IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-1015

Filed: 16 October 2018

Cleveland County, No. 14 CRS 55577, 55578

STATE OF NORTH CAROLINA

v.

RAHEEM WEBBER, Defendant.

Appeal by Defendant from judgment entered 20 April 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 5 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Richard Croutharmel, attorney for defendant-appellant.

MURPHY, Judge.

Raheem Webber ("Defendant") appeals from his two convictions for felony animal cruelty under N.C.G.S. § 14-360(a1) and (b). He argues that the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence that he acted "intentionally" and "maliciously." Defendant also

argues that the trial court failed to make sufficient findings to impose a 36 month probation term and a $60.00 restitution order as a condition of his probation. For the reasons stated herein, we find no error.

BACKGROUND

At approximately 11:00 a.m. on 4 November 2014, Cleveland County Animal Control officers received a radio dispatch that a dog was running loose at an apartment complex located at 1327 Lenoir Drive. Defendant and his mother lived in one of the units at this complex. Animal Control Officer Jason Lord was the first to arrive at the scene. Officer Lord saw an adult brown-and-white female pitbull running loose without any tags. He approached the canine and observed that she had blood around her mouth and was "real skinny." The dog ("Lady") was approximately two years old.

After securing the animal, Officer Lord received information from another tenant that Lady belonged to the residents of Apartment B, which was leased to Defendant's mother, Rachel Smith. Officer Lord interviewed Smith, who told him that the dog belonged to her son and that her son was feeding it chicken bones. Officer Lord transported Lady back to the animal shelter to photograph and document her condition and then to Hope Animal Hospital for a veterinary examination.

Later that day, at approximately 1:20 p.m., Animal Control Officer Zach Lovelace arrived at 1327 Lenoir Drive. After arriving, Officer Lovelace learned that

the apartment building's landlord had recently taken six newborn pitbull puppies to the county animal shelter. These puppies were Lady's puppies. Officer Lovelace also learned that there was a pet crate in the rear yard of the apartment building that contained more of Lady's puppies. Officer Lovelace then proceeded to the rear yard, located the crate, and observed three pitbull puppies inside, lying on a bed sheet covered with feces and urine. Officer Lovelace also noticed a "necrotic smell." One of the puppies in the crate, a brown and white male, was already dead. Officer Lovelace then directed a fellow officer to transport the two living puppies and the dead puppy to the Hope Animal Hospital, where Lady and the six other puppies were being examined by veterinarian Dr. Deanna Moseley-Lawrence.

Dr. Moseley-Lawrence performed a medical examination on each of the ten dogs removed from 1327 Lenoir Drive that day – Lady, the six puppies dropped off by the landlord, and the three puppies found outside in the pet crate. The eight puppies that were still alive were "in distress," "lifeless," and "at the brink of death." Dr. Moseley-Lawrence also examined the dead puppy Officer Lovelace found in the crate. She determined that the puppy more than likely starved to death and that it was dead for less than 24 hours. Dr. Moseley-Lawrence's examination of Lady revealed that a large bone had become embedded in her throat a few weeks prior, causing a serious infection. Additionally, since the embedded bone prevented Lady from swallowing for weeks, she was extremely emaciated, weighing less than half of the

normal body weight for an adult dog of her breed. Lady's malnourished state was further evidenced by the lack of milk in her mammary glands despite recently giving birth to a litter of puppies. Dr. Moseley-Lawrence had to euthanize Lady.

Defendant was subsequently arrested and indicted for two counts of felony animal cruelty under N.C.G.S. §§ 14-360(a1) and (b). Regarding his charge under N.C.G.S. § 14-360(a1), the indictment alleged that Defendant did:

> maliciously cause to be killed a male brown and white pit bull mix canine by intentional deprivation of necessary sustenance.

Regarding his charge under § 14-360(b), Defendant's indictment alleged that Defendant did:

> maliciously cause to be tortured an animal . . . by neglecting said canine and not providing the canine the necessary care, medical care, and attention it needed when a foreign object (a large bone) was lodged in the canines throat not allowing the canine to eat and/or drink, swallow, or breath properly causing or permitting unjustifiable pain suffering, or death.

Defendant's trial began on 19 April 2017, and the State called several witnesses, including Defendant's mother, Animal Control officers, and Dr. Moseley-Lawrence. Several photographic exhibits also were admitted as evidence of the poor physical health and the dismal conditions these animals were kept in.

Defendant also testified. He explained that he took Lady when a friend of his no longer wanted her, and he kept her at his mother's apartment, where he lived about half of the time. Defendant also stayed at his girlfriend's residence a few miles

away. A couple of months later, "the dog ended up pregnant" and that is why he bought the plastic pet crate Officer Lovelace found in the rear yard of the apartment building. After Lady gave birth to the nine puppies, Defendant noticed three of the puppies "looked sick" and he thought they may have parvovirus. Defendant testified that he was worried the disease might spread to the rest of the litter, so he decided to separate these puppies by placing them in the plastic crate and putting them outside.

> *The State*: The three puppies you put outside, you basically put them out to either finish dying or just sit out there dead.
>
> *Defendant*: No, I didn't leave them out there to die. Like I said, I assumed that they were already dead because of the disease thing, so I was going to already, you know, dispose of them and just dispose of the kennel as well. That's why I had it outside.

On 20 April 2017, the jury found Defendant guilty of both counts of felony animal cruelty. Defendant was sentenced to 10 to 21 months of incarceration for his charge under § 14-360(b) and 36 months of supervised probation for his charge under § 14-360(a1)[1]. Defendant was also ordered, as a condition of his probation, to pay $60.00 to Hope Animal Hospital as restitution for the cost incurred by the animal hospital to euthanize Lady. Defendant timely appealed, raising three issues which we address in turn.

[1] Defendant was indicted in 14CRS055578 under N.C.G.S. § 14-360(a1); however, judgment was incorrectly listed under § 14-360(b). This clerical error is fully discussed in Part C of this opinion.

A. Felony Animal Cruelty Charges

Defendant first argues that the trial court erred in denying his motion to dismiss for each of his felony animal cruelty charges because there was insufficient evidence that he acted "intentionally" and "maliciously." We disagree.

Standard of Review

Our standard of review regarding motions to dismiss is well established:

> When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. The defendant's evidence, unless favorable to the State, is not to be taken into consideration, except when it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). Accordingly, "[i]f there is substantial evidence of each element of the offense charged or lesser included offenses, the trial court must deny a defendant's motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991).

Analysis

Defendant was convicted of two counts of felony animal cruelty. One count was under N.C.G.S. § 14-360(a1), which provides:

> (a1) If any person shall maliciously kill, or cause or procure to be killed, any animal by intentional deprivation of necessary sustenance, that person shall be guilty of a Class H felony.

N.C.G.S. § 14-360(a1). This count was based on Defendant's indictment related to the death of the male pitbull puppy. The other count was under N.C.G.S. § 14-360(b), which provides:

> (b) If any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal, every such offender shall for every such offense be guilty of a Class H felony.

N.C.G.S. § 14-360(b). This count was based on Defendant's indictment related to Lady's death. The requisite mental state for felony animal cruelty under both subsections (a1) and (b) is "maliciously," a term defined in subsection (c) of the animal cruelty statute:

> (c) As used in this section, the words "torture", "torment", and "cruelly" include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. *As used in this section, the word "intentionally" refers to an act committed knowingly and without justifiable excuse, while the word "maliciously" means an act committed intentionally and with malice or bad motive*

N.C.G.S. § 14-360(c) (emphasis added). Thus, to convict a defendant of felony animal cruelty under subsections (a1) and (b), the State must present evidence that a

defendant acted both "intentionally" (e.g. knowingly and without justifiable excuse) and "maliciously" (e.g. intentionally and with malice or bad motive). N.C.G.S. §§ 14-360(a1), (b), (c). On the other hand, the lesser included offense of misdemeanor animal cruelty under N.C.G.S. § 14-360(a) only requires the State to prove that a defendant acted "intentionally." *See State v. Gerberding*, 237 N.C. App. 502, 507, 767 S.E.2d 334, 337-38 (2014).

In the instant case, Defendant first argues that the evidence was insufficient to show that he acted "intentionally." He contends that the evidence failed to show that he knew the animals were suffering as alleged in the indictments. We disagree.

While the term "intentionally" is defined in the animal cruelty statute, the term "knowingly" is not. *See* N.C.G.S. § 14-360(c) ("As used in this section, the word "intentionally" refers to an act committed knowingly and without justifiable excuse.") "Knowingly" is a legal term of art that defines the mental state for several criminal offenses. *See*, *e.g.*, N.C.G.S. § 14-100.1(b) ("it shall be unlawful for any person to knowingly obtain a form of identification by the use of false, fictitious, or fraudulent information."). Furthermore, because the term "knowingly" has a commonly accepted meaning in the law, we adopt the legal definition of the word. *See Vann v. Edwards*, 135 N.C. 661, 669, 47 S.E. 784, 788 (1904). Regarding a defendant's "knowledge," our Supreme Court notes:

> [k]nowledge means "an impression of the mind, the state of being aware; and this may be acquired in numerous ways

> and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said that a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction of it are such as to give him actual information concerning it."

State v. Aguilar-Ocampo, 219 N.C. App. 417, 428, 724 S.E.2d 117, 125 (2012) (citing *Underwood v. Bd. of Alcoholic Control*, 278 N.C. 623, 632, 181 S.E.2d 1, 7 (1971). "Knowledge or intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Coble*, 163 N.C. App. 335, 338, 593 S.E.2d 109, 111 (2004) (holding that there was sufficient evidence that defendant acted intentionally under the animal cruelty statute because the evidence, taken in the light most favorable to the State, constituted substantial circumstantial evidence that the defendant knew the dogs were kept at her home and did not feed them, and knowingly deprived the dogs of necessary sustenance) (citations omitted).

Regarding Defendant's conviction under N.C.G.S. § 14-360(a1), we conclude that there was substantial evidence that Defendant acted knowingly. Lady recently birthed a litter of nine puppies. One of these puppies was found dead by Animal Control officers, and a veterinarian concluded that the dead puppy had been "starved to death." When Animal Control officers first arrived at Defendant's mother's apartment, they found the dead puppy with two other puppies (who were still alive) inside a plastic crate covered in feces in the rear yard of his mother's apartment

building. When asked about these three puppies and the conditions they were kept in, Defendant explained that he separated these puppies from the litter in order to prevent the spread of disease. Defendant testified:

> they looked really sick to the point to where they were possibly dead or dying, so I had put them outside. . . . I didn't want that to spread.

The evidence also indicated that Defendant was aware that the puppies were still alive when he first separated them from the litter, and he knew that leaving them in the crate would eventually lead to their death. Defendant testified:

> I figured it wasn't really too much I can do about them three dogs. . . so I thought the disease was going to -- just do -- make its course
>
> . . . .
>
> I assumed that they were already dead because of the disease thing, so I was going to already, you know, dispose of them and just dispose of the kennel as well. That's why I had it outside.

This evidence, when viewed in the light most favorable to the State, permits a reasonable inference that Defendant was aware that separating the three newborn puppies would deprive them of necessary sustenance, and with such knowledge, he proceeded to place the puppies in a plastic crate in his mother's rear yard. Therefore, there was substantial evidence that Defendant acted "intentionally" with regard to his charge under N.C.G.S. § 14-360(a1).

Regarding Defendant's conviction under N.C.G.S. § 14-360(b), there was substantial evidence that Defendant intentionally caused or permitted the unjustifiable suffering of Lady. The evidence indicated that the Defendant owned Lady and kept her tied to a pole in the rear yard of his mother's apartment building where he frequently stayed. The evidence also indicated that Lady was extremely emaciated when examined by Dr. Moseley-Lawrence. One Animal Control officer testified that he could see Lady's ribs, spine, and hips "plain as day." Several photos were admitted at trial which indicated the same and also that blood was oozing out of Lady's mouth. Dr. Moseley-Lawrence, the veterinarian who examined Lady, testified that the dog was unable to eat or drink for two weeks due to a bone embedded in her throat and weighed approximately half of what she should weigh. Defendant's mother reported to Animal Control officers that Defendant was feeding Lady chicken bones, and Defendant testified that he thought Lady had a chicken bone stuck in her throat. Due to the condition Lady was found in, Dr. Moseley-Lawrence had to euthanize her:

> *Dr. Moseley-Lawrence*: And then I euthanized the mother. And this would be an experience I will never forget: To visually reach my hand in her mouth and pull out something that was so embedded down in the aspects of her throat that I literally had to tug it out because it had scarred down around the bone. But basically this piece of her -- it was a vertebra, but it was a bone that took up almost the full length of my hand, was wedged sideways into the back of her throat. And part of the bone had grown into the larynx, which is in the back of the throat. The

> smell was horrendous. And there was no way that dog had been able to swallow for weeks.

In the light most favorable to the State, this evidence permits a reasonable inference that Defendant knew Lady had been unable to eat for some time prior to 4 November 2014 and with this knowledge, he neglected the animal. Therefore, there was substantial evidence that Defendant acted "intentionally" with regard to his felony animal cruelty charge under N.C.G.S. § 14-360(b).

Defendant also contends that there was insufficient evidence that he acted "maliciously." The animal cruelty statute defines "maliciously" as "an act committed *intentionally and with malice or bad motive*." N.C.G.S. § 14-360(c) (emphasis added). "[M]alice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred." *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003). "Malice has many definitions." *State v. Wrenn*, 279 N.C. 676, 686, 185 S.E.2d 129, 135 (1971). "To the layman it means hatred, ill will or malevolence," but "malice is not restricted to spite or enmity." *Id.* "[I]t also denotes a wrongful act intentionally done without just cause or excuse" and comprehends "hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty[.]" *Id.* at 687. Malice may also be implied when an act "is done so recklessly or wantonly as to manifest depravity of mind and disregard of . . . life." *Id.* at 687. In *State v. Gerberding*, we upheld a defendant's felony animal cruelty conviction and recognized

that a jury can find a defendant acted with "express malice" or "implied malice." *See Gerberding*, 237 N.C. App. at 507, 767 S.E.2d at 338 (holding that the pattern jury instruction on malice used in homicide cases was not improper in prosecution for felonious cruelty to animals).

Regarding the dead male pitbull puppy, and Defendant's charge under N.C.G.S. § 14-360(a1), the evidence taken in the light most favorable to the State was sufficient to show that Defendant acted maliciously. Defendant admittedly separated three newborn puppies from their mother and placed them in a plastic crate outside, forcing them to live out their remaining days without sustenance in a state of squalor. One of these puppies died of starvation. This was a wrongful act intentionally done without just cause or excuse and is sufficient evidence of malice (i.e. a "hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty"). *Wrenn*, 279 N.C. at 686, 185 S.E.2d at 135.

Regarding Defendant's charge under N.C.G.S. § 14-360(b) relating to Lady, the State proceeded under a theory that Defendant maliciously "tortured" the animal. Under N.C.G.S. § 14-360(c), torture "include[s] or refer[s] to any act, omission, or *neglect* causing or permitting unjustifiable pain, suffering, or death." N.C.G.S. § 14-360(c) (emphasis added). "[T]he word neglect indicates, as a purely objective fact, that a person has not done that which it was his duty to do . . . ." *Neglect*, Black's Law Dictionary (10th ed. 2014). Here, the evidence indicated that Defendant was

responsible for Lady, and aware that she was emaciated and blood was oozing out of her mouth. Nevertheless, Defendant still neglected the canine for a substantial period of time, and this neglect caused and permitted unjustifiable pain and suffering. Dr. Moseley-Lawrence testified that the foreign object, which prevented Lady from eating or drinking for weeks, was not merely a bone stuck in her throat. Rather, due to weeks of neglect, the bone became embedded in the soft tissue of the canine's larynx and caused a serious infection. Moreover, since Lady was unable to eat and drink, she was unable to produce the milk needed to feed her newborn puppies. When viewed in the light most favorable to the State, this evidence permits the reasonable inference that Defendant's intentional neglect caused Lady to experience tremendous physical pain, pushed her to the brink of starvation, and prevented her from feeding her puppies. Therefore, there was substantial evidence that Defendant acted "maliciously," and the trial court did not err in denying Defendant's motion to dismiss.

B. $60.00 Restitution Order

Defendant next argues that the trial court erred by imposing a condition of probation requiring him to pay $60.00 in restitution to the Hope Animal Hospital, the veterinary clinic that euthanized Lady. He does not challenge the amount in the order, but instead argues that the "trial court failed to consider any of the factors related to [Defendant's] ability to pay the full amount of restitution."

Standard of Review

Under N.C.G.S. § 15A-1340.36, before ordering restitution as a condition of probation, the trial court must consider a defendant's ability to pay restitution, but it need not "make findings of fact or conclusions of law" on this matter. *See* N.C.G.S. § 15A-1340.36(a) (2017). The standard of review for a restitution order is *de novo*, and "when there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419, (2015). We look not only to statements made by defense counsel during sentencing, but also to the evidence presented at trial. *See State v. Minton*, 223 N.C. App. 319, 324, 734 S.E.2d 608, 609 (2012). Accordingly, our review of this issue is limited to determining whether there was "some evidence" presented at trial or sentencing that Defendant had the ability to pay $60.00 in restitution.

Analysis

Defendant argues that "[g]iven the totality of the circumstances, his ability to pay any money was uncertain." He points out that he was only 18 years old, not going to school, not working, living with his mother, and at other times, with his girlfriend. However, the fact that Defendant was unemployed at the time he was convicted, standing alone, does not limit his "ability" to earn. Ability is defined as "the physical or mental power to do something." *Ability*, Merriam–Webster's Collegiate Dictionary (11th ed. 2003). Here, the evidence showed that Defendant had been employed in the

past, and there was no evidence that indicated he had any mental or physical disability which would necessarily preclude employment in the future. Furthermore, the fact that Defendant lives with his mother or girlfriend does not limit his "ability" to pay restitution. In fact, by living with others, Defendant would be able to share housing costs and reduce his personal expenses, and thus increase his ability to pay restitution.

Defendant also claimed at his sentencing hearing that he had a child on the way. On appeal, he argues that the restitution order "may have made it impossible for [him] to support his family." We first note that in ordering restitution, a court must consider a "defendant's obligation to support dependents . . . ." N.C.G.S. § 15A-1340.36 (a). However, in the instant case, there was no evidence presented that Defendant had any legal obligation to support any dependents. Defendant testified that he was expecting his first child to be born in about four months. Yet, as of the date of his sentencing hearing, Defendant was not married and had no children. Therefore, although he may have had a moral duty to provide for his unborn child and its mother, Defendant had no legal obligation to support dependents that would affect his ability to pay $60.00.

Defendant further contends that in imposing both restitution and community service conditions upon his probation, the trial court failed to consider his ability to comply with both conditions simultaneously, while also meeting his other obligations

under the sentence of paying costs, fines, and fees. We disagree. Nothing in the record shows that Defendant lacked the "ability" to pay $60.00 ($1.67 per month) and perform 72 hours of community service (2 hours per month) within 36 months of his release from incarceration. *See e.g., State v. Riley*, 167 N.C. App. 346, 349, 605 S.E.2d 212, 215 (2004) (upholding restitution order amount because the defendant "failed to present evidence showing that she would not be able to make the required restitution payments, we find no error."). Furthermore, Defendant and his mother are jointly and severally liable for the $60.00 restitution order, a fact which further supports Defendant's ability to pay restitution. *See State v. Person*, 187 N.C. App. 512, 529-31, 653 S.E.2d 560, 571-72 (2007) (upholding restitution order and noting that the defendant and his accomplice were jointly and severally liable for the restitution order), *rev'd on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008).

Finally, Defendant "has cited no decision in which a North Carolina appellate court has reversed such a moderate award of restitution for failure to consider the defendant's ability to pay." *Id*. (upholding restitution order of $2,300.52); *see also State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986) (upholding restitution award of $919.25). The cases relied on by Defendant are distinguishable because "common sense" dictated that those defendants could not pay the restitution amount ordered. *See, e.g*., *State v. Mucci*, 163 N.C. App. 615, 627, 594 S.E.2d 411, 419 (2004) (trial court erred in entering restitution order of over $26,000.00 when the terms of the

defendant's probation also obligated him to perform 25 hours per week of community service for 36 months, remain gainfully employed, and pay $4,500.00 in fines and costs); *State v. Hayes*, 113 N.C. App. 172, 175, 437 S.E.2d 717, 719 (1993) (trial court erred in entering restitution order of $208,899.00 necessitating monthly payments of over $3,000.00 when the defendant only earned $800.00 per month bagging groceries); *State v. Smith*, 90 N.C. App. 161, 168, 368 S.E.2d 33, 38 (1988) (trial court erred in entering restitution order of $100,000.00 per year where common sense dictated that the defendant clearly would be unable to pay). As common sense dictates that Defendant had the ability to pay $60.00 within 36 months, we find no error.

C. Clerical Error

Defendant's remaining argument contends that the trial court erred in ordering a probation term of 36 months without making sufficient findings. We disagree.

Standard of Review

When a defendant assigns error to the sentence imposed by the trial court, our standard of review is "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citations omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial

court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (internal citations and quotation marks omitted).

Analysis

Regarding his felony conviction under N.C.G.S. § 14-360(a1) (14 CRS 55578) Defendant's sentence was suspended and he was ordered to begin 36 months of supervised probation when he was released from incarceration for his conviction under N.C.G.S. § 14-360(b) (14 CRS 55577). Pursuant to N.C.G.S. § 15A-1343.2(d), the maximum term of probation for felons sentenced to community punishment is 30 months, whereas the maximum term for felons sentenced to intermediate punishment is 36 months. A probation term may not exceed these limits "[u]nless the court makes specific findings that longer . . . periods of probation are necessary . . . ." N.C.G.S. § 15A-1343.2(d).

Defendant's "Judgment Suspending Sentence" form contains a check box that indicates that he was sentenced to a "community punishment." This form did not include any specific findings, and Defendant argues that because he was sentenced to community punishment, the trial court erred because it failed to make specific findings addressing why a probation term longer than 30 months was necessary. However, Defendant was not sentenced to a community punishment. The fact that the box labeled "community punishment" on the pre-printed form was checked

instead of the box labeled "intermediate punishment" is an obvious clerical error as it is inconsistent with the sentence announced in open court, which is controlling. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000).

> Trial Court: . . . On the second case, that's a Class H felony, Prior Record Level III with 8 points, sentence in the presumptive range and *intermediate punishment*. . . That sentence will be suspended for 36 months supervised probation with the probation to begin upon his release from the Division of Adult Corrections.

The misplaced check in the "community punishment" box on Defendant's pre-printed sentencing form is a clerical error as it is "an error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696; *see also State v. Peele*, 246 N.C. App. 159, 167, 783 S.E.2d 28, 34 (2016) ("Clerical errors include mistakes such as inadvertently checking the wrong box on preprinted forms."). Moreover, because N.C.G.S. § 14-360(a1) is a Class H felony and Defendant has a prior record level of III, he was ineligible for community punishment and must be sentenced to either an active or intermediate punishment. *See* N.C.G.S. § 15A-1340.17(c). Accordingly, we affirm Defendant's intermediate sentence and remand for the correction of the clerical error. *See Smith,* 188 N.C. App. at 845, 656 S.E.2d at 696.

Additionally, the trial court made a clerical error in entering judgment in 14 CRS 055578 under N.C.G.S. § 14-360(b) when Defendant was indicted under

N.C.G.S. § 14-360(a1). Defendant does not raise this clerical error on appeal; however, this Court is required to remand the sentence for correction of the clerical error. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696. While this clerical error requires remand to amend the judgment to reflect the correct subsection of the statute, resentencing is not required for this error. Both N.C.G.S. § 14-360(a1) and (b) are classified as Class H felonies. Thus, an error in listing the correct subsection of the statute was "an error on a judgment form which does not affect the sentence imposed." *State v. Gillespie*, 240 N.C. App. 238, 246, 771 S.E.2d 785 (2015), *disc. review denied*, 368 N.C. 353, 777 S.E.2d 62 (2015). Accordingly, we affirm the intermediate sentence and remand for correction of the clerical error. *See Smith,* 188 N.C. App. at 845, 656 S.E.2d at 696.

CONCLUSION

Regarding Defendant's trial and sentence, we find no error. We remand to correct clerical errors for Defendant's sentence under N.C.G.S. § 14-360(a1) (14 CRS 5578).

NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).