An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-845

Filed: 4 August 2020

Mecklenburg County, No. 18 JA 568-70

IN THE MATTER OF: D.R., C.R., J.R.

Appeal by respondents from order entered 7 June 2019 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 9 June 2020.

Senior Associate County Attorney Kathleen Arundell Jackson for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Mary McCullers Reece for respondent-appellant mother.

Benjamin J. Kull for respondent-appellant father.

Fox Rothschild LLP, by Zachary T. Dawson, for guardian ad litem.

TYSON, Judge.

Respondents appeal from an order adjudicating D.R. (“Dylan”), C.R. (“Cade”), and J.R. (“Jack”) as neglected children, and Dylan and Cade as dependent children. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). We vacate in part, affirm in part, and remand.

I. Background

Respondent-mother has four minor children: Dylan, Cade, Jack, and a daughter, who is not a subject of this action. Respondent-father is the biological father of Jack, but not of the other children. Dylan was twelve years old, Cade was four years old, and Jack was almost one year old in the fall of 2018.

On 17 February 2018, Respondent-mother obtained an *ex parte* domestic violence protective order ("DVPO") against Respondent-father. Respondent-mother's DVPO was dismissed on 27 February 2018 for failure to prosecute.

On 24 September 2018, Respondents argued at her mother's home. They continued to argue in the vehicle after they left to pick up Respondent-mother's daughter. Respondent-mother's three sons were passengers in the vehicle. Respondent-mother pulled the car over onto the side of the road during this argument, at which point Respondent-father grabbed her car keys and threw them into an adjacent field. Respondent-father walked away with Jack. Respondent-mother found the keys and drove off with Dylan and Cade.

Respondent-father later called Respondent-mother and asked her to pick him and Jack up, which she did. Respondents resumed arguing as they arrived at a Comfort Suites hotel in Charlotte with the four children in the car. Respondent-father took Jack and approached the hotel while "yelling and cussing" at Respondent-mother. Respondent-mother kept the other children near her and the car.

Respondent-father grabbed Respondent-mother and began hitting her. Dylan tried to break up Respondents' fight. Witnesses staying at the hotel saw the altercation and called the police. Huntersville Police Officers responded and observed Respondent-mother and the children inside her car. Several bystanders informed the officers that Respondent-father had fled. Respondent-father was located, arrested, and charged with assault on a female, assault by strangulation, assault and battery, and disorderly conduct.

Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") became involved with the family after this incident. Respondent-mother's daughter was temporarily placed into the sole legal and physical custody of her father on 8 November 2018. Respondent-mother obtained an *ex parte* DVPO against Respondent-father on 19 November 2018.

Marie Zeigler, a social worker with YFS, visited Respondent-mother at her home on 20 November 2018. Respondent-father did not live with Respondent-mother and her children. Respondent-mother told Zeigler she and Respondent-father were "having relationship issues" and denied any domestic violence had occurred. Another home visit was scheduled for the following week.

Respondent-mother called social worker Zeigler on 27 November 2018 to inform her Jack had been admitted to the hospital and she had to cancel the scheduled home visit. Respondent-mother called Respondent-father to inform him of

Jack's hospitalization. Respondent-father came to the hospital and another argument ensued between the Respondents in Jack's hospital room. Respondent-father was escorted by security officers from the hospital. Respondent-mother's DVPO hearing against Respondent-father was continued until 11 December 2018 due to her child's illness.

Respondent-father failed to attend his scheduled family team meeting on 5 December 2018. Respondent-mother attended hers and agreed to voluntarily place the children into her parents' care. The maternal grandparents volunteered to move into Respondent-mother's home with the children and agreed to contact law enforcement officers if Respondent-father violated the DVPO.

Respondent-father came to Respondent-mother's home on 10 December 2018. The maternal grandmother tried to call the police, but Respondent-mother hung up the phone. The hearing on Respondent-mother's DVPO was canceled due to inclement weather and continued until 19 December 2018.

YFS filed a juvenile petition on 12 December 2018, alleging that Dylan, Cade, and Jack were neglected and dependent children. Respondent-mother's DVPO against Respondent-father was dismissed without prejudice after she failed to appear on 19 December 2018 and for lack of service on Respondent-father. After a mediation hearing with YFS on 17 January 2019, Respondent-mother signed a mediated family services agreement with a stated goal of reunification with her children.

At an adjudication and disposition hearing on 26 March 2019, the trial court adjudicated all three juveniles as neglected, based upon "a history of domestic violence between" Respondents causing an "injurious environment in which they lived." The trial court also adjudicated Dylan and Cade as dependent. The trial court entered its adjudication and disposition order on 7 June 2019. Respondents each timely filed notices of appeal.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(3) (2019).

III. Issues

Respondent-mother asserts the trial court erred in determining Dylan and Cade were dependent. Respondent-mother also asserts the trial court erred by entering an order adopting the mediated family service agreement in total, where the provisions relating to income and housing did not address reasons for the children's removal.

Respondent-father asserts the trial court erred in determining Jack was neglected. Respondent-father also asserts the trial court erred by failing to make required findings of fact to support the conclusion that returning the children to their own home would be contrary to their health and safety.

IV. Standards of Review

> Allegations of neglect [and dependency] must be proven by clear and convincing evidence. In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. If competent evidence supports the findings, they are binding on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

In re M.K., 241 N.C. App. 467, 470, 773 S.E.2d 535, 537-38 (2015) (citations and internal quotation marks omitted).

V. Respondent-mother's Issues

A. Dependency

Respondent-mother argues the trial court erred in adjudicating Dylan and Cade as dependent. She asserts the conclusions of her inability to provide care or supervision to the juveniles and that no alternative childcare arrangements were available are unsupported.

A juvenile is dependent when: "(i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2019). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

YFS concedes in its brief the trial court made no findings of fact in its adjudication order to support the conclusion that Dylan or Cade were dependent under N.C. Gen. Stat. § 7B-101(9). The guardian *ad litem* ("GAL") argues Respondent-mother does not challenge the adjudication of Dylan or Cade as neglected, asserts that conclusion is binding on appeal, and takes no position on the adjudication of dependency.

The trial court erred in adjudicating Dylan and Cade as dependent by failing to find and enter findings of fact to support its conclusion. We vacate that portion of the trial court's adjudication order.

B. Mediated Family Services Agreement

Respondent-mother argues the trial court erred in adopting the mediated family services agreement ("the agreement") in total, after stating in its oral rendition and disposition there was no reason to adopt those provisions of the service plan relating to housing or income. The agreement includes provisions requiring Respondent-mother to provide proof of income to YFS sufficient for the children's needs, and to "maintain appropriate, safe, and stable housing for herself and her children." Alternatively, Respondent-mother argues the trial court made a clerical error in its written order.

The trial court expressed concern with some of the agreement's provisions at the 26 March 2019 hearing:

> I do think that, you know, again, kids were brought into custody for domestic violence, and although there may be other needs, there have been no evidence or allegation that, other than these incidents, that Mom and Dad have been unable to take care of the kids, that they don't have housing, that they don't have anybody to feed them. So just looking at the allegation of the complaint, I think the case plans are too broad. We're gonna (sic) focus on domestic violence, making sure they get the domestic violence treatment that they need based upon the allegations that are in the current petition, and based upon the adjudication findings of fact.

The trial court further stated it would adopt several, but not all, of the recommendations made by YFS and the GAL. The trial court specifically stated it declined YFS' recommendation that it adopt the agreement with Respondent-mother, and the GAL's recommendation that Respondents find employment.

YFS argues Respondent-mother has not preserved this issue because the agreement was admitted by the trial court without objection. YFS also argues Respondent-mother made no objection regarding the income or housing provisions at the hearing. *See* N.C. R. App. P. 10(a)(1).

Respondent-mother did not object at the hearing. However, YFS fails to note Respondent-mother *could not* object at the hearing, because the trial court did not adopt the provisions she now challenges until it filed its written order more than *two months* later. Respondent-mother filed a timely appeal from the trial court's written order, preserving this issue for appeal. YFS' argument is overruled.

At a disposition hearing, the trial court may order the parent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent." N.C. Gen. Stat. § 7B-904(d1)(3) (2019).

In cases where juveniles are removed from their parents due to issues with domestic violence, this Court has stated certain requirements pertaining to proof of housing and income are "reasonable" as a means by which social workers "can stay in contact with respondents and ensure that they are making progress toward having their children returned home." *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 633 (2013) (footnote omitted).

The trial court's disposition order in this case could rest within its statutory authority. *See id.* However, a discrepancy exists between its findings and adjudications at the disposition hearing and those contained within the written order.

> A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination. The discovery of a clerical error in the trial court's order requires this Court to remand the case to the trial court for correction because of the importance that the record speak the truth.

In re I.W.P., 259 N.C. App. 254, 260, 815 S.E.2d 696, 701-02 (2018) (citations and internal quotation marks omitted). The discrepancies between the trial court's statements and rendition in the disposition hearing and the provisions in its written order do not appear to be supported by "judicial reasoning or determination." *Id.*

This portion of the trial court's order is vacated and remanded. Upon remand, the trial court is to make findings and clarify its conclusions whether it adopts the full agreement as written, or as limited and adopted in its statements and rendition at the disposition hearing, so the record may "speak the truth." *Id.*

VI. Respondent-father's Issues

A. Neglect

Respondent-father argues the trial court erred in adjudicating Jack as neglected. Respondent-father challenges six of the court's findings of fact in its adjudication. He asserts the conclusion of law that Jack is neglected is unsupported without those challenged findings of fact. Those findings of fact are:

> 4. On February 17, 2018, [Respondent-mother] filed a Complaint and Motion for Domestic Violence Protective Order in 18 CVD 3506. The mother stated that during a custody exchange, [Respondent-father] forced her into an elevator and would not allow her to exit at her correct floor. When she was managed [sic] to exit the elevator, he grabbed at her and poked her in the face with his hands and fingers. He held her against a wall, choking her. He took her wallet so she could not start her vehicle to leave. She reported she was afraid he would come to her home, which was typical after such incidents. She reported a history of violence between them.
>
> 5. On September 24, 2018, [Respondents] began arguing at her mother's home and the argument continued after they left, resulting in her stopping the car on the side of the road and [Respondent-father] throwing the keys. He then left on foot with the baby and [Respondent-mother] continued on

after finding the keys. Later, [Respondent-father] called her to pick up he and the baby, which she did. Once the family arrived back at the hotel, the argument continued in the parking lot. [Respondent-father] was yelling and cursing at [Respondent-mother]. [Respondent-father] grabbed the keys and told everyone to go inside. [Respondent-father] grabbed the baby and began to walk towards the room; however, [Respondent-mother] grabbed the rest of the children and began walking back to the car. [Respondent-father] began following [Respondent-mother]. [Respondent-father] had a plate of food in his hand and smeared it in her face. [Respondent-mother] started to yell at him and [Respondent-father] grabbed her by the hair, while still holding the baby, and threw her to the ground. [Respondent-mother] grabbed a large rock and told [Respondent-father] to stop. [Respondent-father] stated to her, "Are you going to throw a rock at me while I'm holding your baby?" [Respondent-father] then gave the baby to one of the other children and continued to attack [Respondent-mother]. [Dylan] jumped on [Respondent-father]'s back and [Respondent-father] threw [Dylan] to the ground. The mother and [Dylan] had minor injuries. The mother informed officers that [Respondent-father] had choked her more than thirty times in the past.

6. On November 28, 2018, despite YFS involvement, the mother called [Respondent-father] to the hospital after [Jack] was admitted. [Respondent-father] became irate at her while at the hospital and began yelling at her and grabbed her shirt. Security was called and [Respondent-father] left the hospital.

7. The mother has filed for two domestic violence protective orders but did not return to Court. On November 27, 2018 she failed to appear due to a sick child and the matter was continued. Lack of service

> of [Respondent-father] would not cause a domestic violence case to be dismissed; it would be continued. The action was dismissed on December 19, 2018 when [Respondent-mother] failed to appear.
>
> 8. The parents' ongoing domestic violence and the mother's failure to follow through with protection for the children cause an injurious environment whenever the children are with their parents.
>
> 9. The children have been negatively impacted by the domestic violence as evidenced by the mother seeking counseling for them.

1. Recitation

Respondent-father argues finding of fact number 4 merely recites Respondent-mother's allegations from the *ex parte* DVPO complaint she filed against him on 17 February 2018. Respondent-father similarly asserts finding of fact number 5 recited nearly *verbatim* the account of the 24 September 2018 incident from the police report admitted into evidence.

> At an adjudicatory hearing, the trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law. These findings must be more than a recitation of allegations. They must be the specific ultimate facts sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.

In re J.W., 241 N.C. App. 44, 48, 772 S.E.2d 249, 253 (citations, alterations, and internal quotation marks omitted), *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015).

Our Supreme Court and this Court have repeatedly and strongly discouraged use of *verbatim* recitation from allegations contained in petitions and pleadings. *In re M.K.*, 241 N.C. App. at 471, 773 S.E.2d at 539 (citation omitted). While mere recitations reflect a lack of proper reconciliation and adjudication of the evidence presented, this Court has also stated it may not be "*per se* reversible error for a trial court's findings of fact to mirror the wording of a party's pleading." *In re J.W.*, 241 N.C. App. at 45, 772 S.E.2d at 251.

> [W]hen examining whether a trial court's fact findings are sufficient, we will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case.

Id.

Respondent-father argues the trial court failed to make "ultimate" findings of fact by reciting allegations from the DVPO complaint or police report. Respondent-father specifically asserts the trial court failed to identify in finding of fact number 5 which of Respondent-mother's children, other than Dylan, were present for the 24 September incident. Evidence in the record shows all four of Respondent-mother's children were present.

Respondent-father also asserts the last sentence of finding of fact number 5 merely recites language from the police report. Respondent-father claims the trial court should have re-framed the factual finding without reference to what

Respondent-mother "informed officers." *See id.* at 49, 772 S.E.2d at 253 ("[T]here is nothing wrong with repeating [the] same words in an order."). This argument is overruled.

2. Challenged Evidence

Respondent-father argues no clear, cogent, and convincing evidence supports the statement that Dylan "jumped on [Respondent-father's] back and [Respondent-father] threw [Dylan] to the ground" in finding of fact number 5. The testimony supporting this finding of fact came from a married couple who frequently traveled for work. This couple observed the 24 September 2018 incident from their hotel room. The trial court allowed these witnesses to testify remotely over Respondent-father's objection.

Respondent-father asserts two arguments that the trial court erred in allowing this testimony. First, Respondent-father argues the Uniform Child-Custody Jurisdiction and Enforcement Act only allows audiovisual testimony from witnesses who reside out-of-state. *See* N.C. Gen. Stat. § 50A-111(b) (2019). Respondent-father argues the trial court erred in allowing this testimony without determining the witnesses' residency. Second, Respondent-father argues the trial court abused its discretion in allowing the husband to testify after his wife, apparently from the same room, in violation of a sequestration order.

Respondent-father also challenges the sentence from finding of fact number 6 which states: "[Respondent-father] became irate at [Respondent-mother] while at the hospital and began yelling at her and grabbed her shirt." Respondent-father argues this sentence is based on incompetent hearsay evidence, in the form of testimony by and a written report from social worker Zeigler about the incident at the hospital.

Presuming, *arguendo*, the trial court erred and we exclude the challenged sentences from findings of fact numbers 5 and 6, the remaining findings of fact document domestic violence occurred in Jack's presence. Respondent-father cannot show any reversible prejudice from the asserted errors. The remaining findings of fact support the trial court's conclusion that Jack was a neglected juvenile. *See, e.g.*, *In re M.K.*, 241 N.C. App. at 476, 773 S.E.2d at 539.

Respondent-father also argues no evidence in the record supports the sentence in finding of fact number 7, which reads: "Lack of service of [Respondent-father] would not cause a domestic violence case to be dismissed; it would be continued." He contends no evidence was presented regarding the "possible, hypothetical consequences of no factual import of a lack of service in a DVPO action." He does not challenge the remainder of the finding regarding Respondent-mother having filed two domestic violence protective actions and her not returning to court to prosecute the claims.

Respondent-father's argument arises from the finding a lack of service "would not" cause an action to be dismissed, instead of saying it "did not" cause the actions to be dismissed. However, considering the parties' arguments before the trial court and the trial court's statements when rendering the order, it is a correct statement of law. *See* N.C. Gen. Stat. § 50B-2(c)(5) (2019). Removing this sentence does not impact the findings to support the conclusion. It simply addresses the parties' arguments regarding the reasons for the trial court's conclusion of Jack's neglect and the dismissal of the domestic violence actions.

In closing arguments at the adjudication hearing, YFS argued the parties had engaged in a pattern of domestic violence and Respondent-mother had failed to recognize the severity of the problem and to follow through to protect herself and the children from further domestic violence. Regarding the two dismissed domestic violence actions, YFS asserted Respondent-mother minimized the domestic violence and stated, "We have relationship issues, but we don't have domestic violence."

In response, Respondent-mother argued she had attempted to address the domestic violence issue appropriately by twice filing for domestic violence protective orders, but she was unable to secure an order because Respondent-father was not served, no jurisdiction over him was acquired, and no adjudication was entered. Her counsel argued, "if you look right above where it says she did not proceed, it also said that he had not been served. Defendant (sic) not served, and the not served part was

underlined. And so that's part of the problem. But nevertheless, -- so they [YFS] wanted a 50B. She tried to get a 50B. She wasn't able to do that because of the problems with service and not having a valid address."

The case files from both domestic violence claims filed by Respondent-mother, on 19 November 2018 and 19 February 2019 were entered into evidence at adjudication. The sheriff's department had attempted to serve Respondent-father at the addresses provided, which included a shelter and a Comfort Suites hotel. Respondent-father was not served with the summons and complaint in either case when the cases were calendared.

The orders dismissing each claim provided that the claims were dismissed without prejudice both because Respondent-mother had failed to appear and because Respondent-father was not served. Respondent-mother argues that without service on Respondent-father, the court did not acquire personal jurisdiction to enter a DVPO against Respondent-father. Respondent-mother could have appeared in court to request an extension of the *ex parte* order and continuance of the hearing while sheriff's deputies made another attempt to serve Respondent-father. Without her cooperation and participation, the trial court had no choice but to dismiss the domestic violence claims.

3. Conclusions of Law Labeled as Findings of Fact

Respondent-father also argues findings of fact 8 and 9 are actually conclusions of law. "[I]f a finding of fact is essentially a conclusion of law[,] it will be treated as a conclusion of law which is reviewable on appeal." *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) (citation, alteration, and internal quotation marks omitted), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005). "To the extent that these findings are more appropriately reviewed as conclusions of law, we review them as such." *In re M.K.*, 241 N.C. App. at 475-76, 773 S.E.2d at 541 (citation omitted).

"The trial court heard evidence and made these findings of fact, through a process of logical reasoning, based on the evidentiary facts before it." *Id.* at 472, 773 S.E.2d at 539 (citation omitted). The trial court's findings of fact and conclusion, adjudicating Jack as neglected, are supported by clear, cogent, and convincing evidence. The findings of fact support the conclusions of law. Respondent-father's arguments are overruled.

B. N.C. Gen. Stat. § 7B-903(a2)

Respondent-father argues the trial court committed reversible error in failing to conclude in its disposition order that returning the children to their own home "would be contrary to their health and safety." *See* N.C. Gen. Stat. § 7B-903(a2) (2019). The trial court's order refers to the children's "welfare and best interest" rather than their "health and safety."

YFS and the GAL each rely on *In re L.M.T.*, 367 N.C. 165, 752 S.E.2d 453 (2013). In that case, our Supreme Court considered another section of the Juvenile Code, the since-repealed N.C. Gen. Stat. § 7B-507(b). *Id.* at 167, 752 S.E.2d at 455. Our Supreme Court advised trial courts that, while "use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language . . . . The trial court's written findings must address the statute's concerns, but need not quote its exact language." *Id.* at 167-68, 752 S.E.2d at 455.

Respondent-father argues *L.M.T.* does not apply because N.C. Gen. Stat. § 7B-903(a2) differs from the former § 7B-507(b). The former N.C. Gen. Stat. § 7B-507(b) stated the trial court "*may* direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes [certain] written findings of fact." *Id.* at 167, 752 S.E.2d at 455 (emphasis supplied). N.C. Gen. Stat. § 7B-903(a2) mandatorily requires that a disposition order "placing or continuing the placement of the juvenile in out-of-home care *shall* contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's health and safety." N.C. Gen. Stat. § 7B-903(a2) (emphasis supplied).

This Court has repeatedly held that "use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible

error." *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) (citations omitted). The trial court erred in failing to find the children's return to their own home "would be contrary to [their] health and safety." N.C. Gen. Stat. § 7B-903(a2). The record contains evidence from which the court could make the statutorily required findings. This matter is remanded to the trial court for entry of appropriate findings and the required statutory conclusion. *See* N.C. Gen. Stat. § 7B-903(a2).

VII. Conclusion

The trial court erred by making no findings of fact in its adjudication order to support the conclusion that either Dylan or Cade were dependent under N.C. Gen. Stat. § 7B-101(9). This portion of the adjudication order is vacated. Respondent-mother does not challenge the adjudication of Dylan or Cade as neglected and that portion of the order is undisturbed.

The trial court's entered written order differs significiaently from its oral rendition and disposition at the 26 March 2019 hearing. The trial court is instructed to clarify on remand whether it adopts the full mediated family services agreement with Respondent-mother as written, or as partially adopted in its rendition at the disposition hearing, so the record may "speak the truth." *In re I.W.P.*, 259 N.C. App. at 260, 815 S.E.2d at 702 (citation omitted).

Except as noted above, the trial court's remaining, unchallenged findings in the adjudication order are supported by clear, cogent, and convincing evidence. These

findings support the conclusion of law that Jack is neglected. This portion of the adjudication order is affirmed.

The trial court erred in not finding that return to the juveniles' own home "would be contrary to [their] health and safety." N.C. Gen. Stat. § 7B-903(a2). Upon remand, the trial court shall enter appropriate findings and statutory conclusions. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge STROUD and Judge COLLINS concur.

Report per Rule 30(e).