

SUPREME COURT OF NORTH CAROLINA

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)	
STATE OF NORTH CAROLINA)	
)	
v.)	From Orange County
)	
DEMON HAMER)	

DEFENDANT APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

Appellant replies to those arguments of the State not already adequately addressed in his principal brief.

- I. WHETHER THE COURT OF APPEALS' MAJORITY ERRED BY DETERMINING THAT MR. HAMER KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL IS PROPERLY BEFORE THIS COURT.

The State argues that the Court of Appeals unanimously agreed the trial court violated Section 15A-1201(d)(1)'s procedure in consenting to Defendant's waiver without having first personally addressed him. The State thus argues that the sole issue properly before this Court is "whether the

Court of Appeals' majority erred by holding that Defendant was required to show prejudice from the trial court's procedure in consenting to his jury trial waiver." (State's Br. 14 – 16).

When the sole ground of the appeal is a dissent, review by this Court is limited to those issues that are specifically set out in the dissenting opinion as the basis for that dissent. The question is "whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals." *In re R.L.C.*, 361 N.C. 287, 290, 643 S.E.2d 920, 921–22 (2007).

The issues Appellant raised and argued in the Court of Appeals were whether the trial court violated Mr. Hamer's constitutional right to trial by jury by conducting a bench trial without obtaining a knowing and voluntary waiver of jury trial by Mr. Hamer, and whether Mr. Hamer was required to show prejudice to be granted a new trial. (Def. COA Br. 3–17).

The Court of Appeals' majority recognized that Appellant argued that "the trial court erred in conducting a bench trial because the record fails to establish that Defendant knowingly and voluntarily waived his constitutional right to a trial by jury." *State v. Hamer*, ___ N.C.App. ___, ___, 845 S.E.2d 846, 848 (2020).

The majority found error in the trial court's failure to follow the

procedural statute required by our Constitution while “overrul[ing] the remainder of Defendant's arguments concerning the sufficiency of the trial court’s inquiry in determining whether his waiver was knowing and voluntary.” *Id.* at ___, 845 S.E.2d at 853.

Chief Judge McGee, dissenting, disagreed. She would have held that the trial court's inquiry was not sufficient under N.C.G.S. § 15A-1201, *and* art. I, § 24, to ensure Defendant's waiver was knowing and voluntary. *Id.* at ___, 845 S.E.2d at 865 (dissenting opinion).

Because the statutory procedure for waiver of the right to a jury trial must comport with art. I, § 24 of our Constitution, it would be extraordinarily difficult, if not impossible, to address the sufficiency of a defendant’s waiver under § 15A-1201 without addressing the constitutional issue. Chief Judge McGee addressed both in her dissent.

The issues raised by Appellant in this Court are the same as those that are the basis for Chief Judge McGee’s dissent. The issues are thus properly before this Court.

II. THE CONSTITUTIONAL ISSUE OF WHETHER MR. HAMER MADE A VALID WAIVER OF HIS RIGHT TO A JURY TRIAL IS PRESERVED FOR APPELLATE REVIEW.

The State argues that because Mr. Hamer did not raise any constitutional issue related to waiver of a jury trial in the trial court, the

issue was not preserved for appellate review. (State's Br. 23–25, 34).

The State cites cases standing for the general rule that constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal. (State's Br. 24). However, this Court has held that “where the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel.” *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009) (citation omitted).

Where [an] error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal.” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citing *State v. Bindyke*, 288 N.C. 608, 222 S.E.2d 521 and *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189).

Here, Mr. Hamer's right to a trial by a jury of twelve was violated. The error is preserved for appellate review though the issue was not raised in the trial court.

CONCLUSION

The issues in this matter are preserved for appellate review and properly before this Court.

Respectfully submitted this 4th day of December 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of the Defendant-Appellant's Brief has been filed pursuant to Appellate Rule 26(a)(2) by utilizing the Courts' electronic filing site.

I further hereby certify that I served the Defendant-Appellant's Brief upon Robert C. Ennis, Assistant Attorney General, by electronic mail sent to his email address: rennis@ncdoj.gov.

This the 4th day of December 2020.

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