An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-503

Filed: 4 December 2018

Guilford County, Nos. 07 CRS 109840, 109843

STATE OF NORTH CAROLINA

v.

FLOYD CALVIN CODY, Defendant.

Appeal by Defendant from order entered 10 April 2017 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 15 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

PER CURIAM.

Floyd Calvin Cody ("Defendant") appeals following an order denying his motion for appropriate relief seeking a new trial. On 28 August 2009, Defendant was found guilty of first-degree murder pursuant to the felony murder rule including underlying felonies of robbery with a firearm and first-degree burglary, and first-

degree kidnapping. The trial court arrested judgment on the underlying felonies, and Defendant was sentenced to life imprisonment without the possibility of parole for first-degree murder and a concurrent sentence of 100-129 months for first-degree kidnapping. On appeal, Defendant contends the trial court erred in denying his motion for appropriate relief for a new trial based on recanted testimony from witnesses at trial. We hold the trial court did not err in denying Defendant's motion for appropriate relief.

I. Factual and Procedural History

On 5 April 2011, this Court filed an opinion in this case. *See State v. Cody*, No. COA10-961, 2011 WL 1238476 (N.C. Ct. App. Apr. 5, 2011), *disc. review denied*, 365 N.C. 334, 717 S.E.2d 574 (2011) (*Cody I*). In *Cody I*, Defendant appealed, contending the trial court erred in denying multiple motions for mistrial, and failing to intervene *ex mero motu* during the State's closing arguments. This Court held Defendant received a fair trial, free from error, and these issues are not pertinent to this appeal. *See Cody I*, 2011 WL 1238476 at *7.

The factual history of this case is discussed at length in *Cody I*. *See Cody I*, 2011 WL 1238476 at *1-4. Accordingly, we adopt the factual and procedural history in *Cody I*, and add the following facts.

On 6 March 2015, Defendant filed a motion for appropriate relief ("MAR") seeking to "present evidence of violations of his constitutional rights and of

[Defendant's] actual innocence." Defendant alleged no physical evidence presented at trial linked Defendant to the crimes charged, and the basis of his conviction relied primarily on the witness testimony of several co-defendants: Emmanuel Sellers, Reco Baskins, and Christopher Little ("Sellers," "Baskins," and "Little," respectively). Defendant argued in his MAR his co-defendants, Little and Baskins, had recanted their testimony, thereby entitling him to an evidentiary hearing, a new trial, and such further relief deemed just and appropriate.

Defendant submitted notarized affidavits from Little and Baskins, recanting their prior testimony at trial that Defendant participated in the kidnapping, burglary and killing of Jermaine Collins ("Collins"). Little stated a third party, Shon Demetres McClain ("McClain") participated in the murder. Both stated their implication of Defendant "was the product of solicitation, threats and intimidation" by the State to get a favorable plea offer. Defendant also submitted a notarized affidavit from McClain, who was not incarcerated, claiming responsibility for the murder of Collins. The affidavit, purportedly written by McClain, stated George Victor Stokes ("Stokes") had solicited him in a murder-for-hire conspiracy for a $10,000.00 payment.[1] McClain stated he organized the murder conspiracy, and commanded Baskins to kill Collins after he retrieved drugs and money from Collins' residence.

[1] McClain is deceased and unavailable to testify.

Defendant's last exhibit was a notarized affidavit from Stokes, who was incarcerated at the time of writing the affidavit. Stokes stated while incarcerated, he met Defendant at mail call and confessed to Defendant he was the person who had ordered the murder of Collins, and he was going to turn himself in and take responsibility for the murder-to-hire plot and payment of $10,000.00 to McClain.[2] Defendant alleged Stokes' affidavit constituted evidence of his actual innocence of Collins' murder.

> 4. On December 18, 2006 I discovered that Jermaine Collins stole two kilos of cocaine from me. For some time after, I considered ways I might get Collins back for stealing from me.
>
> 5. On July 14, 2007, I met with Shon McClain, of Raleigh, N.C. I asked McClain if he would kill Collins for me. He agreed to do the job for $10,000. I paid McClain $5,000 at that time, with the remaining $5,000 due after Collins was killed. The plan was to have Collins killed on December 18, 2007 – the one year anniversary of the day Collins stole the cocaine from me.
>
> 6. Two days after my meeting with McClain, I was picked up on unrelated charges and spent approximately seven months in the county jail.
>
> 7. After being released from jail, I met with McClain again. He informed me that the job had been completed and he shared some of the details with me. He told me that he gathered a crew of men and went to a house where they knew Collins would be. Together they entered the house, tied up the occupants and searched the home for drugs and cash. At some time during these events, McClain said he

[2] Stokes was brought to the evidentiary hearing to be called as a witness; however, Defendant did not call him to testify as to the contents of the affidavit.

> told one of the other guys to shoot Collins. The other man, Reco Baskins, then shot Collins in the back of the head. Satisfied that the job had been completed, I paid McClain the remaining $5,000.
>
> . . .
>
> 10. Earlier this year, after being moved to a new unit within the prison, I heard [Defendant's name] called out during mail call. Later, I approached [Defendant] and asked him whether he was [ ] convicted for the murder of Jermaine Collins. He told me he was. I told him that I was the person who had Collins killed and that I wanted to confess my role in the murder. I told him that the crime, and the fact that someone who had nothing to do with it had been convicted, was weighing on my conscience. I told him that the man I had hired to do the killing was going to come forward as well. I then asked [Defendant] for the contact information of his lawyer.

On 29 May 2015, the trial court filed a written order denying Defendant's MAR without holding an evidentiary hearing. In the written order, the trial court stated the following:

> [D]efendant contends that the murder of . . . [Collins] was committed by George Victor Stokes. Defendant has attached an inculpatory affidavit of Stokes confessing to the crime as well as affidavits of co-defendants who testified at trial, which essentially exculpate [D]efendant and inculpate Stokes.
>
> Under normal circumstances, the court would order an evidentiary hearing in this matter, especially in light of such a sworn statement. This court however, is aware of Mr. Stokes['] previous machinations in other cases in Guilford County wherein Stokes has filed similar affidavits claiming he was the actual murderer, and that the defendant was also innocent (State v[.] Darnell Dawkins

> 06CR092523; 092535; 092527; 092528 attached)[.] The [trial judge] ordered an evidentiary hearing in that matter and Stokes asserted his right to remain silent when called as a witness. [The trial judge] denied Dawkins' Motion for Appropriate Relief, finding that Stokes' affidavit did not meet the credibility threshold incorporated into the test for whether a conviction should be set aside for newly discovered evidence. See e.[g.], State v. Beaver, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976) (that the newly discovered evidence is probably true)[.]
>
> The Court has reviewed the documents pertaining to the Dawkins file, which is in the custody of Guilford County Clerk of Court, and hereby takes judicial notice of its contents. The Court concomitantly observes that Stokes is inherently unreliable and the Court will not conduct an evidentiary hearing to simply confirm what is already obvious.

On 10 August 2015, Defendant filed a petition for writ of certiorari to this Court, requesting an evidentiary hearing be held on Defendant's motion for appropriate relief. On 25 August 2015, this Court allowed Defendant's petition and remanded the matter for an evidentiary hearing, vacating the trial court's dispositional order. On 16 September 2015, the trial court filed an order vacating the previous order denying the MAR, and scheduled an evidentiary hearing for 27 October 2015. However, Defendant's MAR hearing was not held until 25 April 2016. At Defendant's MAR hearing, several witnesses testified.

Defendant first called Baskins to testify. At the time of the evidentiary hearing, Baskins was serving a sentence commensurate with a plea deal for second-degree murder and other associated crimes for Collins' killing, and was due to be

released in 2031. In exchange for his plea deal, Baskins agreed to testify truthfully at Defendant's trial about Defendant's involvement in Collins' murder. Baskins testified some of his original testimony was not correct at the time, and he was prepped by the State to not talk about "certain things." Baskins testified at the evidentiary hearing Defendant was not present at the scene of the crime, and maintained he had testified to the same facts previously. Defense counsel attempted to refresh Baskins' recollection of his original testimony years earlier with transcripts; however, Baskins maintained he had been consistent in both the original trial and the evidentiary hearing stating Defendant was not involved.

Defense counsel introduced Baskins' signed affidavit from 2014, averring Defendant was not involved in Collins' murder. Baskins read the following from his affidavit:

> When I was arrested for participating in a crime, I hadn't planned on implicating [Defendant]. I only agreed to testify against [Defendant] because the assistant district attorney says he was going to make sure I got the death penalty or a life sentence and try to make me agree that I deliberately intended to kill Jermaine Collins with malice and intent.
>
> . . .
>
> My implication of [Defendant] in these crimes was not of my own free will, but was suggested to me through solicitation, threats and intimidation by the prosecutor who offered me a plea deal in exchange for my cooperation.
>
> I was reluctant to cooperate, but because I had

> already confessed to being a person who actually shot Mr. Collins, I was afraid of the possibility of receiving the death sentence or life in prison even though I never meant to actually shoot Mr. Collins.
>
> . . .
>
> With this affidavit I recant any testimony that implicated [Defendant] in these crimes.

Defense counsel refreshed Baskins' recollection concerning the State's notice to vacate and set aside his plea deal, and potentially re-charge Baskins with first-degree murder for Collins' murder. Baskins remained consistent his testimony at Defendant's trial was untrue.

On the State's cross-examination, Baskins invoked his Fifth Amendment rights to be silent. In response, the trial court granted the State's motion to give Baskins immunity for his testimony at the hearing so he could answer the questions about Collins' murder. Baskins testified again Defendant was not present, and there was an unknown third person who entered Collins' house from the back door. The only person Baskins claimed to know was Little, another co-defendant in the case. Baskins, Little, Sellers, and the unknown man put on makeshift masks before being picked up in a van driven by Sellers. Upon arriving at Collins' house, Baskins and the others were told what to do by the unknown accomplice. Baskins testified to the additional pertinent facts concerning the veracity of his original trial testimony:

> A. . . . . What you got to understand is that a lot of things [have] transpired in that time from[, w]hen he got killed,

> before he got killed, and after he got killed. I was forced to do a lot of the things that I wasn't supposed to do. I was forced to say some things that I wasn't supposed to say. And that's what I want you to understand, is that – that's what I want you to understand is that –
>
> Q. Mr. Baskins, I want you to express yourself. Please tell me who was forcing you to say things you did not want to say?
>
> A. I only got a little bit of family in North Carolina, and my grandmother is paralyzed from the waist down. I got threats that if I didn't take that charge, if I didn't admit to taking that murder charge, that they w[ere] going to kill my – they w[ere] going to kill my grandmother.

Baskins recanted being the person who shot Collins in the robbery, and admitted to having been caught with two cellphones in prison. Baskins denied coordinating or talking to other co-defendants before testifying at the hearing. Baskins claimed a prosecutor met with him without his attorney present and threatened him with the death penalty.

Next, Defendant called Little to testify. Little invoked his right to remain silent, and the trial court granted the State's motion to grant Little immunity for his testimony at the hearing. Little pled guilty to second-degree murder and associated charges related to Collins' murder, predicated upon testifying against Defendant, with a release date of 2021. Little recounted the events of the night of the murder. Little, Baskins, Sellers, and Defendant drove over to Collins' house, and Sellers drove the truck. Little and Baskins went through the front door, and ordered Collins and

his family on the ground. Defendant and Baskins searched the home for drugs and money. When they concluded the search, Baskins shot Collins, and the group left with drugs, money, televisions, and Christmas presents. Little refused to recant his original trial testimony implicating Defendant in Collins' murder.

Defense counsel introduced the affidavit, signed on 27 August 2013. Little confirmed he had signed it and it was in his handwriting, which recanted his original testimony from Defendant's trial implicating Defendant in the murder. Defense counsel introduced the State's motion to set aside Little's plea agreement, based on his recantation in the affidavit.

On cross-examination, Little testified he was approached in prison by an unknown individual to write his affidavit to defense counsel, and to implicate another individual, Shon McClain, in the murder. Little reaffirmed his original testimony Defendant was present and involved in the murder, and disavowed the affidavit.

Defendant called his original defense counsel to testify as to his memory from the original trial in the years prior. Counsel recalled Sellers had received a traffic ticket the night of the murder, putting him in the area of the crime at the time it happened, and confirmed Little and Baskins testified against Defendant. No DNA, forensic, or physical evidence was introduced at trial. Counsel confirmed Defendant was offered a plea deal from the State, Defendant was informed of the plea offer, discussed it at length, and refused it. At the close of Defendant's case-in-chief,

Defendant introduced and the trial court admitted the affidavits and motions to set aside the plea deal into evidence. After arguments from the State and Defendant, the trial court limited the affidavits to only impeachment and corroborative purposes, and not as substantive evidence. The trial court also took judicial notice of the original trial transcript.

The State called Baskins' appointed counsel in the original case, to testify. He was not aware of a meeting between Baskins and a prosecutor without him being present. Lastly, the State called the Director of Special Operations and Intelligence for the Department of Corrections, Wendell Hargrave ("Director"), to testify. The Director explained the records and investigation process in the North Carolina Department of Corrections ("NCDOC"), including the investigation surrounding Defendant's MAR filing in the instant case.

The Director examined McClain's affidavit, attached to Defendant's MAR. The affidavit was signed and notarized on 23 February 2012 in Hoke County by "Shon D. McClain." The State introduced copies of NCDOC records from McClain's personnel file. McClain's handwriting in NCDOC records did not match the handwriting in the affidavit. Other NCDOC records tended to show Defendant had cell phones or other electronic devices confiscated while in prison six times, and Baskins had two devices confiscated. The Director testified both Defendant and Baskins were validated members of the United Blood Nation, among thousands of other members within

NCDOC. Defendant was known to be a higher ranking member than Baskins. The State presented no evidence Defendant and Baskins had talked or communicated with each other while incarcerated.

After the hearing, the trial court requested supplemental briefs from both parties. Defendant filed their supplemental brief on 19 August 2016, arguing no eye-witness testimony linked Defendant to Collins' murder, and Seller's and Little's recantations constituted new evidence from which Defendant should receive a new trial. The State filed their supplemental brief on 18 August 2016, arguing the witness testimony at the MAR hearing was inherently unreliable, and Defendant's basis for post-conviction relief was not based on newly discovered evidence but instead on recanted testimony.

On 10 April 2017, the trial court entered an order ("April Order") denying Defendant's motion for appropriate relief. In the written order, the trial court made the following findings of fact, in pertinent part:

> 3. Reco Baskins testified first at the evidentiary hearing. His testimony consisted of statements that Defendant was not present during the commission of the crime as well as that he received pressure from the then Assistant District Attorney, [REDACTED]. Mr. Baskins additionally stated that he was unsure of the identity of the third person present in the house when the crime was committed as well as the third person being the actual shooter. Furthermore, Baskins' testimony about riding in a car with a masked man he couldn't identify while on the way to "do a lick" defies belief. Ultimately, Mr. Baskins' testimony appeared unreliable for he was not forthcoming with his answers as

well as backtracked on numerous occasions, and his affidavit—the basis for the MAR—was used to merely impeach his trial testimony.

4. Christopher Little was the second person to testify. During the evidentiary hearing Mr. Little did not recant his trial testimony but rather testified that the affidavit containing his recantation was not truthful, and that, contrary to the affidavit, the testimony provided by himself during Defendant's trial was truthful. Moreover, Mr. Little testified that he was approached by an unknown person in prison to write the affidavit recanting his testimony at Defendant's trial as well as to use the name "Shon McClain" in the affidavit. Furthermore, Mr. Little testified that Mr. Baskins and Defendant did know each other which is contrary to Mr. Baskins' assertions regarding their relationship. Based on these reasons, Mr. Little's testimony provided during the evidentiary hearing was unreliable as it relates to his affidavit.

5. [REDACTED], Defendant's counsel at trial, testified next at the evidentiary hearing. Given that the evidentiary hearing was surrounding the recantation of testimony provided by Mr. Little and Mr. Baskins, the testimony provided by [defense counsel] was irrelevant with respect to those issues. [Defense counsel] merely provided a statement of the occurrences throughout the trial including testimony by Emmanuel Sellers, another co-defendant, and the implication of Defendant in the crime by all co-defendants.

6. These three witnesses comprised the evidence of Defendant, and, Defendant failed to meet the preponderance of the evidence burden given the vast inconsistencies in the affidavits and the live testimony relating to Christopher Little, as well as the lack of credibility from Reco Baskins' live testimony.

7. The affidavits submitted by the co-defendants formed the basis for the Defendant's filing his MAR, but in light of

> the evidentiary hearing that took place (where said co-defendants gave live testimony under oath) the Court considers the affidavits to have a much-reduced impact from an evidentiary standpoint. In fact, the affidavits were only used to impeach many aspects of the co-defendants' testimony, when subjected to cross-examination by the State.

Based on the foregoing findings of fact, the trial court made the following conclusions of law:

> 1. The Court first notes that the Defendant's MAR is not actually based on "newly-discovered" evidence in the strictest sense of the term; rather, as the State points out in its brief, the evidentiary hearing revolved around the recanted testimony of two witnesses who had testified on behalf of the State at the Defendant's trial in 2009. (*See State v. Nickerson*, 320 N.C. 603, 609-10, 359 S.E.2d 760, 763-64 (1987) for a discussion of the distinctions between the two types of evidence.)[.]
>
> 2. Testimony via affidavit at an evidentiary hearing is insufficient to comply with evidentiary requirements. *See State v. Howard*, 783 S.E.2d 786, 797, 798 (N.C. App. 2016). Although affidavits are considered evidence for supporting a Defendant's MAR, an affiant's live in-court testimony is necessary for determination of credibility, thereby affidavit serving as proxy testimony is insufficient. *Id.*
>
> 3. "In an evidentiary hearing, defendant bears the burden of proving by a preponderance of the evidence every fact essential to support the motion." *State v. Garner*, 136 N.C. App. 1, 23, 523 S.E.2d 689, 698 (1999) (citing N.C. Gen. Stat. § 15A-1420(c)(5)(1997)).
>
> 4. Defendant did not show, by a preponderance of the evidence, the test enunciated in *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987). Indeed, the testimony of Christopher Little and Reco Baskins proved to be

> exceedingly unreliable, and, as such, the Court is guided by the holding in *State v. Garner*, 136 N.C. App. 1, 523 S.E.2d 689 (1999).
>
> 5. Taken in the totality of the evidence offered as well as with the testimony provided throughout the evidentiary hearing amounting to nothing more than an attempt at impeaching or corroborating evidence provided at trial, Defendant has failed to meet the burden of preponderance of the evidence in this instance.

On 15 November 2017, Defendant filed a petition for writ of certiorari to this Court requesting review of the April Order denying his motion for appropriate relief. This Court allowed Defendant's petition for writ of certiorari on 15 December 2017. On 23 January 2018, the trial court found Defendant to be indigent, and appointed him counsel from the Office of the Appellate Defender. The record on appeal was settled on 26 April 2018, and is ripe for review by this Court.

II. Jurisdiction

"The court's ruling on a motion for appropriate relief pursuant to G.S. 15A-1415 is subject to review . . . [i]f the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C. Gen. Stat. § 15A-1422(c)(3) (2017); *see State v. Morgan,* 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995). Accordingly, we have jurisdiction to hear the instant case from the trial court's order denying Defendant's motion for appropriate relief.

III. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and quotation marks omitted). "Findings of fact made by the trial court pursuant to hearings on motions for appropriate relief are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999) (citation and internal quotation marks omitted). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted). "Where trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, *even though the evidence might sustain findings to the contrary*." *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991) (citations omitted).

IV. Analysis

Defendant argues the trial court erred in denying his MAR because (1) the evidence offered at trial was unreliable as all witnesses issued varying levels of recantation post-trial, (2) Defendant demonstrated actual innocence of all offenses, and (3) his continued incarceration violates the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and North Carolina Constitution Article I §§ 19 and 21.[3]

A. Motion for Appropriate Relief Order

Defendant contends the recanted testimony in affidavits attached to his MAR presented sufficient evidence to the trial court to vacate Defendant's convictions of first-degree murder and first-degree kidnapping. Defendant asserts he is entitled to relief under N.C. Gen. Stat. § 15A-1415(c), and should receive a new trial.

To determine whether the trial court properly considered the evidence presented at the MAR hearing, we must first determine what evidence is subject to review. The parties disagree how the trial court considered the affidavits Defendant submitted as attached exhibits in his MAR. The State argues the trial court properly considered the affidavits to solely impeach or corroborate the affiants' live testimony at the evidentiary hearing, and not as stand-alone evidence. Defendant contends the

[3] Defendant presents extensive arguments in the underlying motion for appropriate relief regarding all issues, and continued to present arguments in the petition for writ of certiorari presented to this Court, which was granted by a prior panel. However, Defendant's appellate brief primarily argues the witness testimony recantation, and does not maintain actual innocence and *habeas corpus* arguments explicitly. Therefore, we address the latter arguments to the extent the trial court discusses them in the order on appeal.

trial court should have considered the affidavits as "part of the body of evidence that should have been used to determine the credibility of the trial testimony of both witnesses."

> A motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.

N.C. Gen. Stat. § 15A-1420(b). "In hearings before a judge sitting without a jury 'adherence to the rudimentary rules of evidence is desirable . . . . Such adherence invites confidence in the trial judge's findings.' " *State v. Howard*, 247 N.C. App. 193, 211, 783 S.E.2d 786, 798 (2016) (citing *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984)).

The trial court addressed the consideration of the evidence presented in Conclusions of Law 1 and 2, relying on *State v. Nickerson*, 320 N.C. 603, 359 S.E.2d 760 (1987), and *Howard*, *supra*. The trial court made a distinction between its consideration of the affiants' live testimony at the evidentiary hearing, and their written statements in their respective affidavits. This Court has previously considered repudiation of or inconsistencies between live testimony at a MAR hearing and written statements in an affidavit. In *State v. Doisey*, 138 N.C. App. 620, 532 S.E.2d 240 (2000), a witness signed an affidavit stating she had given false testimony at trial, but at the MAR evidentiary hearing, she repudiated the recantation, and

testified she had in fact told the truth in the original proceeding. 138 N.C. App. at 624, 532 S.E.2d at 243-44. The trial court made findings of fact reflecting this change in testimony, and weighed the differing statements, finding it was "not reasonably well satisfied that the testimony of [the witness] given at the original trial was false." *Id.* at 627, 532 S.E.2d at 245. This Court held the trial court did not err in considering the affidavits in conjunction with the affiant's live testimony at the MAR hearing, and properly weighed the evidence as it was presented to the trial court. *See id.* at 628, 532 S.E.2d at 246.

The trial court's consideration of evidence here is similar, and we find the holding in *Doisey* applicable to the case at bar. The trial court justified its consideration and weighing of the live testimony presented at the evidentiary hearing and the submitted affidavits with legal reasoning and appropriate discretion. The affidavits were properly submitted, attached to Defendant's MAR pursuant to Section 15A-1420(b), and the live testimony was properly taken. Accordingly, the trial court did not err when judging the credibility and weight of the evidence before it.

i. Findings of Fact

Defendant challenges Findings of Fact 3 and 4, arguing the majority of the findings are "merely recitations of testimony," and are not supported by competent evidence to determine the veracity of testimony at the evidentiary hearing. We disagree.

"A trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *In re Bullock*, 229 N.C. App. 373, 378, 748 S.E.2d 27, 30 (2013) (citation, brackets, and ellipses omitted). "[R]ecitation of testimony is insufficient only where a material conflict actually exists on that particular issue," and does not "resolve the conflicts in the evidence and actually find facts." *State v. Travis*, 245 N.C. App. 120, 128, 781 S.E.2d 674, 679 (2016) (internal citations omitted). "[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010); *see also Morganherring*, 350 N.C. at 714, 517 S.E.2d at 630. "[E]vidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives[.]" *State v. Jones*, 336 N.C. 229, 243, 443 S.E.2d 48, 54 (1994) (citation omitted).

(1) Findings of Fact 3 and 4

In Finding of Fact 3, the trial court considered two primary types of evidence presented at the evidentiary hearing, Baskins' live testimony and Baskins' notarized affidavit submitted with Defendant's MAR to the trial court. Defendant is correct "recitations of testimony" are insufficient to constitute a finding supported by

competent evidence. However, while the first three sentences were recitations of testimony, the trial court resolved the material conflict in evidence presented when it found the following:

> Furthermore, Baskins' testimony about riding in a car with a masked man he couldn't identify while on the way to "do a lick" defies belief. Ultimately, Mr. Baskins' testimony appeared unreliable for he was not forthcoming with his answers as well as backtracked on numerous occasions, and his affidavit – the basis for the MAR – was used to merely impeach his trial testimony.

The trial court weighed the testimony and evidence presented at the MAR hearing, and resolved the material conflict by finding Baskins' testimony was incredible, and undermined by conflicting statements in his affidavit. *See Travis*, 245 N.C. App. at 128, 781 S.E.2d at 679. Based upon the contents of Finding of Fact 3, it is apparent the trial court reached this determination from evaluating and weighing competent evidence presented by both parties. Finding of Fact 3 is sufficient, as there is no material conflict left unresolved by the trial court's order on Baskins' testimony, and it is not merely a recitation of testimony presented. Accordingly, we hold Finding of Fact 3 is supported by competent evidence and binding upon this Court.

Finding of Fact 4 mirrored the structure of Finding of Fact 3, in that it recited testimony in several sentences, but it resolved any material conflict presented by Baskins' testimony, accompanying affidavits, Little's own live testimony, and

affidavit. The trial court found, "[b]ased on these reasons, Mr. Little's testimony provided during the evidentiary hearing was unreliable as it relates to his affidavit."

(2) Finding of Fact 7

Defendant contends Finding of Fact 7 is not a proper finding, but instead a conclusion of law. The State does not address this contention directly, but does argue "the credibility of and the weight given to a witness's testimony is determined by the jury, not the court." *State v. Thaggard*, 168 N.C. App. 263, 282, 608 S.E.2d 774, 787 (2005) (citations omitted). In the context of an MAR evidentiary hearing, it is the trial judge's role to determine whether the movant has met his burden to satisfy each element by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1420(c)(5); *see also Howard*, 247 N.C. App. at 208, 783 S.E.2d at 797. In the context of a post-conviction hearing, it is the trial judge who "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Barlett*, 368 N.C. 309, 313, 776 S.E.2d 672, 674 (2015) (citation and quotation marks omitted). "In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties throughout [the hearing] and to discern the sincerity of their responses to difficult questions." *Trogdon*, 330 N.C. at 148, 409 S.E.2d at 900.

In Finding of Fact 7, the trial court weighed the evidence presented and determined the credibility of the testimony at the evidentiary hearing consistent with

its role in the context of a post-conviction evidentiary hearing. The trial court found "in light of the evidentiary hearing that took place . . . the Court considers the affidavits to have a much-reduced impact from an evidentiary standpoint." Thus, the trial court did not err in Finding of Fact 7, as it weighed the evidence Defendant submitted to the trial court for that very purpose. In this case, the trial judge was "better able than we at the appellate level" to determine credibility and proper weight of the evidence, and made a proper finding supported by competent evidence. *See Trogdon*, 330 N.C. at 148, 409 S.E.2d at 900.

We hold the trial court made proper findings of fact in the order on appeal. Findings of Fact 3, 4, and 7 are each supported by competent evidence, and comport with a trial judge's role of weighing evidence and determining credibility in the absence of a jury. Further, Defendant has not demonstrated the trial judge's findings constituted a manifest abuse of discretion. Accordingly, Defendant's challenges to Findings of Fact 3, 4, and 7 are overruled.

ii. Conclusions of Law

The trial court made several conclusions of law Defendant challenges on appeal as unsupported by the findings of fact. Specifically, Defendant challenges Conclusions of Law 4 and 5.[4] The trial court concluded Defendant did not satisfy the

[4] Defendant also challenges Findings of Fact 6 and 7, asserting both constitute conclusions of law. Finding of Fact 6 is a conclusion of law; however, it is essentially the same conclusion reached in Conclusion of Law 5.

Britt test for recanted testimony, and failed to meet the preponderance of the evidence standard for each element of his claim for relief. We hold the trial court did not err in its application of the *Britt* test, and hold its conclusions of law were supported by underlying findings of fact.

A party may file a MAR or other post-conviction motion based upon newly discovered evidence or recanted testimony from a prior trial tending to show the party is entitled to appropriate relief from the trial court. *See* N.C. Gen. Stat. § 15A-1411 (2017).

> Notwithstanding the time limitations herein, a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, *including recanted testimony*, and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence.

N.C. Gen. Stat. § 15A-1415(c) (2017) (emphasis added). "[T]he rule for granting a new trial for newly discovered evidence is not the same as the rule for granting a new trial for recanted testimony." *State v. Britt*, 320 N.C. 705, 712, 360 S.E.2d 660, 664 (1987) (citation omitted). Recognizing recanted testimony is not exactly the same as newly discovered evidence, our Supreme Court partially adopted a test promulgated in *Larrison v. United States*, 24 F. 2d 82 (7th Cir. 1928), and restated it as follows:

> A defendant may be allowed a new trial on the basis of recanted testimony if:

> 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and
>
> 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

Britt, 320 N.C. at 715, 360 S.E.2d at 665; *see also Larrison*, 24 F. 2d 82, 87-88. When presenting evidence at the MAR hearing, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2017).

At the evidentiary hearing, Defendant presented testimony from co-defendants Baskins and Little, and one of the public defenders involved in the trial. The trial court concluded Baskins' and Little's live testimonies at the evidentiary hearing were "exceedingly unreliable." Conclusion of Law 4 specifically referenced the *Britt* case to support the evidence's unreliability. Despite the trial court not referencing the underlying trial testimony in the conclusions, it is clear from the transcript and record the trial court heard and received substantial testimony, and considered all evidence in the order on appeal. The trial court concluded, "[t]aken in the totality of the evidence offered as well as with the testimony provided throughout the evidentiary hearing . . . Defendant has failed to meet the burden of preponderance of the evidence" that the recantations were reliable. The trial court took judicial notice and received into evidence Defendant's original trial transcript to consider along with

the evidence offered through Defendant's post-conviction filings. In reaching these conclusions, the trial court applied a preponderance of the evidence standard as mandated by Section 15A-1420(c)(5). Accordingly, we hold the trial court's conclusions of law were supported by its findings of fact.

iii. Entry of Order

The trial court entered the order on appeal on 10 April 2017. The order denied Defendant's motion for appropriate relief, and it contained findings of fact supported by competent evidence, conclusions of law in turn supported by sufficient findings of fact, and did not err in any application of law. Accordingly, the order appropriately denied Defendant a new trial based on recanted testimony presented in affidavits and live testimony at the evidentiary hearing before the trial court. *See Frogge*, 359 N.C. at 240, 607 S.E.2d at 634.

V. Conclusion

The trial court made sufficient findings of fact supported by competent evidence at Defendant's evidentiary hearing, and did not err in applying the *Britt* test recognized in North Carolina to determine whether Defendant was entitled to a new trial. Accordingly, we hold the trial court did not err in its entry of the order on appeal, and affirm.

AFFIRMED.

Report per Rule 30(e).