the trial court's findings are supported by competent evidence, they are binding on appeal. *See State v. Williams*, 308 N.C. 47, 60, 301 S.E.2d 335, 344 (1983) ("[T]he

trial court's ruling will not be disturbed on appeal, notwithstanding the fact that there was evidence from which a different conclusion could have been reached." (citing *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966))). "The trial court's conclusions of law, however, are reviewable *de novo*." *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002)).

Defendant also challenges the sufficiency of the evidence to support the verdict, as is typical in a criminal jury trial. We review the trial court's ruling on the motion to dismiss for insufficiency of the evidence *de novo*:

> A trial court, on a motion to dismiss for insufficient evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." "Whether evidence presented constitutes substantial evidence is a question of law for the court" and is reviewed *de novo*. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." In reviewing the denial of a motion to dismiss for insufficiency of the evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal."

State v. Glisson, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127-28 (2017) (citations omitted).

IV. Sufficiency of the Evidence to Support Verdict of Murder by Starvation

A. Murder by Starving

1. Preservation of Issue

Defendant first argues the trial court erred by not granting his motion to dismiss based upon insufficient evidence he murdered Malachi by starvation. The State contends that Defendant failed to preserve this issue for review by his general motion to dismiss, noting that Defendant's motion to dismiss failed to identify the charge of murder by starvation.

Defendant made a general motion to dismiss at the close of the State's evidence, and the trial court denied the motion:

> MR. RATCHFORD: Your Honor, we would make a motion to dismiss, the standard of the State's evidence motion. We do not wish to be heard or argue further.
>
> THE COURT: When all of the evidence is taken in the light most favorable to the nonmoving party, the Court believes there is sufficient evidence to go forward and will deny the motion at this time.

Defendant renewed this motion at the close of all of the evidence, again with no additional argument.

The State is correct that if a Defendant makes a specific argument regarding the basis for dismissal of a particular charge before the trial court and then attempts to make a different argument for that particular charge on appeal, the Defendant has waived the new argument by his failure to present it to the trial court, based upon the theory that the defendant may not "swap horses" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996). But prior cases have held that where the

Defendant makes a general motion to dismiss, he has preserved his challenge to the sufficiency of the evidence to support all of the crimes charged.

> 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." Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides further that
>
> > in a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
> >
> > A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

> Our courts have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." This "swapping horses" argument historically has applied to circumstances in which the arguments on appeal were grounded on separate and distinct legal theories than those relied upon at the trial court, or when a sufficiency of the evidence challenge on appeal concerns a conviction different from a charge challenged before the trial court.

State v. Walker, ___ N.C. App. ___, ___, 798 S.E.2d 529, 530 (citations and brackets omitted), *review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017).

Here, Defendant did not swap horses on appeal; the horse he rode in the trial court was insufficiency of the evidence in general to support all of the charges, and he rides the same horse on appeal in his argument regarding the first degree murder conviction. This case is more akin to *State v. Glisson*:

> Defendant's motion to dismiss required the trial court to consider whether the evidence was sufficient to support each element of each charged offense. The trial court acknowledged Defendant's contention that the State "simply failed to offer sufficient evidence on each and every count as to justify these cases to survive a motion to dismiss." The trial court referred to the motion as "global" and "prophylactic," acknowledging on the record that Defendant's motion was broader than the single oral argument presented. In ruling on the motion to dismiss, the trial court stated that "the State has offered sufficient evidence on each and every element of all the surviving charges to justify these cases being advanced to the jury." Counsel's oral argument challenging a single aspect of the evidence does not preclude Defendant from arguing other insufficiencies in the evidence on appeal. So we will address the merits of Defendant's argument challenging

> the sufficiency of the evidence to support the conspiracy charge.

___ N.C. App. at ___, 796 S.E.2d at 127 (citation omitted). We will therefore consider Defendant's challenge to sufficiency of the evidence.

2. Definition of "Starving" Under North Carolina General Statute § 14-17(a)

Defendant's specific argument on appeal regarding insufficiency of the evidence is that the evidence cannot support a conviction of first degree murder by starvation. Defendant notes correctly that in North Carolina "there are no cases upholding convictions for first-degree murder by starving under [North Carolina General Statute § 14-17(a)]." But there is also no case in North Carolina *reversing* a conviction for first degree murder by starvation; this is a case of first impression. Indeed, there are very few cases of first degree murder by starvation reported in the United States.

Defendant was charged and convicted of murder by starving under North Carolina General Statute § 14-17(a):

> A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, *starving*, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any

> person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 14-17(a) (2017) (emphasis added).

At trial, at the end of the day on 30 October 2017, the trial court discussed the definition of starvation with counsel during its charge conference and invited counsel to research the issue overnight to propose guidance on the proper definition. The next morning, the trial court noted the results of its research on the issue, which was included in the record as part of Court's Exhibit 1 as the definitions of starvation from a variety of sources, as follows:

> Starvation is the result of a severe or total lack of nutrients needed for the maintenance of life. https://medicaldictionary.thefreedictionary.com/starvation
>
> To starve someone is to "kill with hunger;" to be starved is to "perish from lack of food." Starving: Medical Definition, Merriam-Webster Dictionary, http://www.merriam-webster.com/medical/starving (last visited Apr. 16,2012).
>
> COMMENT: KinderLARDen Cop: Why States Must Stop Policing Parents of Obese Children. 42 Seton Hall L. Rev. 1783. 1801
>
> To starve someone is the act of withholding of food, fluid, nutrition, Rodriguez v. State, 454 S.W.3d 503, 505 (Tex. Crim. App. 2014)
>
> Starving can result from not only the deprivation of food,

> but also liquids. Deprivation of life-sustaining liquids amounts to starvation under the statute. A specific intent to kill is . . . irrelevant when the homicide is perpetrated by means starving, or torture. State v. Evangelista, 319 N.C. 152 (1987)
>
> When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself.
>
> State v. Dunheen, 224 N.C. 738,739, 32 S.E.2d 322, 323 (1944)

(Alteration in original). After the trial court provided the definitions above, counsel for defendant noted that his research "found almost the exact same thing." The trial court then stated it would rely upon *State v. Evangelista* and the definitions listed above as the definition of starvation in its deliberations. Defendant had no objection or proposed modification to this definition to include a *complete* deprivation of food and liquids.

As the trial court noted, the statute does not define "starving," but in *State v. Evangelista*, our Supreme Court in dicta noted that the evidence in that case would have supported a theory of murder by starvation. 319 N.C. 152, 158, 353 S.E.2d 375, 380 (1987). In *Evangelista*, the trial court "[f]rom an abundance of caution" submitted the charge of first degree murder of an 8 month old baby to the jury based on the "theory of 'murder perpetrated by any other kind of willful, deliberate and premeditated killing'" instead of the theory of starving. *Id.* In *Evangelista*, the

baggage master on an Amtrak train saw bullet holes in the door of a compartment and heard loud voices inside. *Id.* at 155, 353 S.E.2d at 378. Others on the train heard sounds of a crying baby, breaking glass, screaming, and gunshots in the compartment. *Id.* They called the police, who determined that the occupants of the compartment were the defendant, his sister, and her two children, ages 8 months and 3 years. *Id.* at 155, 353 S.E.2d at 378-79. The car was separated from the rest of the train and thus was cut off from access to a water supply. *Id.* at 155, 353 S.E.2d at 379. For three days, defendant remained barricaded in the car while police tried to negotiate with him. *Id.* The negotiators repeatedly asked the defendant to come out or at least to release the children. *Id.* at 156, 353 S.E.2d at 379. They offered food and liquids for him and the children, but he refused. *Id.* They also warned him regarding the safety of the children and that they could not survive without food and water. *Id.* Ultimately, when police entered the train car, they found the woman deceased from a gunshot wound and the 8 month old baby deceased from dehydration. *Id.*

The Supreme Court upheld the defendant's conviction for murder of the baby based upon "willful, deliberate and premeditated killing, but noted that the evidence would have supported murder by starvation as well":

> We note that the evidence in the present case would have supported conviction of the defendant for the first degree murder of the infant on the theory of murder perpetrated by means of starvation, specifically declared to

> be first degree murder by the statute. The evidence tended to show that the defendant deprived the infant male of liquids and thereby caused his death. Liquids are necessary in the nourishment of the human body, especially as here in the case of an infant. Therefore, deprivation of life-sustaining liquids amounts to starvation under the statute. If the trial court had submitted the case to the jury on the theory of starvation, it would not have been necessary that the State prove a specific intent to kill. As we said in *State v. Johnson*, "a specific intent to kill is . . . irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture. . . ."

Id. at 158, 353 S.E.2d at 380 (alterations in original).

Although the statute does not define murder by starving, *Evangelista* provides a definition of starving: death from the deprivation of liquids or food "necessary in the nourishment of the human body" may amount to starvation under North Carolina General Statute § 14-17(a). *See id.*

Defendant argues that "a homicide resulting from the failure to provide sufficient food, as opposed to the *complete denial* of food, will not *ipso facto* constitute murder by 'starving' as the term is used in N.C.G.S. 14-17." (First emphasis added.) Defendant derives this argument from two cases upholding convictions of involuntary manslaughter of children who died from malnutrition or starvation, *State v. Fritsch*, 351 N.C. 373, 526 S.E.2d 451 (2000), and *State v. Mason*, 18 N.C. App. 433, 197 S.E.2d 79 (1973). Defendant notes that "unlike *Evangelista*, there is no suggestion in *Mason* or *Fritsch* that the evidence in those cases would have supported a conviction for first-

degree murder by starvation." This is correct, but the absence of dicta regarding first degree murder by starvation in *Mason* and *Fritsch* is not helpful to our analysis. In *Evangelista*, the defendant was charged with first degree murder under several theories, including starving, but the trial court elected not to submit that theory to the jury, so our Supreme Court noted that the evidence would have supported this theory in addition to those considered by the jury. 319 N.C. at 158, 353 S.E.2d at 380. In *Fritsch*, the defendant was not charged with murder. 351 N.C. at 374, 526 S.E.2d at 452. The defendant in *Fritsch* was charged with felonious child abuse and involuntary manslaughter and convicted of non-felonious child abuse and involuntary manslaughter. *Id.* The defendants in *Mason* were charged with murder but the trial court reduced the charge to involuntary manslaughter at the close of the State's evidence, and the defendants were convicted of involuntary manslaughter. 18 N.C. App. 433, 197 S.E.2d 79. In each case, there was evidence of other abuse or neglect of the child beyond deprivation of food and water, but the situations are all different. The defendants in each case were charged with the crimes the prosecutor in his or her discretion elected to pursue and the juries considered the theories the trial court determined were supported by the evidence in that particular case. As the State argues,

> By defendant's absurd logic, anyone who claims—or can definitely prove—they fed their child some amount of food or water cannot be guilty of murder. If that were so, short deaths (with arguably less suffering) would be

> murder. Protracted deaths—a child intentionally, cruelly, but slowly, starved to death—only manslaughter. A defendant who fed his victim one tablespoon of food a day, or three teaspoons thrice a day—three square meals—could not be guilty of murder.

We have been unable to find any support in the law for Defendant's argument that murder by starvation requires the complete denial of all food or water (or both) for a certain period of time. We also note that Defendant did not present this proposed definition of starvation to the trial court and had no objection to the definition of starvation announced by the trial court. Murder by starving requires the willful deprivation of sufficient food or hydration to sustain life. The deprivation need not be absolute and continuous for a particular time period. As the *Evangelista* court noted, a baby or small child would likely not be able to survive as long as a healthy adult, so the duration of starvation needed to cause death will vary, but if the deprivation is so severe as to cause death, it may be the basis for murder by starving. *See Evangelista*, 319 N.C. at 158-59, 353 S.E.2d 375, 380-81.

We again note the unusual posture of this appeal, as a criminal bench trial where the trial court made specific findings of fact instead of simply giving its verdict. Since the trial court made findings of fact, Defendant must challenge the sufficiency of the evidence to support those findings on appeal. *See State v. Durham*, 74 N.C. App. 121, 123, 327 S.E.2d 312, 314 (1985) ("Failure to except to individual findings waives any challenge to the sufficiency of the evidence to support them." (citing *State*

v. Ford, 70 N.C. App. 244, 318 S.E.2d 914 (1984))). Defendant did not challenge on appeal the sufficiency of the evidence to support any of the trial court's specific findings of fact regarding Malachi's physical condition as quoted above. We therefore consider those findings conclusive on appeal.[8] *Id.* Based upon the evidence and the trial court's findings, the State met its burden of proving that for an extended period, two months or more, Defendant denied Malachi of sufficient food and hydration to survive. According to the findings, Malachi was "chubby" before October 2013. In December of 2014, a therapist noticed he was hungry, and by January 2015, a therapist noticed he was very thin. Shortly thereafter, Defendant and Ms. Golden stopped allowing therapists in the home, and Malachi was "cloistered" in the home until his death. That fact that Malachi was wasting away would have been obvious to Defendant, and Defendant was by his own testimony Malachi's primary caretaker for the last months of his life. But he took no action to seek medical assistance or to provide more sustenance to him. As the trial court accurately stated to Defendant at the close of the trial, "the photographs of Malachi Golden speak more volumes than any words ever could. There is no way that you did not starve that child to death." This argument is overruled.

3. Legal Duty to Feed

[8] Even if Defendant's argument could be construed as a challenge to specific findings of fact, we have reviewed the record, and the trial court's findings are fully supported by the evidence.

Defendant argues that "[t]here was no evidence, and the trial court did not find, that [Defendant] was under a legal duty to feed Malachi." Defendant again seeks to rely upon *Fritsch* and *Mason* to support this argument as to a "legal duty," noting that the defendants in those cases "were natural parents of the decedents, so this element was not in question and those cases do not elaborate further on the requirement." Beyond this, Defendant cites various cases from other states. We also note that the Defendant did not request that the trial court consider a legal duty to feed as part of the jury instructions. The State cites cases from other states holding otherwise, but none of these cases address first degree murder under a statute comparable to North Carolina General Statute § 14-17.

We first note that the trial court made several findings and conclusions which would support a legal duty to feed Malachi, including Defendant's position as a "caregiver" for Malachi providing about 80% of his care in the months immediately preceding his death.[9] But based upon North Carolina General Statute § 14-17 and *Evangelista*, we can find no support for the necessity of a separate element of a "legal duty to feed" for murder by starving. In *Evangelista*, the defendant was an uncle of the deceased child, but his familial relationship was irrelevant. 319 N.C. at 155, 353 S.E.2d at 379. There is no indication in *Evangelista* he was ever a "caregiver" for his

[9] In fact, being a caregiver for the child is one of the elements of negligent child abuse under North Carolina General Statute § 14-318.4(a4), and the trial court found defendant guilty of this charge as well.

sister's child. *See id.* The relevant fact was that he barricaded himself into a train car with the child and would not accept offers of food and water from the police. *Id.* The *Evangelista* defendant had no "legal duty" to feed his sister's child before he barricaded them into the train car, but then he placed the child in circumstances where he was entirely dependent upon defendant for food and water and the defendant intentionally failed to provide food and water to the child. If Defendant's argument there must be a "legal duty" to feed to support a conviction of murder by starvation were correct, then a defendant who shuts his victim into a locked room with no food or water and no means to escape must first have an independent "legal duty" to provide food to the victim before he could be convicted of murder by starving. This is not the law. As a four-year old child with developmental delays, Malachi depended entirely upon Defendant and his mother for all of his needs, including food and water, and, by their own testimony, both were fully aware of his dependency upon them. No further "legal duty" is necessary. This argument is overruled.

4. Malice

Defendant next argues that "the trial court's findings are insufficient to support the verdict because malice is an essential element of murder by starving, but the trial court did not determine that defendant acted with malice." The State argues that no separate finding of malice is required for first degree murder under North Carolina General Statute § 14-17.

Defendant seeks to derive from *Mason*, *Fritsch,* and 61 A.L.R.3d 1207 the proposition that "[a]bsent a showing of malice, the failure of a parent to meet the legal obligation to provide a child sufficient food would have been manslaughter, not murder, at common law." But our Supreme Court has clearly held that no separate showing of malice is required for first degree murder by the means set forth under North Carolina General Statute § 14-17:

> This Court has previously concluded that N.C.G.S. § 14-17 "separates first-degree murder into four distinct classes as determined by the proof: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; (2) murder perpetuated by any other kind of willful, deliberate, and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon." "Any murder committed by means of poison is automatically first-degree murder." As this Court has previously stated, "premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods."
>
> "Malice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life." This Court has already stated that murder by torture, which is in the same class as murder by poison, "is a dangerous activity of such reckless disregard for human life that, like felony murder,

> malice is implied by the law. The commission of torture implies the requisite malice, and a separate showing of malice is not necessary." We hold that the same reasoning applies for the crime of first-degree murder by poison and conclude that a separate showing of malice is not necessary. Thus, this assignment of error is overruled.

State v. Smith, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000) (citations, brackets, and ellipsis omitted).

Just as with poisoning or torture, murder by starving "implies the requisite malice, and a separate showing of malice is not necessary." *Id.* Malice is not a separate element of murder by starving under North Carolina General Statute § 14-17, so the trial court did not err by not making a finding or conclusion as to malice. This argument is overruled.[10]

B. Causation of Death

Defendant argues there was "no evidence that Malachi's death was caused by starvation." Defendant bases this argument upon evidence he argues could indicate that other factors contributed to Malachi's death, including his genetic abnormalities, seizures, and abuse by Defendant. Defendant also argues that Dr. Jonathan Privette, medical examiner and forensic pathologist with the Mecklenburg County Examiner's Office, "*unequivocally testified* that the cause of Malachi's death was asphyxia due to strangulation," not starvation. (Emphasis added.) But Defendant's argument

[10] Defendant also argues that "the trial court committed plain error by failing to instruct itself that malice is an element of murder by starvation." Since we have determined that malice is not an element of murder by starvation, we need not address this argument.

ignores much of Dr. Privette's testimony and particularly the fact that Dr. Privette's opinion regarding strangulation was based *solely* upon Defendant's statement to Detective Brienza he had strangled Malachi. Dr. Privette first determined that starvation and dehydration caused Malachi's death and considered strangulation as a potential cause based only upon Defendant's statement to Detective Brienza, months after Malachi's death, that he had choked Malachi.

Dr. Privette testified at length regarding the autopsy and his determination that Malachi had died from malnutrition and dehydration. He described Malachi's autopsy and the physical findings including his weight, the unusually small size of his internal organs, his wasted appearance, his loose skin, and the severe dermatitis in his diaper area. He also testified regarding various laboratory findings, such as isonatremic dehydration. He explained that isonatremic dehydration means that the sodium level in Malachi's body was essentially normal but he was severely dehydrated. With a sudden, acute dehydration, the sodium level would go up, but with chronic dehydration, over an extended period of time, the kidneys try to adapt to the reduced intake of liquid and adjust the sodium level so it does not get too high. Thus, Malachi was chronically dehydrated, over a period of time of "more than a few days" and "probably weeks."[11] Dr. Privette could not determine exactly when Malachi

[11] Defendant argues that "chronic" malnutrition and dehydration, as opposed to an "acute" condition, does not support death by starvation. This interpretation of the evidence is not supported by Dr. Privette's testimony. He explained the difference: "When a person gets acutely dehydrated we can see

had died, but based upon his condition, he believed "he died one to two days" before 12 May 2015, when he performed the autopsy.

Besides his findings regarding dehydration and malnourishment, Dr. Privette found a bruise on the top of Malachi's head; a fresh subgaleal hemorrhage on his left forehead,[12] and pressure ulcers on his knees. Dr. Privette also examined Malachi's prior medical records up to 2013 and spoke to some physicians who had treated him and learned that he had a chromosomal disorder which may have caused the seizure disorder.[13] Dr. Privette's initial impression after the autopsy and review of medical records was that Malachi died from malnutrition and dehydration. He had concerns regarding the genetic abnormality but determined that the particular abnormality Malachi had did not account for his presentation. Although his autopsy report noted the genetic abnormality, the defect did not directly contribute to his death.[14] He noted that if the genetic defect "prevented him from being able to get up and feed himself

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acute dehydration if only dehydrated for a few days. If someone has a GI infection and vomiting and diarrhea and this is going on for a couple days and gets dehydrated, you can see affects [sic] of acute dehydration or presentation of acute dehydration. Chronic dehydration is you are talking more than a few days, this is probably weeks."

[12] The subgaleal hemorrhage was through the full thickness of the scalp, and this would take more force to generate bleeding to this level than the bruise on the top of his head. Dr. Privette testified this hemorrhage was consistent with being struck on the head.

[13] Dr. Privette was unable to review more recent medical records because Mrs. Cheeks stopped taking Malachi to his physicians.

[14] Dr. Robinett, Malachi's pediatric neurologist, testified that it would be "unusual, highly unusual" for seizures of the type Malachi suffered to cause death.

and go get water, which you would expect a normal four-year old to be able to do," then the underlying genetic abnormality could have contributed to his death because he had to rely solely upon his caregivers to provide food and water.

Dr. Privette testified that the contents of Malachi's stomach was approximately 100 milliliters of "clear fluid" with ""fragments of semi-solid white material consistent with dairy product." Defendant testified that he fed Malachi repeatedly on the day of his death, but Dr. Privette's autopsy did not find indications of the food Defendant testified he had given Malachi on the day of his death.

After the autopsy, as part of his investigation as to the cause of death, Dr. Privette later reviewed statements from defendant and Ms. Cheeks regarding Malachi's death. Portions of their statements were generally consistent with the physical findings. Defendant had stated that he had hit Malachi on the head at least twice, which was consistent with the two head injuries found during the autopsy. Defendant had also told police he would put his hands around Malachi's neck to make him be quiet, and that he had done this repeatedly. Defendant also said that he had put pressure on Malachi's neck and watched him take his last breath. Dr. Privette noted that it would take very little pressure to cut off the blood flow to Malachi's brain, given his extremely weak state, so he would not expect necessarily to see any signs of bruising or injury to Malachi's neck. Even pressure by two fingers on his neck, for a very brief time, could result in death due to his debilitated state, while a

healthy person, if the pressure is released, the person should "come around and be okay." Ultimately, Dr. Privette testified that the causes of Malachi's death were "inflicted pressure on the carotid arteries or basically asphyxia"—based only upon Defendant's claims in his third interview—and that "the malnourished state would have contributed to his death."

Although Dr. Privette's initial autopsy report identified "malnutrition/dehydration" as the immediate cause of Malachi's death, he amended his report to include "strangulation" as the cause of death after reading the interview transcripts from Ms. Cheeks and Defendant. If Dr. Privette had any reason to suspect strangulation at the time of the autopsy, such as bruising, he would have done and "in situ neck dissection" to try to find additional evidence of strangulation. But he saw no signs of strangulation during the autopsy and had no reason to do further investigation.[15] He testified the amendment to the autopsy report was based "solely" upon defendant's and Mrs. Cheeks's statements that defendant had strangled Malachi. He also agreed that "[i]f those statements were deemed to be faulty or not the truth," there was "no objective scientific evidence to suggest strangulation." Thus, his opinion of strangulation as a contributing factor to Malachi's death was based

[15] Although Defendant and Mrs. Cheeks both gave statements to the police immediately after Malachi's death, neither mentioned any abuse or possible strangulation until their later interviews, months after Malachi's death.

solely on the later statements of Defendant and Mrs. Cheeks and he found "no positive physical findings" of strangulation.

As the trier of fact, the trial court did not have to believe Defendant's statement to Detective Brienza he strangled Malachi, and this was the *only* basis for Dr. Privette's testimony that Malachi may have been strangled. Both Defendant and Mrs. Cheek gave several different versions of what happened to Malachi. Some of these statements, such as Defendant's claim of drowning Malachi, were refuted by the autopsy. Defendant's trial testimony of repeatedly feeding Malachi, changing his diaper, and bathing him on the day of his death is patently incredible, given the condition of Malachi's body when EMS arrived and the autopsy results. The trial court found it did not find either Defendant or Mrs. Cheeks credible, noting that both had "recanted their interviews with the police where they admitted wrongdoing regarding the care of Malachi Golden" and that "Defendant contradicted himself several times on the stand during his testimony during the trial." In fact, the trial court's finding that Defendant "contradicted himself several times" minimizes the extreme variations in Defendant's several conflicting statements to police and his entirely different trial testimony.

Given the abundant evidence that Malachi died from starvation, Dr. Privette's testimony that Malachi could have died from strangulation as described by Defendant in his interview with police—which Defendant and Mrs. Cheeks both recanted at

trial—does not negate his initial opinion that Malachi died from starvation. The trial court specifically found that Defendant's statements to police about choking Malachi were not true, and Defendant himself testified at trial they were not true.[16] The trial court determined, quite correctly, that all of the credible evidence supported starvation as the cause of Malachi's death. This argument is without merit.

V. Fatal Variance as to Negligent Child Abuse

Defendant last argues that the trial court erred by returning a verdict finding Defendant guilty of negligent child abuse based on a theory not alleged in the indictment. The indictment alleged that from 1 January 2014 to 11 May 2015, in violation of North Carolina General Statute § 14-318.4(a4), Defendant

> unlawfully, willfully and feloniously did show reckless disregard for human life by committing a grossly negligent omission, allowing the child, Malachi Golden, age 4 years old, and thus, under 16 years of age, by not providing the child with medical treatment in over 1 year, despite the child having a disability, and further, not providing the child with proper nutrition and medicine resulting in weight loss and failure to thrive. The defendant's omission resulted in serious bodily injury, to wit, extreme malnutrition and severe dehydration. At the time the defendant committed the offense, he was a person providing care or supervision of the child.

[16] If the trial court had deemed Defendant's claim of strangulation to be true, Defendant could have been convicted of child abuse inflicting serious injury (which was based upon inflicting "serious bodily injury, by placing his hands around Malachi Golden's throat restricting air and blood flow resulting in Malachi Golden's death"), and first degree murder based upon premeditation and deliberation where a deadly weapon (hands) is used and/or first degree murder in perpetration of a felony. But based upon its determination that Defendant's statement regarding strangulation was false, the trial court found Defendant not guilty of these charges.

Defendant argues

> that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984). If it is error for the judge to allow the jury to convict on a theory not charged in the indictment, it necessarily follows that it must be error for the judge to do so himself in a bench trial.

The State argues that Defendant failed to preserve his argument regarding fatal variance between the indictment and evidence presented at trial by raising it before the trial court. *See State v. Nickens*, ___ N.C. App. ___, ___, 821 S.E.2d 864, 874 (2018) ("This Court repeatedly has held a defendant must preserve the right to appeal a fatal variance. If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue." (citations and brackets omitted)). The State also argues that "the trial court's numerous detailed findings and conclusions—what defendant essentially challenges as a special verdict—are immaterial. [Defendant] points to nothing to suggest that they were necessary in the first place let alone that review would be so constricted."

We also agree with the State that the "detailed findings and conclusions" were unnecessary, but since the trial court made the findings, we cannot ignore them and they are not "immaterial." Again, this is a case of first impression as a criminal bench trial which utilized "jury instructions" and includes an order with detailed findings. Typically, in a bench trial, we can rely upon the assumption that the trial court has

properly applied the law unless the record demonstrates otherwise. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court."). But here, the trial court entered an order and made a conclusion regarding negligent child abuse:

> 7. Defendant committed a grossly wanton negligent omission with reckless disregard for the safety of Malachi Golden by:
>
> a. Allowing the child to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and
>
> b. Keeping the child in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees;
>
> 8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

Defendant argues we should view this conclusion of law in isolation, but we must review the entire order and must consider all of the findings of fact which support this conclusion in context. The trial court also made these findings of fact relevant to this issue:

> 20. Malachi Golden suffered acute diaper rash with extensive inflammation on his buttocks and groin.
>
> 21. Some of the ulcers, or wounds, caused by the diaper rash were healing while others were open sores that exhibited bleeding.

> 22. Malachi Golden suffered from the acute diaper rash for an extended period without proper treatment.
>
> 23. Staying in soiled diapers for long periods of time caused the diaper rash.
>
> 24. Malachi Golden also suffered from bed sores on his legs and knees from his lying in the "Pack and Play" for extensive periods of time without being moved or given proper attention.
>
> . . . .
>
> 35. The caregivers ceased Malachi Golden's medication, medical care and therapy sessions at, or near, December of 2014.
>
> 36. The caregivers ceased all medication, medical care, and therapy sessions without consulting Malachi Golden's physicians.

Again, the parties' arguments regarding this issue and our review are complicated by the unusual procedure in this case, as bench trials normally do not include "jury instructions" or findings of fact. But we review the issue of a fatal variance *de novo*, so we will turn to the law first to determine if there was a fatal variance. *See State v. Martinez*, 230 N.C. App. 361, 364, 749 S.E.2d 512, 514 (2013). A fatal variance arises when the allegations of the indictment do not conform to material aspects of the jury instructions, or, in this case, the law as the trial court stated it would apply through its "jury instructions" to itself. *See State v. Glidewell*, ___ N.C. App. ___, ___, 804 S.E.2d 228, 232 (2017). The variance must involve an

essential element of the crime charged, and the defendant must demonstrate prejudice as a result of the variance:

> When allegations asserted in an indictment fail to "conform to the equivalent material aspects of the jury charge," our Supreme Court has held that a fatal variance is created, and "the indictment is insufficient to support that resulting conviction." Furthermore, for "a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring "that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from another prosecution for the same incident." However, "a variance does not require reversal unless the defendant is prejudiced as a result."

Id. at ___, 804 S.E.2d at 232 (citations, brackets, and ellipsis omitted).

We have found no cases addressing whether the allegations of the particular acts or exact harm caused by the negligent child abuse under North Carolina General Statute § 14-318(a4) are "essential elements" which must be included in the indictment or surplusage. But this Court has addressed this issue under North Carolina General Statute § 14-318(a3), and we see no reason for these two subsections of this statute to be treated differently. In *State v. Qualls*, this Court held that the allegation of the particular injury in the indictment for felonious child abuse under North Carolina General Statute § 14-318(a3) was surplusage and not grounds for a fatal variance. 130 N.C. App. 1, 502 S.E.2d 31 (1998) (citation omitted), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). In *Qualls*, the indictment alleged defendant had

inflicted serious physical injury on 15 March 1993 by: "blunt trauma to the head resulting in a subdural hematoma to the brain," but the evidence at trial showed that the "victim suffered an epidural hematoma on 15 March 1993 and a subdural hematoma on or about 26 March 1993." *Id.* at 7, 502 S.E.2d at 36 (brackets and emphasis omitted). This Court held there was no fatal variance:

> All that is required to indict a defendant for felonious child abuse is an allegation that the defendant was the parent or guardian of the victim, a child under the age of 16, and that the defendant intentionally inflicted any serious injury upon the child. Here, the indictment appropriately charged the elements of that crime; therefore, the reference to the victim suffering a subdural hematoma rather than an epidural hematoma was surplusage and was properly disregarded by the trial court. As such, the trial court did not err by denying defendant's motion to dismiss on that basis.

Id. at 8, 502 S.E.2d at 36 (citation and emphasis omitted).

North Carolina General Statute § 14-318(a4) provides as follows:

> A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

N.C. Gen. Stat. § 14-318.4(a4) (2017). Thus, the essential elements of an indictment for negligent child abuse inflicting serious bodily injury are: (1) the defendant was "a parent or any other person providing care to or supervision"; (2) "of a child less than 16 years of age"; (3) the defendant commits a "willful act or grossly negligent omission

in the care of the child"; (4) showing "a reckless disregard for human life;" and, (5) "the act or omission results in serious bodily injury to the child[.]" *Id.*

The indictment here includes each of these elements, and the additional statements regarding failure to provide medical care, failure to provide nutrition and hydration, extreme malnutrition, and severe dehydration are surplusage. The allegations are "beyond the essential elements of the crime sought to be charged[, and they] are irrelevant and may be treated as surplusage." *State v. Lark*, 198 N.C. App. 82, 90, 678 S.E.2d 693, 699-700 (2009) (quoting *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)).

We also note that a defendant must show prejudice arising from an alleged fatal variance. Defendant here failed to make any argument he was unable to prepare his defense or of any prejudice whatsoever from this alleged fatal variance Further, the evidence showed that Malachi needed medical care for many reasons, but the trial court's findings and conclusions regarding Malachi's acute diaper rash and bed sores are consistent with the scope of the evidence as discussed in the charge conference regarding the jury instruction on negligent child abuse. The State noted that it was "talking about a variety of things. It includes not providing the child with medical treatment in over one year despite having a disability, not providing the child with proper nutrition, medicine resulting in weight loss and failure to thrive. So basically, includes nutrition aspect of it, the medicine, and the medical treatment."

Defendant had no objection to the "jury instruction" as to negligent child abuse as encompassing "a variety of things" including failure to provide medical treatment.

As found by the trial court and as supported by the testimony of several witnesses, this was not a case of garden variety diaper rash. The extreme diaper rash and pressure sores were serious and painful conditions requiring medical treatment, but Defendant and Mrs. Cheeks failed to obtain any medical treatment for these conditions. Mrs. Cheeks testified that they failed to provide Malachi with *any* medical treatment whatsoever after 31 October, 2013, the day before she and Defendant got married. She testified that he never again saw his pediatric neurologist, got a wellness check, got an immunization, or went to a pediatrician after this date, although she did regularly take her other two children to the doctor. This argument is overruled.

VI. Conclusion

The evidence was sufficient to support first degree murder by starving and negligent child abuse, so the trial court properly denied Defendant's motion to dismiss. There was no fatal variance between the evidence presented and the indictment for negligent child abuse because the additional allegations of the indictment were surplusage, not necessary for the indictment, and Defendant failed to argue any prejudice from the alleged variance. The trial court's findings of fact

support its conclusions of law regarding both first degree murder by starving and negligent child abuse. Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges BRYANT and COLLINS concur.