

No. 119PA21

DISTRICT TWENTY-TWO (A)

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)

)

v.)

)

From Iredell County

MADERKIS DEYAWN ROLLINSON)

DEFENDANT-APPELLANT'S NEW BRIEF

INDEX

TABLE OF AUTHORITIES	iii
ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
GROUND FOR APPELLATE REVIEW.....	3
STATEMENT OF THE FACTS	3
STANDARD OF REVIEW	12
ARGUMENT	12
I. The Court of Appeals erred by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1) where the trial court did not personally engage with Mr. Rollinson to determine whether he (i) wanted to have a bench trial on habitual felon status and (ii) understood the consequences of waiving his right to a jury trial.....	12
A. Applicable Legal Principles.....	13
B. The Court of Appeals ignored the plain language of N.C.G.S. § 15A- 1201(d)(1) because there was no direct communication between the trial judge and Mr. Rollinson about whether Mr. Rollinson wished to waive his right to a jury trial or whether he understood the consequences of doing so	15

II.	The Court of Appeals erred by requiring Mr. Rollinson to establish that he was prejudiced by the trial court’s failure to address him personally and determine whether he knew the consequences of waiving his constitutional right to a jury trial as mandated by N.C.G.S. § 15A-1201(d)(1) and N.C. Const. art. I, § 24.....	32
A.	Applicable Legal Principles.....	33
B.	<i>State v. Hamer</i> holds that technical violations of N.C.G.S. § 15A-1201 are not per se structural error	34
C.	Based on the totality of the circumstances, structural error or prejudicial error per se applies in Mr. Rollinson’s case	40
D.	Even if a showing of prejudice is required, that showing was made here	43
	CONCLUSION.....	55
	CERTIFICATE OF FILING AND SERVICE.....	56
	APPENDIX	

TABLE OF AUTHORITIES

CASES

Adams v. United States ex rel. McCann,
317 U.S. 269 (1942)..... 36

Boykin v. Ala.,
395 U.S. 238 (1969)..... 13, 21, 22

Duncan v. State of La.,
391 U.S. 145 (1968).....*passim*

Neder v. United States,
527 U.S. 1 (1999)..... 33

Rose v. Clark,
478 U.S. 570 (1986)..... 32, 33, 34, 40

State v. Austin,
378 N.C. 272, 2021-NCSC-87..... 51

State v. Bindyke,
288 N.C. 608 (1975) 32, 33, 38, 40

State v. Bullock,
316 N.C. 180 (1986) 19, 21, 22, 42

State v. Bunning,
346 N.C. 253 (1997) 32, 33, 40

State v. Cranford,
2021-NCCOA-511 (unpublished) 29

State v. Evans,
153 N.C. App. 313 (2002)..... 30

State v. French,
2021-NCCOA-606 (unpublished) 28, 29

State v. Garcia,
358 N.C. 382 (2004) 36, 37

<i>State v. Gilmore</i> , 142 N.C. App. 465 (2001).....	20, 43, 44
<i>State v. Hamer</i> , 377 N.C. 502, 2021-NCSC-67	<i>passim</i>
<i>State v. Hudson</i> , 280 N.C. 74 (1971)	32, 33, 40
<i>State v. Moore</i> , 362 N.C. 319 (2008)	42
<i>State v. Mumford</i> , 364 N.C. 394 (2010)	12
<i>State v. Owens</i> , 243 N.C. 673 (1956)	46
<i>State v. Poindexter</i> , 353 N.C. 440 (2001)	32, 33, 40
<i>State v. Pruitt</i> , 322 N.C. 600 (1988)	19, 41
<i>State v. Robinson</i> , 368 N.C. 402 (2015)	52
<i>State v. Rollinson</i> , 2021-NCCOA-58 (unpublished)	<i>passim</i>
<i>State v. Rutledge</i> , 267 N.C. App. 91 (2019).....	25, 27
<i>State v. Sinclair</i> , 301 N.C. 193 (1980)	30
<i>State v. Strudwick</i> , 379 N.C. 94, 2021-NCSC-127	49
<i>State v. Swink</i> , 252 N.C. App. 218 (2017).....	27, 28

State v. Thompson,
349 N.C. 483 (1998) 49

State v. Thompson,
359 N.C. 77 (2004) 37

State v. Todd,
313 N.C. 110 (1985) 33, 44

State v. Tucker,
2022-NCSC-15..... 50

State v. Ward,
338 N.C. 64 (1994) 50

State v. Warren,
82 N.C. App. 84 (1986)..... 31

State v. Wilkins,
225 N.C. App. 492 (2013)..... 20, 43

State v. Williamson,
227 N.C. App. 204 (2020)..... 19, 42

Sullivan v. Louisiana,
508 U.S. 275 (1993)..... 32, 33, 34, 40

Swain v. Creasman,
260 N.C. 163 (1963) 50

CONSTITUTIONAL PROVISIONS

N.C. Const. art. I, § 24 1, 13, 14, 32

STATUTES

N.C.G.S. § 7A-31 3

N.C.G.S. § 8C-1, Rule 201 49

N.C.G.S. § 14-7.5..... 15, 33, 44

N.C.G.S. § 14-7.6..... 15, 33, 44
N.C.G.S. § 15A-1022*passim*
N.C.G.S. § 15A-1201*passim*
N.C.G.S. § 15A-1214 37
N.C.G.S. § 15A-1242 21, 42

RULES

N.C. R. App. P. 15 3
N.C. R. App. P. 37 49

SUPREME COURT OF NORTH CAROLINA

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v.)	<u>From Iredell County</u>
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DEFENDANT-APPELLANT’S NEW BRIEF

ISSUES PRESENTED

- I. Did the Court of Appeals err by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1) where the trial court did not personally engage with Mr. Rollinson to determine whether (i) he wanted to have a bench trial on habitual felon status and (ii) he understood the consequences of waiving his right to a jury trial?

- II. Did the Court of Appeals err by requiring Mr. Rollinson to establish that he was prejudiced by the trial court’s failure to address him personally to determine whether he knew the consequences of waiving his constitutional right to a jury trial as mandated by N.C.G.S. § 15A-1201(d)(1) and N.C. Const. art. I, § 24?

STATEMENT OF THE CASE

Maderkis Rollinson was indicted on two counts of assault with a deadly weapon on a government official, possession of up to one-half ounce of marijuana, possession of marijuana paraphernalia, possession with intent to sell and deliver (“PWISD”) a Schedule II Controlled Substance, maintaining a vehicle for keeping and selling controlled substances, possession of cocaine, and having attained habitual felon status. (R pp 8-11, 14).

On 13 May 2019, a bench trial was held in Iredell County Superior Court before the Honorable Mark Klass. (R pp 52-55; T pp 4-5).¹ The court dismissed one count of assault with a deadly weapon on a government official for insufficient evidence. (R pp 58-59; T pp 123-24). The court found Mr. Rollinson guilty of the remaining charges. (R p 60; T p 135).

Mr. Rollinson requested a bench trial to determine whether he had attained habitual felon status and signed a Waiver of Jury Trial form. (R pp 61-63; T p 136). After a hearing, the court “accepted” Mr. Rollinson’s guilty plea to habitual felon status. (T pp 143-44). The court consolidated Mr. Rollinson’s convictions for judgment and sentenced Mr. Rollinson as an habitual felon to 101-134 months in prison. (R pp 66-69). Mr. Rollinson gave notice of appeal in open court following the entry of judgment. (R p 69; T p 144).

¹ The 13-14 May 2019 trial transcript is cited as (T p x).

GROUNDNS FOR APPELLATE REVIEW

Review of the Court of Appeals' decision in this case is based upon this Court's Order allowing Mr. Rollinson's petition for discretionary review pursuant to N.C. R. App. P. 15 and N.C.G.S. § 7A-31.

STATEMENT OF THE FACTS

On 6 January 2017, a confidential informant told Detective Chris Pitts of the Iredell County Sherriff's Office that he could purchase crack cocaine from a black male named "D." Det. Pitts directed the informant to buy a "ball" of cocaine (3.4 grams) for \$250 from "D" and arranged for the buy to take place at the Home Depot. The informant told "D" that his red truck would be parked in front of the lumber area. The informant told "D" he was inside Home Depot and asked "D" to let him know when he arrived, and he would come outside. (T pp 16-19).

When "D" pulled into Home Depot, the informant identified "D" to Det. Pitts as the driver of a white Dodge Intrepid that parked near the red truck. (T pp 21-23, 86, 107). Pitts notified two officers in separate patrol cars who then tried to detain "D" by activating their blue lights and attempting to block the white car from leaving. The officers eventually succeeded, but the white car bumped into the two police cars before submitting to the stop. (T pp 20, 23-25, 86-88, 108-110).

Once the white car was stopped, the officers saw the driver throw two plastic bags out of the passenger window that contained an off-white substance which appeared to be cocaine. (T pp 24-25, 28, 43, 94-97, 111; State's Ex. 16).

Mr. Rollinson was identified as the driver of the white Dodge Intrepid. (T pp 26-27, 97-98, 110-11). When Mr. Rollinson was searched, officers found money in Mr. Rollinson's pants pocket and a plastic bag of what appeared to be marijuana in his jacket pocket. (T pp 112, 116).

A forensic chemist at NMS Laboratories conducted a chemical analysis of the green vegetable matter and off-white substance and concluded the substances were cocaine and marijuana. (T pp 66, 68-72, 77, 82; State's Ex. 17A, 17B, 21-22).

Mr. Rollinson's Trial

When Mr. Rollinson's case was called for trial on 13 May 2019, the prosecutor informed the court that "it's [her] understanding that [Mr. Rollinson] now wishes to elect to have a bench trial instead of a jury trial," and asked the court to have a colloquy with Mr. Rollinson. (T p 4). The prosecutor then explained that Mr. Rollinson was charged with two counts of assault with a deadly weapon on a government official; possession of marijuana; possession of marijuana paraphernalia; PWISD cocaine; maintaining a vehicle; possession

of cocaine; and having attained habitual felon status. (T p 4). Immediately thereafter, the following transpired:

[COURT]: Mr. Rollinson, if you will stand up, please.

[[*Mr. Rollinson*] *stands*]

[COURT]: Do you understand you're charged with the charges she just read to you?

[MR. ROLLINSON]: Yes, sir.

[COURT]: Do you understand you have a right to be tried by a jury of your peers?

[MR. ROLLINSON]: Yes, sir.

[COURT]: At this time you wish to waive your right to a jury and have this heard as a bench trial by me?

[MR. ROLLINSON]: Yes, sir.

[COURT]: If you will sign the appropriate form.

(T pp 4-5).

That same day, Mr. Rollinson, defense counsel, and the court signed form AOC-CR-405, titled "Waiver of Jury Trial." (R pp 52-53). The form declared that Mr. Rollinson provided notice of his intent to waive a jury trial in accordance with N.C.G.S. § 15A-1201(c) by giving "notice on the record in open court[.]" (R pp 52-53).

The “Order” section of AOC-CR-405 provides:

In light of the foregoing findings of fact and conclusions of law, the undersigned judge hereby orders as follows: (*check one*)

- 1. The court consents to the defendant’s waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed in accordance with that waiver, and as otherwise required by law.
- 2. The court does not consent to the defendant’s waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed as required by law.

The court did not check either box and did not consent – either orally or in writing – to Mr. Rollinson’s waiver of his right to a jury trial. (R p 53).

At the close of all evidence, the court granted Mr. Rollinson’s motion to dismiss one count of assault with a deadly weapon on a government official. (R pp 58-59; T pp 123-24). The court found Mr. Rollinson guilty of one count of assault with a deadly weapon on a government official, possession of up to one-half ounce of marijuana, possession of marijuana paraphernalia, PWISD a Schedule II Controlled Substance, maintaining a vehicle for keeping and selling controlled substances, and possession of cocaine. (R p 60; T p 135).

Habitual Felon Phase

After the court announced its verdict on the substantive charges, the prosecutor informed the court that Mr. Rollinson had been indicted as an habitual felon. (T pp 135-36). The following occurred:

[PROSECUTOR]: I would contend that [Mr. Rollinson]'s waived his, the jury trial for both of them. But if you feel like you need to have another colloquy with him about that, we need to have that so we can proceed.

[COURT]: I'll do that. At this point in the trial it's a separate trial. The jurors are coming back to hear the habitual felon matter, or you can waive your right to a jury trial and we can proceed.

[DEFENSE COUNSEL]: Just one second, please, your Honor.

[Brief pause]

[DEFENSE COUNSEL]: ... [A]fter speaking with my client on an habitual felon hearing, trial, he is not requesting a jury trial on that matter and is comfortable with a bench trial.

[PROSECUTOR]: Your Honor, I'm ready to proceed.

[COURT]: Go ahead.

(T p 136). The court did not conduct a colloquy with Mr. Rollinson before proceeding with the State's evidence.

However, on 14 May 2019, Mr. Rollinson, defense counsel, and the court signed form AOC-CR-405, titled "Waiver of Jury Trial." (R pp 61-62). The form declared that Mr. Rollinson provided notice of his intent to waive a jury trial in accordance with N.C.G.S. § 15A-1201(c) by giving "notice on the record in open court[.]" (R pp 61-62).

In the "Order" section of AOC-CR-405 for the habitual felon phase, the court checked the box which states:

The court consents to the defendant's waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed in accordance with that waiver, and as otherwise required by law. (R p 62).

During the habitual felon phase, the State moved to admit three judgments as evidence that Mr. Rollinson had attained habitual felon status. The judgments were admitted without objection. The prosecutor declined to make a closing argument. (T pp 136-38).

The court heard sentencing arguments from the State, defense counsel, and Mr. Rollinson. (T pp 139-143). Thereafter, the court announced:

[COURT]: Upon consideration of the record, the evidence presented, answers of [Mr. Rollinson], statements of the lawyers, I find there's a factual basis for entry of the plea. [Mr. Rollinson] is satisfied with his attorney, he's competent to stand trial, and the plea is the informed choice made freely, voluntarily, and understandingly. The defendant's plea is hereby accepted by the Court and ordered recorded.

[Mr. Rollinson] having been found guilty of [six substantive charges], and admitting his habitual felon, or pleading to the habitual felon, I consolidate them into one sentence.

(T pp 143-44). The court sentenced Mr. Rollinson to 101-134 months in prison.

(T p 144). After the court pronounced judgment, the prosecutor noted, "The only thing is he ... didn't admit the habitual felon." (T p 144). The court responded, "He pled guilty to that." (T p 144).

The Court of Appeals' Opinion

In his brief to the Court of Appeals, Mr. Rollinson challenged the waiver of his right to a jury trial both at trial and during the habitual felon phase. (Defendant-Appellant's Br., COA20-42, pp. 10-35). Regarding the waiver of his right to a jury trial for the habitual felon phase, Mr. Rollinson argued, in relevant part, that the trial court erred by sentencing him as an habitual felon because a jury did not find that he attained habitual felon status, he did not waive his right to a jury trial, and he did not plead guilty to having attained habitual felon status. (Defendant-Appellant's Br., COA20-42, pp. 24-35). In particular, Mr. Rollinson contended that the trial court failed to determine whether he fully understood and appreciated the consequences of his decision to waive the right to a jury trial as required by N.C.G.S. § 15A-1201(d)(1). (Defendant-Appellant's Br., COA20-42, pp. 29-32).

Regarding the waiver of his right to a jury trial for the guilt phase and the habitual felon phase, Mr. Rollinson additionally argued the deprivation of Mr. Rollinson's right to a trial by a properly constituted jury of twelve constituted structural error, entitling Mr. Rollinson to a new trial. Mr. Rollinson alternatively contended that was prejudiced by the trial court's failure to comply with N.C.G.S. § 15A-1201. (Defendant-Appellant's Br., COA20-42, pp. 21-23, 32-34).

The Court of Appeals concluded the trial court complied with N.C.G.S. § 15A-1201(d)(1), which requires the court to “[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.” *State v. Rollinson*, 2021-NCCOA-58, ¶ 23 (unpublished).² The Court of Appeals reasoned that the trial court addressed Mr. Rollinson personally when it stated, “[Y]ou can waive your right to a jury trial.” *Id.* at ¶ 24. Although trial counsel – not Mr. Rollinson – responded to the trial court, the Court of Appeals concluded that § 15A-1201(d)(1) was satisfied for three reasons: (1) section 15A-1201(d)(1) “does not forbid an answer from counsel on a defendant’s behalf”; (2) “[a]n answer by counsel on behalf of [Mr. Rollinson] does not negate the fact that the trial court judge had otherwise properly complied with the requirement that the judge address [Mr. Rollinson] ‘personally’”; and (3) Mr. Rollinson “has not raised an issue regarding ineffective assistance of counsel.” *Id.*

In his brief in the Court of Appeals, Mr. Rollinson also argued the trial court’s failure to comply with N.C.G.S. § 15A-1201 constituted structural error and is reversible per se. Defendant-Appellant’s Br., COA20-42, pp. 29-33.

² The decision in *State v. Rollinson*, 2021-NCCOA-58 (unpublished) is appended to this New brief.

The Court of Appeals did not address Mr. Rollinson's contention that the trial court's failure to comply with N.C.G.S. § 15A-1201(d)(1) is reviewed on appeal as structural error. Instead, the Court of Appeals asserted that for Mr. Rollinson "to prove the trial court erred by accepting his waiver of the right to a jury trial, [Mr. Rollinson] must show: (1) the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201; and (2) [he] was prejudiced by the error." *Rollinson*, 2021-NCCOA-58, ¶ 9. In evaluating prejudice, the Court of Appeals found that Mr. Rollinson failed to show that his decision to waive his right to a jury trial "was made unknowingly or without an understanding of the consequences of doing so." *Id.* at ¶ 29; *see id.* at ¶ 24 (reasoning that prejudicial error did not occur because nothing "suggests [that Mr. Rollinson] did not understand or appreciate the consequences of the waiver" of his right to a jury trial on habitual felon status). The Court of Appeals ultimately concluded that Mr. Rollinson failed to show "that his choice to waive his right to a jury trial on the day of trial prejudiced him." *Id.* at ¶ 29.

Finally, in his brief to the Court of Appeals Mr. Rollinson argued that he was entitled to a resentencing hearing because the trial court erroneously entered judgment and sentenced him for both possession of cocaine and possession with intent to sell or deliver the same cocaine. Defendant-Appellant's Br., COA20-42, pp. 36-38.

The State conceded error. *Rollinson*, 2021-NCCOA-58, ¶ 28. The Court of Appeals agreed that the trial court erred in sentencing Mr. Rollinson for both PWISD cocaine and possession of the same cocaine. *Id.* at ¶¶ 28, 31. The Court of Appeals vacated Mr. Rollinson’s conviction for possession of cocaine and remanded the case to the trial court for a resentencing hearing. *Id.*

STANDARD OF REVIEW

On appeal of a Court of Appeals decision, this Court reviews “whether there was any error of law in the decision of the Court of Appeals.” *State v. Mumford*, 364 N.C. 394, 398 (2010) (citation omitted).

ARGUMENT

I. The Court of Appeals erred by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1) where the trial court did not personally engage with Mr. Rollinson to determine whether he (i) wanted to have a bench trial on habitual felon status and (ii) understood the consequences of waiving his right to a jury trial.

The Court of Appeals erred by concluding that Mr. Rollinson knowingly and voluntarily waived his right to a jury trial on habitual felon status. N.C.G.S. § 15A-1201(d)(1) expressly requires that the trial judge (1) address the defendant personally and (2) determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury. In this case, the trial judge did *not* personally address Mr. Rollinson in open court about his decision to waive his

constitutional right to a jury trial or take any measures to ensure he understood and appreciated the consequences of his decision to waive the right to trial by jury before it proceeded to a bench trial on habitual felon status. The Court of Appeals' conclusion is legally erroneous because it ignores the plain language of N.C.G.S. § 15A-1201(d)(1) and directly conflicts with the precedent established by this Court and the U.S. Supreme Court.

A. Applicable Legal Principles

The right to a “trial by jury in criminal cases is fundamental to the American scheme of justice[.]” *Duncan v. State of La.*, 391 U.S. 145, 149 (1968). It “is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, ... it is basic in our system of jurisprudence, and it is a fundamental right, essential to a fair trial.” *Id.* at 148-49 (citations omitted). Waiver cannot be presumed from a silent record. *Boykin v. Ala.*, 395 U.S. 238, 242-43 (1969).

Article I, § 24 of the North Carolina Constitution provides, in relevant part:

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that *a person accused of any criminal offense ... may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly.*

N.C. Const. art. I, § 24 (emphasis added).

Our constitution demands that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court” unless the person waives his right to a jury trial in accordance with the procedures prescribed by our General Assembly. The procedures incorporated in art. I, § 24, are set forth in N.C.G.S. § 15A-1201. *State v. Hamer*, 377 N.C. 502, 2021-NCSC-67, ¶ 10.

N.C.G.S. § 15A-1201(b) sets forth the procedure for a defendant to waive his constitutional right to a jury trial and provides in relevant part:

A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter ... shall be heard and judgment given by the court.

N.C.G.S. § 15A-1201(b).

“The decision to grant or deny the defendant’s request for a bench trial shall be made by the judge who will actually preside over the trial.” N.C.G.S. § 15A-1201(d).

Before consenting to a defendant’s waiver of the right to a trial by jury, the trial judge *shall* ... :

- (1) Address the defendant personally *and* determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury. [...]

N.C.G.S. § 15A-1201(d) (emphasis added).

Proceedings to determine whether a defendant has attained habitual felon status “shall be as if the issue of habitual felon were a principal charge.” N.C.G.S. § 14-7.5. *See* N.C.G.S. § 14-7.6 (entry of a guilty verdict or a defendant’s plea of guilty to habitual felon status must occur before a court can sentence the defendant as an habitual felon). Accordingly, a trial court may not allow a defendant to waive his constitutional right to a jury trial on habitual felon status without first complying with statutory requirements for waiver of the constitutional right to a jury trial as set forth in N.C.G.S. § 15A-1201.

B. The Court of Appeals ignored the plain language of N.C.G.S. § 15A-1201(d)(1) because there was no direct communication between the trial judge and Mr. Rollinson about whether Mr. Rollinson wished to waive his right to a jury trial or whether he understood the consequences of doing so.

After the trial court announced its verdict on the substantive charges, the prosecutor informed the court that Mr. Rollinson had been indicted as an habitual felon. The prosecutor then asked that in the event the court felt a colloquy was necessary, that it conduct a colloquy with Mr. Rollinson regarding the waiver of his right to a jury trial on habitual felon status. (T pp 135-36).

The court stated it would conduct a colloquy and the following transpired:

[COURT]: ... At this point in the trial it’s a separate trial. The jurors are coming back to hear the habitual felon matter,

or you can waive your right to a jury trial and we can proceed.³

[DEFENSE COUNSEL]: Just one second, please, your Honor.

[*Brief pause*]

[DEFENSE COUNSEL]: ... [A]fter speaking with my client on an habitual felon hearing, trial, he is not requesting a jury trial on that matter and is comfortable with a bench trial.

[PROSECUTOR]: Your Honor, I'm ready to proceed.

[COURT]: Go ahead.

(T p 136) (emphasis added).

Before a trial judge consents to a defendant's waiver of the right to a trial by jury, N.C.G.S. § 15A-1201(d) mandates that "*the trial judge shall*":

- (1) Address the defendant personally *and* determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.

N.C.G.S. § 15A-1201(d)(1) (emphasis added).

The Court of Appeals concluded "[t]he transcript shows the trial court complied with N.C. Gen. Stat. § 15A-1201(d)(1)." *Rollinson*, 2021-NCCOA-58, ¶ 23 (quoting N.C.G.S. § 15A-1201(d)(1)). In support, the Court of Appeals found that "the trial court addressed [Mr. Rollinson] personally" when it

³ The italicized language above is the language quoted by the Court of Appeals in support of its conclusion that the trial court personally addressed Mr. Rollinson as required by N.C.G.S. § 15A-1201(d)(1). *Rollinson*, 2021-NCCOA-58, ¶ 24.

stated, “[Y]ou can waive your right to a jury trial.” *Id.* at ¶ 24 (quoting T p 136). The Court of Appeals acknowledged that the trial court did not communicate directly with Mr. Rollinson about the waiver of his right to a jury trial and noted that “defense counsel answered for [Mr. Rollinson] after speaking to him.” *Id.*

The Court of Appeals concluded that defense counsel’s communication with the trial judge satisfied the requirement that “the trial judge shall ... [a]ddress the defendant personally.” *Rollinson*, 2021-NCCOA-58, ¶ 24 (quoting N.C.G.S. § 15A-1201(d)(1)). In support, the Court of Appeals reasoned that “N.C. Gen. Stat. § 15A-1201(d)(1) does not forbid an answer from counsel on a defendant’s behalf” and concluded that counsel’s response on behalf of Mr. Rollinson “d[id] not negate the fact that the trial court judge had otherwise properly complied with the requirement that the judge address [Mr. Rollinson] ‘personally.’” *Id.*

The Court of Appeals’ conclusion that the trial court complied with N.C.G.S. § 15A-1201(d)(1) is legally erroneous and contrary to the plain language of the statute for two reasons. First, the trial court did *not* personally address Mr. Rollinson in open court about his decision to waive his right to a jury trial on the habitual felon charge. The trial judge only communicated with defense counsel about Mr. Rollinson’s decision. Second, the trial judge’s failure to personally address Mr. Rollinson precluded the court from determining that

Mr. Rollinson understood and appreciated the consequences of his decision to waive the right to trial by jury as required by N.C.G.S. § 15A-1201(d)(1) before it proceeded to a bench trial. Accordingly, the trial court made no findings that Mr. Rollinson had such an appreciation or understanding. Indeed, defense counsel's statement—that Mr. Rollinson was “not requesting” rather than *waiving his right* to a jury trial—indicates confusion on this crucial point. (T p 136). For both of these reasons, the Court of Appeals' conclusion that the trial court complied with N.C.G.S. § 15A-1201(d)(1) is erroneous and ignores the plain language of the statute.

1. Communication between the trial judge and defense counsel cannot satisfy the trial court's duty to “address the defendant personally.”

The Court of Appeals erroneously concluded that defense counsel's statements were sufficient to satisfy the trial judge's duty to address the defendant personally about his decision to waive his constitutional right to a jury trial. *Rollinson*, 2021-NCCOA-58, ¶ 24.

N.C.G.S. § 15A-1201(d)(1) expressly requires that the *trial judge* (1) address the defendant personally and (2) determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury. Because N.C.G.S. § 15A-1201(d)(1) requires the trial judge to address the defendant personally, defense counsel's communication with the court cannot be a satisfactory substitute for

communication between the court and the defendant. Similarly, defense counsel's communication with Mr. Rollinson cannot satisfy the trial court's responsibility of ensuring that Mr. Rollinson's desire to waive his constitutional right to a jury trial is the product of an informed choice.

“It is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision” to waive a constitutional right. *State v. Pruitt*, 322 N.C. 600, 604 (1988) (rejecting argument that defense attorney's advice to defendant regarding consequences of decision to waive right to counsel could substitute for an adequate inquiry of the defendant by the trial court).

A trial court cannot assume that the defendant knows his rights. A trial court must conduct the mandated inquiry. *State v. Bullock*, 316 N.C. 180, 186 (1986) (trial court must conduct statutorily mandated inquiry to affirmatively demonstrate the defendant knowingly and voluntarily waived a constitutional right). Because the trial court failed to address Mr. Rollinson personally and ensure that he knew the consequences of his decision to waive his right to a jury trial, the Court of Appeals erred by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1). *See generally State v. Williamson*, 227 N.C. App. 204, 220-21 (2020) (reversing habitual felon conviction where the trial judge communicated with defendant's attorney but failed to address the defendant personally and failed to assess whether the defendant's plea was

an informed choice as required by N.C.G.S. § 15A-1022(c)); *State v. Wilkins*, 225 N.C. App. 492, 497-98 (2013) (vacating habitual felon conviction where the trial court sentenced the defendant as an habitual felon where the issue was not submitted to the jury and the trial court accepted the defendant's stipulation without first addressing the defendant personally and making inquiries of the defendant as required by N.C.G.S. § 15A-1022); *State v. Gilmore*, 142 N.C. App. 465, 471 (2001) (holding that a defendant's stipulation to habitual felon status "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.")

2. The Court of Appeals erred by concluding that Mr. Rollinson knowingly and voluntarily waived his right to a jury trial.

In the absence of compliance with N.C.G.S. § 15A-1201(d)(1), an appellate court cannot presume that a defendant knowingly and voluntarily waived his constitutional right to a jury trial. The Court of Appeals erred by concluding that Mr. Rollinson knowingly and voluntarily waived his right to a jury trial because nothing "suggests [Mr. Rollinson] did not understand or appreciate the consequences of the waiver." *Rollinson*, 2021-NCCOA-58, ¶ 24.

The Court of Appeals erroneously assumed that even though the trial judge failed to conduct the inquiry mandated by section 15A-1201(d)(1), Mr. Rollinson nevertheless knowingly and voluntarily waived his right to a jury trial because he failed to make an affirmative showing to the contrary. The

Court of Appeals' analysis and conclusion directly conflicts with the precedent established by this Court in *Bullock* and by the U.S. Supreme Court in *Boykin v. Ala. Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Bullock*, 316 N.C. at 186.

The record must affirmatively show that the defendant knowingly and voluntarily waived his constitutional right to a jury trial. An appellate court cannot presume a voluntary waiver of the right to trial by jury from a silent record. *Boykin*, 395 U.S. at 243. Likewise, a court cannot assume that the defendant knows his rights where the court failed to conduct the statutorily mandated inquiry. *Bullock*, 316 N.C. at 186 (concluding a trial judge could not assume the defendant, a magistrate judge, knew his rights, and holding the trial court committed reversible error by failing to conduct inquiry required by N.C.G.S. § 15A-1242). Thus, the trial court must conduct the inquiry mandated by N.C.G.S. § 15A-1201(d)(1) to ensure the defendant's waiver of his constitutional right to a jury trial is a knowing and voluntary choice. See *Bullock*, 316 N.C. at 186.

Moreover, the Court of Appeals ignored record evidence that Mr. Rollinson did not understand that a jury trial was the default procedure that would occur unless he waived it. Instead, his counsel indicated that Mr. Rollinson was not requesting a jury trial and was "comfortable with" (i.e. did not object to) a bench trial. (T p 136). Failing to request a jury trial or accepting a bench trial is not the same as intelligently waiving a known right to a jury

trial.

Here, the Court of Appeals erroneously concluded that in the absence of an affirmative showing that Mr. Rollinson's waiver was involuntary, an appellate court could assume that Mr. Rollinson knowingly and voluntarily waived his constitutional right to a jury trial despite the trial court's failure to comply with N.C.G.S. § 15A-1201(d)(1). *Rollinson*, 2021-NCCOA-58, ¶¶ 18, 24, 29. The Court of Appeals reasoned that Mr. Rollinson knowingly and voluntarily waived his constitutional right to a jury trial since nothing in the transcript "suggests [Mr. Rollinson] did not understand or appreciate the consequences of the waiver." *Rollinson*, 2021-NCCOA-58, ¶ 24; *see id.* at ¶ 29 (concluding that Mr. Rollinson's waiver of his right to a jury trial was proper because "[t]he record provides no indication that [Mr. Rollinson's] choice to do so was made unknowingly or without an understanding of the consequences of doing so."); *see also id.* at ¶ 18 (finding a valid waiver of Mr. Rollinson's right to a jury trial on the substantive charges on the ground that "[t]here are no facts in the record before us to indicate [Mr. Rollinson's] waiver of his right to a jury trial was not knowingly, intelligently, or voluntarily waived, or that his waiver was exclusively at the direction of counsel and not his choice"). The Court of Appeals' analysis is the exact opposite of the precedent established by this Court in *Bullock* and by the U.S. Supreme Court in *Boykin v. Alabama* *Boykin*, 395 U.S. at 243; *Bullock*, 316 N.C. at 186. Furthermore, the Court of

Appeals ignored evidence that Mr. Rollinson did not understand that he would receive a jury trial unless he waived that right. To the contrary, the evidence suggests that Mr. Rollinson believed he was required to request a jury trial or object to a bench trial. For both of these reasons, the Court of Appeals erred in upholding Mr. Rollinson's habitual felon status.

3. Because the trial court did not ask Mr. Rollinson a single question before proceeding with a habitual felon bench trial, Mr. Rollinson's case is distinguishable from all other cases evaluating a trial court's colloquy under N.C.G.S. § 15A-1201(d)(1).

This Court recently stated that N.C.G.S. § 15A-1201(d)(1) “simply requires the trial court to ‘determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.’” *State v. Hamer*, 377 N.C. 502, 2021-NCSC-67, ¶ 23 (quoting N.C.G.S. § 15A-1201(d)(1)). Mr. Rollinson’s case is distinguishable from *State v. Hamer* – and every other appellate court decision evaluating whether the defendant knowingly and voluntarily waived his right to a jury trial – because the trial court in this case did *not* ask Mr. Rollinson a single question before proceeding to the habitual felon bench trial.

At the beginning of the trial in *Hamer*, defense counsel informed the court that the defendant waived his right to a jury trial and that the State consented to a bench trial. *Hamer*, 2021-NCSC-67, ¶ 5. The trial court accepted the waiver through counsel of defendant’s right to a jury trial and proceeded

to a bench trial. *Id.* The trial court subsequently announced that N.C.G.S. § 15A-1201 required him to personally address the defendant “and ask if he waives a jury trial and understands the consequences of that.” *Id.* at ¶ 6. The following colloquy occurred, in relevant part:

THE COURT: [...] Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That’s 15A-1201. Your [defense counsel] has waived it on your behalf. The State has consented to that. Do you consent to that also?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [a] possibility of a 20-day jail sentence. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

Hamer, 2021-NCSC-67, ¶ 6.

On appeal, the defendant argued he did not knowingly and voluntarily waive his right to a jury trial. *Hamer*, 2021-NCSC-67, ¶ 9. This Court concluded that “the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant’s subsequent clear and unequivocal answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that

decision.” *Id.* at ¶ 23.

Unlike the trial judge in *Hamer*, the trial judge in this case did not ask Mr. Rollinson a single question regarding his decision to waive his right to a jury trial on habitual felon status. Unlike in *Hamer*, the judge never asked Mr. Rollinson if he wished to waive his right to a jury trial on habitual felon status and did not inform him of the maximum punishment or consequences of his decision to waive his right to a jury trial. Unlike the defendant in *Hamer*, there is nothing in the transcript to show that Mr. Rollinson personally desired a bench trial on habitual felon status and understood the consequences of proceeding with a bench trial.

Mr. Rollinson’s case is distinguishable from every other appellate decision evaluating whether a defendant knowingly and voluntarily waived his right to a bench trial as required by N.C.G.S. § 15A-1201(d)(1). In every other appellate decision reviewed by undersigned counsel, the trial court personally questioned the defendant about his decision to waive his right to a jury trial.

In *State v. Rutledge*, the defendant was charged with possession of methamphetamine. *State v. Rutledge*, 267 N.C. App. 91, 93 (2019). Before trial, defense counsel informed the court of the defendant’s request to waive his right to a jury trial and informed the court that the State had no objection. *Id.* The judge then conducted a colloquy with the defendant. *Id.* The court informed the defendant of his charge and the maximum punishment for that charge, and

asked the defendant the following questions:

THE COURT: ... I'm advised [by defense counsel] that it is your desire to waive a jury trial in this matter and have a bench trial; is that correct?

DEFENDANT: Yes, sir.

THE COURT: ... [Do you] understand, sir, that you have the right to have 12 ... jurors of your peers, ... that you have the right to participate in their selection ... and that any verdict by the jury would have to be a unanimous verdict ... of the 12? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You have the right to waive that and instead have a bench trial, which would mean that the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present were you to waive your right to a jury trial. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Have you talked with [defense counsel] about your rights in this regard and the ramifications of waiving a jury trial?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the jury trial or your rights therein?

DEFENDANT: No, sir.

THE COURT: ... [I]s it your decision ... and your request, that the jury trial be waived and that you be afforded a bench trial?

DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

Id. at 93-94. The court granted the defendant's motion to waive his right to a jury trial. *Id.* at 94. The court and defendant signed form AOC-CR-405 ("Waiver of Jury Trial form"). *Id.*

On appeal, the defendant in *Rutledge* argued that the trial court's colloquy pursuant to N.C.G.S. § 15A-1201(d)(1) was insufficient to establish a knowing and voluntary waiver. *Rutledge*, 267 N.C. App. at 97. The Court of Appeals disagreed. The Court of Appeals explained that "the trial court's colloquy mirrored the acknowledgements made on the Waiver of Jury Trial form." *Id.* at 98. The Court of Appeals concluded the colloquy between the trial court and the defendant established that the defendant fully understood and appreciated the consequences of his decision to waive the right to trial by jury. *Id.*

In *State v. Swink*, the trial court engaged in a colloquy with the defendant prior to trial and asked the defendant about his age, education, mental faculties, representation by counsel, and his request to waive his right to a jury trial. *State v. Swink*, 252 N.C. App. 218, 219-20 (2017). During the colloquy the defendant affirmed to the trial court that he wished "to have a judge decide [his] case as opposed to a jury of 12 individuals[.]" *Id.* The trial court concluded that the defendant "knowingly and with advice from counsel

... made his individual decision to waive his right to a jury trial and will be allowed to go forward with a bench trial.” *Id.* at 224. The defendant signed a written waiver of jury trial form and reaffirmed – through counsel – his desire to waive his right to a jury trial on the date of trial. *Id.*

On appeal, the defendant argued, *inter alia*, that his waiver was not constitutionally sufficient and that the trial court erred by failing to conduct an adequate inquiry into whether he made a knowing and voluntary waiver of his right to a jury trial. *Swink*, 252 N.C. App. at 223. The Court of Appeals disagreed and concluded “the defendant’s waiver of his right to trial by jury was constitutional, and the record reflects that his waiver was knowing and voluntary.” *Id.* at 225.

Similar to the Court of Appeals’ holdings in *Rutledge* and *Swink*, the Court of Appeals also concluded the defendant’s waiver of the right to a jury trial was knowing and voluntary in an unpublished decision where the trial court personally addressed the defendant and questioned her about her decision to waive the constitutional right to a jury trial. *See State v. French*, 2021-NCCOA-606 (unpublished) (trial court’s colloquy established the defendant fully understood and appreciated her decision to waive a jury trial where the court personally addressed the defendant, the court explained to the defendant the differences between bench trials and jury trials, and personally

asked the defendant if she wished to waive her right to a jury trial);⁴ *see also State v. Cranford*, 2021-NCCOA-511, ¶¶ 12-17 (unpublished) (where the trial court asked the defendant one question regarding the waiver of his right to a jury trial and the record failed to disclose the substance of defense counsel’s statements or describe on the record the defendant’s request to waive his right to a jury trial, the court held that “[e]ven if we were to presume error in the violation of the statutory mandate, N.C. Gen. Stat. § 15A-1201(d)(1), Defendant cannot establish prejudice to warrant a new trial”).⁵

Mr. Rollinson’s case is distinguishable from every other appellate decision concluding that the trial court conducted a sufficient colloquy under N.C.G.S. § 15A-1201(d)(1) to establish a knowing and voluntary waiver of jury trial because the trial court in this case did not personally address Mr. Rollinson or ask him a single question about his desire to waive his right to a jury trial on habitual felon status. Because the trial court failed to personally address Mr. Rollinson regarding his decision to waive his right to a jury trial on habitual felon status, a knowing and voluntary waiver of Mr. Rollinson’s right to a jury trial cannot be shown in this case.

⁴ The decision in *State v. French*, 2021-NCCOA-606 (unpublished) is appended to this New Brief.

⁵ The decision in *State v. Cranford*, 2021-NCCOA-511 (unpublished) is appended to this New Brief.

4. A signed Waiver of Jury Trial form (AOC-CR-405) is not a substitute for the trial court's compliance with N.C.G.S. § 15A-1201(d)(1).

The Court of Appeals erroneously relied on a signed Waiver of Jury Trial form as a substitute for the trial judge's compliance with N.C.G.S. § 15A-1201(d)(1). *Rollinson*, 2021-NCCOA-58, ¶ 18. The Court of Appeals stated that Mr. Rollinson's "argument that the execution the Waiver of Jury Trial form did not properly serve as a substitute for compliance by the trial court with N.C. Gen. Stat. § 15A-1201 is unpersuasive." *Id.* The Court of Appeals reasoned that the signed form demonstrates compliance with section 15A-1201(d)(1) because Mr. Rollinson "was represented by counsel, and [his] counsel signed the Waiver of Jury Trial form certifying that counsel had fully explained all the waiver implications to him." *Id.*

Although Mr. Rollinson, defense counsel, and the court signed the Waiver of Jury Trial form (AOC-CR-405) (R pp 61-62), the execution of a written waiver is no substitute for compliance by the trial court with N.C.G.S. § 15A-1201(d)(1). *See State v. Sinclair*, 301 N.C. 193, 199 (1980) (a completed Transcript of Plea form is inadequate to satisfy the mandate of N.C.G.S. § 15A-1022(c), which ensures a knowing and voluntary plea); *State v. Evans*, 153 N.C. App. 313, 315 (2002) ("The execution of a written waiver is no substitute for compliance by the trial court with the statute" governing waiver of a constitutional right). When the court signs a certification indicating the

statutory waiver procedure has been followed, but the record belies that fact, the waiver is invalid. *State v. Warren*, 82 N.C. App. 84, 87 (1986).

Although the court and Mr. Rollinson signed a waiver form stating that the court addressed Mr. Rollinson personally and determined that Mr. Rollinson understood and appreciated the consequences of his decision to waive his right to a jury trial on habitual felon status, the record belies that fact. (T pp 135-43). Despite the trial court and Mr. Rollinson's signatures on the Waiver of Jury Trial form, the record shows the trial court did *not* personally address Mr. Rollinson in open court or take any measures to ensure he understood and appreciated the consequences of his decision to waive the right to trial by jury as required by N.C.G.S. § 15A-1201(d)(1) before it proceeded to a bench trial. Therefore, the signed Waiver of Jury Trial form (AOC-CR-405) cannot serve as a substitute for the trial court's failure to comply with the mandate set forth in N.C.G.S. § 15A-1201(d)(1).

The Court of Appeals erred by concluding that Mr. Rollinson knowingly and voluntarily waived his constitutional right to a jury trial on habitual felon status because the Court of Appeals' conclusion disregards the plain language of N.C.G.S. § 15A-1201(d)(1) and is premised on a fundamentally flawed legal analysis that directly conflicts with this Court's precedent.

II. The Court of Appeals erred by requiring Mr. Rollinson to establish that he was prejudiced by the trial court's failure to address him personally to determine whether he knew the consequences of waiving his constitutional right to a jury trial as mandated by N.C.G.S. § 15A-1201(d)(1) and N.C. Const. art. I, § 24.

This Court and the United States Supreme Court have long held that violations of a criminal defendant's right to a jury trial by twelve impartial jurors is reversible error per se. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Duncan v. Louisiana*, 391 U.S. 145, 148-62 (1968); *State v. Poindexter*, 353 N.C. 440, 444 (2001); *State v. Bunning*, 346 N.C. 253, 257 (1997); *State v. Bindyke*, 288 N.C. 608, 621-22 (1975); *State v. Hudson*, 280 N.C. 74, 80 (1971). The Court of Appeals erred by failing to apply this well settled standard to this case. Instead, the Court of Appeals required Mr. Rollinson to demonstrate a type of prejudice at odds with the law on waivers of fundamental constitutional rights: the Court of Appeals required Mr. Rollinson to demonstrate that he would not have waived his right if he had been properly advised of his right to a jury trial. This Court's recent decision in *State v. Hamer*—which recognized a defendant's absolute right to a mistrial where a court accepted a waiver of jury trial without personally addressing the defendant—demonstrates the flaws in the decision below.

A. Applicable Legal Principles

A defendant has the right to a habitual felon jury trial. N.C.G.S. § 14-7.5. Further, a defendant may only be sentenced as an habitual felon after a guilty verdict or a knowing and voluntary guilty plea. N.C.G.S. § 14-7.6. *See State v. Todd*, 313 N.C. 110, 118 (1985) (“The procedures set forth in N.C.G.S. § 14-7.1 to -7.6 ... comport with the defendant’s federal and state constitutional guarantees.”).

Violations of a criminal defendant’s right to a jury trial by twelve impartial jurors is structural error or reversible error per se. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Duncan v. Louisiana*, 391 U.S. 145, 148-62 (1968); *State v. Poindexter*, 353 N.C. 440, 444 (2001); *State v. Bunning*, 346 N.C. 253, 257 (1997); *State v. Bindyke*, 288 N.C. 608, 621-22 (1975); *State v. Hudson*, 280 N.C. 74, 80 (1971). “The very premise of structural-error review is that even convictions reflecting the ‘right’ result are reversed for the sake of protecting a basic right.” *Neder v. United States*, 527 U.S. 1, 34 (1999). A defendant’s remedy for structural error is not dependent upon harmless error analysis; rather, such errors are reversible per se. *Id.*

In the context of a defendant’s right to a jury trial, the United States Supreme Court has stated that, in light of “the Sixth Amendment’s clear command to afford jury trials in serious criminal cases[, w]here th[e] right is

altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt," given that "the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578 (citations omitted); *see also Sullivan*, 508 U.S. at 281-82 (stating that, since "[t]he right to trial by jury reflects ... a profound judgment about the way in which law should be enforced and justice administered," "[t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (citations omitted) (quoting *Duncan v. Louisiana*, 391 U.S. at 155)).

B. *State v. Hamer* holds that technical violations of N.C.G.S. § 15A-1201 are not per se structural error.

Recently, in *State v. Hamer*, this Court carved out technical violations of the statutory waiver procedure from the prejudice per se rule. For such technical violations, this Court required the defendant to show that there was a reasonable possibility of a different result had his case been decided by a jury. *State v. Hamer*, 377 N.C. 502, 2021-NCSC-67, ¶ 25. Nothing in *Hamer* altered the long-standing principle that denial of the right to a jury trial without a knowing and intelligent waiver constitutes structural error. To the contrary, *Hamer* recognized the structural nature of the error here.

At the beginning of trial in *Hamer*, defense counsel informed the court that the defendant waived his right to a jury trial and that the State consented

to a bench trial. *Hamer*, 2021-NCSC-67, ¶ 5. The trial court accepted the waiver through counsel of defendant's right to a jury trial and proceeded to a bench trial. *Id.*

After the State rested its case-in-chief, the trial court recognized its error in failing to address the defendant directly regarding his waiver saying, "we complied completely with [N.C.G.S. § 15A-1201] with the exception of the fact that I'm supposed to personally address the defendant and ask if he waives a jury trial and understands the consequences of that." *Id.* at ¶ 6. The court then spoke to the defendant to assess his understanding and desire:

THE COURT: [...] Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your [defense counsel] has waived it on your behalf. The State has consented to that. Do you consent to that also?

DEFENDANT: Yes, sir.

THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [a] possibility of a 20-day jail sentence. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

Hamer, 2021-NCSC-67, ¶ 6.

On appeal, the defendant argued that he was entitled to a new trial because the trial court belatedly addressed Hamer to assess his understanding and willingness to waive his right to a jury trial. *Hamer*, 2021-NCSC-67, ¶ 12. Strict compliance with N.C.G.S. § 15A-1201(d)(1) required the trial court to address the defendant personally and obtain his waiver before the case was tried. Hamer argued that even a technical violation of the waiver statute constituted structural error. *Hamer*, 2021-NCSC-67, ¶ 12.

This Court rejected Hamer’s contention that structural error applied, because applying structural error “would impose a per se rule that would rigidly require a new trial for *technical violations* of N.C.G.S. § 15A-1201(d), without regard to the facts and circumstances of a particular case and without consideration of prejudice to the defendant.” *Hamer*, 2021-NCSC-67, ¶ 18 (emphasis added (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) (“[W]hether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.”))).

This Court relied on *State v. Garcia* to explain that while a substantial violation of N.C.G.S. § 15A-1201(d)(1) amounts to structural error or reversible error per se, a mere technical violation does not. *Hamer*, 2021-NCSC-67, ¶ 17 (citing *State v. Garcia*, 358 N.C. 382, 410 (2004)). In *Garcia*, the defendant argued that the trial court committed structural error by deviating from the

jury selection procedure of N.C.G.S. § 15A-1214. *Id.* (citing *Garcia*, 358 N.C. at 410). The Court explained that for structural error to apply, the defendant must show the violation of a constitutional right that “*necessarily* rendered the criminal trial fundamentally unfair or unreliable.” *Garcia*, 358 N.C. at 410. The *Garcia* Court found the defendant failed to show that he was denied a trial by a fair and impartial jury or that any other constitutional error resulted from the jury selection procedure employed at his trial. *Id.* The Court concluded that the defendant showed “only a technical violation” of the jury selection statute; and, “[w]ithout more, this statutory violation is insufficient to support a claim of constitutional structural error.” *Id.* (emphasis added). See *State v. Thompson*, 359 N.C. 77, 87 (2004) (alleged violation of jury selection statute amounts to structural error where the violation is “so serious as to render [defendant’s] trial unreliable;” however, “a mere technical violation of N.C.G.S. § 15A-1214 is insufficient to support a claim of structural error”).

In *Hamer*, this Court reasoned that the trial court merely committed a technical violation of N.C.G.S. § 15A-1201(d)(1) by belatedly obtaining the defendant’s waiver. *Hamer*, 2021-NCSC-67, ¶ 18. In this Court’s view, such a technicality was “simply an error in the trial process itself that did not affect the framework within which the trial proceeded.” *Id.* (internal quotation and citation omitted). In other words, structural error did not apply in *Hamer* because the defendant had shown only a technical violation of N.C.G.S. § 15A-

1201(d)(1). Because the error in *Hamer* involved a technical violation of N.C.G.S. § 15A-1201(d)(1), the defendant had to show that he was prejudiced by the error. *Hamer*, 2021-NCSC-67, ¶ 21.

Importantly, in *Hamer*, this Court recognized that absent the trial court's colloquy with the defendant pursuant to N.C.G.S. § 15A-1201(d)(1) and an affirmative showing of a knowing and voluntarily waiver by the defendant, a mistrial could not have been avoided. This Court explained that although the trial court's colloquy pursuant to N.C.G.S. § 15A-1201(d)(1) "should have been conducted prior to trial, [the] defendant had the unique authority to compel the trial court to declare a mistrial." *Hamer*, 2021-NCSC-67, ¶ 24.

Prior to conducting the colloquy with the defendant, the trial court had only spoken with the defendant's attorney about the defendant's desire to waive his right to a jury trial. Thus, in the absence of the trial court's colloquy with the defendant pursuant to N.C.G.S. § 15A-1201(d)(1) and an affirmative showing of a knowing and voluntarily waiver by the defendant, the verdict could not have survived a challenge—either by motion for mistrial or on appeal. No showing of prejudice was required. *Hamer*, 2021-NCSC-67, ¶ 24. *See State v. Bindyke*, 288 N.C. 608, 623 (1975) (deciding that the presence of an alternate in the jury room during deliberations constituted reversible error per se and noting most courts viewed such an occurrence as "a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates

the verdict, if rendered”).

In *Hamer*, this Court recognized the centrality of the requirement that the trial court address the defendant directly: “[a]lthough the trial court’s colloquy was untimely, N.C.G.S. § 15A-1201(d)(1) simply requires the trial court to ‘determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.’” *Hamer*, 2021-NCSC-67, ¶ 23 (quoting N.C.G.S. § 15A-1201(d)(1)) (emphasis added). This Court found that “the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant’s subsequent clear and unequivocal answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that decision.” *Id.* (emphasis added). This Court concluded that the trial court’s delayed colloquy constituted a mere technical violation of N.C.G.S. § 15A-1201(d) for which the defendant was unable to show prejudice.

The circumstances in *Hamer* are vastly different than the circumstances in this case. In *Hamer*, a technical statutory violation occurred because the trial court’s colloquy pursuant to N.C.G.S. § 15A-1201(d)(1) was *untimely*. Mr. Rollinson’s case is not about the timeliness of the trial court’s colloquy; it is about the complete failure of the trial court to conduct *any* colloquy with Mr. Rollinson before proceeding to a habitual felon bench trial. In *Hamer*, the trial court personally addressed the defendant, conducted a colloquy pursuant to

N.C.G.S. § 15A-1201(d)(1), and the defendant personally affirmed his desire to waive his right to a jury trial. Unlike the facts in *Hamer*, the trial court failed to address Mr. Rollinson personally and failed to take any steps to ensure the waiver of his right to a jury trial on habitual felon status was a knowing and voluntary decision. Because the errors in Mr. Rollinson's case were not mere technical statutory violations, structural error applies in this case.

C. Based on the totality of the circumstances, structural error or prejudicial error per se applies in Mr. Rollinson's case.

The Court of Appeals did not address Mr. Rollinson's contention that the trial court's failure to comply with N.C.G.S. § 15A-1201(d)(1) is reviewed on appeal as structural error or prejudice per se. Instead, to obtain relief, the Court of Appeals required Mr. Rollinson to show (1) the trial court violated the waiver requirements set forth in N.C.G.S. § 15A-1201 and (2) that he was prejudiced by the error. *Rollinson*, 2021-NCCOA-58, ¶ 9. The court imposed its prejudice requirement without regard to the long-standing precedent holding that such fundamental violations of the right to a jury trial are deemed prejudicial per se. *Sullivan*, 508 U.S. at 281-82; *Rose*, 478 U.S. at 578; *Duncan*, 391 U.S. at 148-62; *Poindexter*, 353 N.C. at 444; *Bunning*, 346 N.C. at 257; *Bindyke*, 288 N.C. at 621-22; *Hudson*, 280 N.C. at 80. Unlike in *Hamer*, the violation was not a mere technicality. It went to the heart of the waiver statute: ascertaining whether Mr. Rollinson was knowingly and intelligently waiving

his constitutional right to a jury trial. In *Hamer*, this Court held that a similar violation of the waiver statute would have given Hamer the right to compel a mistrial, regardless of prejudice. *Hamer*, 2021-NCSC-67, ¶ 24. The Court of Appeals' requirement that Mr. Rollinson show prejudice cannot be reconciled with this Court's reasoning in *Hamer*.

Further, in evaluating prejudice, the Court of Appeals turned the law of waiver on its head, requiring Mr. Rollinson to show that his decision to waive his right to a jury trial "was made unknowingly or without an understanding of the consequences of doing so." *Id.* at ¶ 29; *see id.* at ¶ 24 (reasoning that prejudicial error did not occur because nothing "suggests [that Mr. Rollinson] did not understand or appreciate the consequences of the waiver" of his right to a jury trial on habitual felon status). Ultimately, the Court of Appeals upheld Mr. Rollinson's habitual felon conviction because he failed to show "that his choice to waive his right to a jury trial on the day of trial prejudiced him." *Id.* at ¶ 29.

A defendant is not required to make an affirmative showing that he "did not understand or appreciate the consequences of the waiver" or that his decision to waive his right to a jury trial "was made unknowingly or without an understanding of the consequences of doing so." *Rollinson*, 2021-NCCOA-58, ¶¶ 24, 29. Instead, a knowing and voluntary waiver must be shown on the record. *State v. Pruitt*, 322 N.C. 600, 604 (1988) (holding that the defendant

was entitled to a new trial when there was “nothing in the record which show[ed]” a knowing and voluntary waiver of his right to counsel as required by N.C.G.S. § 15A-1242).

Further, this Court has found per se reversible error where the trial court wholly failed to address the defendant personally and conduct the statutorily mandated inquiry to establish a knowing and voluntary waiver of a constitutional right. *See, e.g., State v. Bullock*, 316 N.C. 180, 186 (1986) (holding “[i]t was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether the defendant voluntarily, knowingly and intelligently waived his right to counsel”); *State v. Moore*, 362 N.C. 319, 326 (2008) (holding that it was prejudicial error for the trial court to accept the defendant’s waiver of the right to counsel without first making the inquiry mandated by N.C.G.S. § 15A-1242 to ensure that the defendant’s decision to represent himself was knowingly and voluntarily made).

The Court of Appeals has likewise found per se reversible error where the trial court wholly failed to address the defendant personally and conduct the colloquy required by N.C.G.S. § 15A-1022. *See, e.g., State v. Williamson*, 227 N.C. App. 204, 220-21 (2020) (reversing habitual felon conviction where the trial judge communicated with defendant’s attorney but failed to address the defendant personally and failed to assess whether the defendant’s plea was

an informed choice as required by N.C.G.S. § 15A-1022(c)); *State v. Wilkins*, 225 N.C. App. 492, 497-98 (2013) (vacating habitual felon conviction where the trial court sentenced the defendant as an habitual felon where the issue was not submitted to the jury and the trial court accepted the defendant's stipulation without first addressing the defendant personally and making inquiries of the defendant as required by N.C.G.S. § 15A-1022); *State v. Gilmore*, 142 N.C. App. 465, 471 (2001) (holding that a defendant's stipulation to habitual felon status "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.")

Because the trial court wholly failed to address Mr. Rollinson personally and conduct the inquiry mandated by N.C.G.S. § 15A-1201(d)(1), structural error or per se reversible error applies in this case.

D. Even if a showing of prejudice is required, that showing was made here.

Even if the Court of Appeals correctly required Mr. Rollinson to demonstrate prejudice, the totality of the circumstances below demonstrate the prejudice required. Here, the trial court's failure to conduct a proper colloquy with Mr. Rollinson led to confusion that ultimately deprived Mr. Rollinson of a lawful adjudication of his habitual felon status. After hearing evidence at the habitual felon proceeding, the trial court said that it was finding Mr. Rollinson attained habitual felon status based on Mr. Rollinson's guilty plea. The

prosecutor alerted the court that Mr. Rollinson had not pled guilty. The trial court disagreed and reiterated that it was accepting Mr. Rollinson's guilty plea. The Court of Appeals erred in discounting the trial court's express and emphatic words declaring that it was accepting Mr. Rollinson's guilty plea to habitual felon status. Because the confusion engendered by the inadequate waiver deprived Mr. Rollinson of a lawful conviction, prejudice is manifest.

A defendant has the right to a habitual felon jury trial. N.C.G.S. §14-7.5. Further, a defendant may only be sentenced as an habitual felon after a guilty verdict or a knowing and voluntary guilty plea. N.C.G.S. §14-7.6. *See State v. Todd*, 313 N.C. 110, 118 (1985) ("The procedures set forth in N.C.G.S. § 14-7.1 to -7.6 ... comport with the defendant's federal and state constitutional guarantees."). Mr. Rollinson was prejudiced because he was erroneously sentenced as an habitual felon in the absence of a verdict of guilt by twelve peers, a verdict of guilt by a judge following a bench trial, or a knowing and voluntary guilty plea. *See State v. Gilmore*, 142 N.C. App. 465, 471-72 (2001).

The Court of Appeals held that "the statement by the trial court that [Mr. Rollinson] pleaded guilty to attaining habitual felon status when he did not so plead was error, though not prejudicial error." *Rollinson*, 2021-NCCOA-58, ¶ 26. The Court of Appeals found that prejudicial error did not occur because (1) the trial judge "simply misspoke" when he said Mr. Rollinson pleaded guilty to habitual felon status and (2) the issue was rectified because

the written judgment indicated Mr. Rollinson received a bench trial and indicated the court “adjudge[d] defendant to be a habitual felon to be sentenced.” *Id.* The Court of Appeals erred on both counts.

1. The transcript demonstrates that the trial court did not misspeak, but instead, mistakenly believed Mr. Rollinson pleaded guilty to habitual felon status.

The Court of Appeals held that prejudicial error did not occur because the “transcript shows the trial court judge intended to state [Mr. Rollinson] was found guilty, not that he pleaded guilty.” *Rollinson*, 2021-NCCOA-58, ¶ 26. The Court of Appeals characterized the trial court’s statements as a “*lapsus linguae*” and concluded “the trial judge *simply misspoke* when he stated ‘[h]e pled guilty to that’ in reference to [Mr. Rollinson]’s habitual felon status charge.” *Id.* (emphasis added).

During the habitual felon phase, the State admitted three judgments as evidence that Mr. Rollinson had attained habitual felon status. The prosecutor declined to make a closing argument. (T pp 136-38). The court heard sentencing arguments from the State, defense counsel, and Mr. Rollinson. (T pp 139-143). Thereafter, the court announced:

[COURT]: Upon consideration of the record, the evidence presented, answers of [Mr. Rollinson], statements of the lawyers, *I find there’s a factual basis for entry of the plea.* [Mr. Rollinson] is satisfied with his attorney, he’s competent to stand trial, and *the plea is the informed choice* made freely, voluntarily, and understandingly. *The defendant’s plea is hereby accepted* by the Court and ordered recorded.

[Mr. Rollinson] having been found guilty of [six substantive charges], *and admitting his habitual felon, or pleading to the habitual felon*, I consolidate them into one sentence.

(T pp 143-44) (emphasis added). After the court pronounced judgment, the prosecutor interjected, “The only thing is he ... didn’t admit the habitual felon.” (T p 144). The court responded, “He pled guilty to that.” (T p 144).

A *lapsus linguae* occurs where the trial court makes an inadvertent slip of the tongue. *State v. Owens*, 243 N.C. 673, 675 (1956). Here, the trial court found a “factual basis for entry of the plea,” that “the plea is [an] informed choice;” accepted a plea to habitual felon status and stated Mr. Rollinson “admit[ed] his habitual felon [status], or plead[ed] to the habitual felon” before entering judgment. (T pp 143-44). When the prosecutor interjected and informed the court that Mr. Rollinson did not plead guilty to habitual felon status, the court reaffirmed its mistaken belief, stating, “He pled guilty to that.” (T p 144).

The trial court stated – five times – that Mr. Rollinson pleaded guilty to habitual felon status and even reaffirmed its belief when the prosecutor attempted to correct the court. Contrary to Court of Appeals’ decision, the transcript does *not* show the court’s oral statements that Mr. Rollinson pled guilty to habitual felon status were merely an inadvertent slip of the tongue. Thus, the Court of Appeals’ conclusion that the “transcript shows the trial court judge intended to state [Mr. Rollinson] was found guilty, not that he

pleaded guilty” is not supported by the record. *Rollinson*, 2021-NCCOA-58, ¶ 26.

2. Because the written judgment does not identify or differentiate the manner of conviction for habitual felon status, it cannot rectify the trial court’s error.

The Court of Appeals also concluded that Mr. Rollinson was not prejudiced because the trial court’s oral assertions that Mr. Rollinson pleaded guilty to habitual felon status were rectified by the written judgment because it indicated Mr. Rollinson received a bench trial and indicated the court “adjudge[d] defendant to be a habitual felon to be sentenced.” *Rollinson*, 2021-NCCOA-58, ¶ 26. The judgment and commitment order does not correct the court’s repeated mistaken assertions that Mr. Rollinson pleaded guilty to habitual felon status because it does not specify the method by which Mr. Rollinson was adjudicated an habitual felon.

The Court of Appeals first asserted that the written judgment rectified the trial court’s oral assertions that Mr. Rollinson pleaded guilty to having attained habitual felon status because “the written judgment indicat[ed] that [Mr. Rollinson] received a trial by judge[.]” *Rollinson*, 2021-NCCOA-58, ¶ 26.

Near the top of the preprinted judgment and commitment order (AOC-CR-601), the form contains four boxes where the court can indicate:

The defendant was found guilty/responsible, pursuant to
 plea (pursuant to Alford) (of no contest) trial by
 judge trial by jury, of

Immediately below the four boxes is a chart where the trial court lists the offenses of conviction.

In Mr. Rollinson’s case, the trial court checked the box indicating that he received a trial by judge. In the chart immediately below, the trial court listed three of the substantive offenses of conviction for which the trial court found Mr. Rollinson guilty following a bench trial. (R p 66).

STATE VERSUS				JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING) (For Convictions On Or After Jan. 1, 2012)			
Name Of Defendant ROLLINSON,MADERKIS,DEYAWN				G.S. 15A-1301, -1340.13			
Race B	Sex M	Date Of Birth 04/17/1981		Attorney For Defendant JUDY DALTON		<input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained	CrR Rptr Initials MB
Attorney For State ELIZABETH O FLOYD		<input type="checkbox"/> Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney					
The defendant was found guilty/responsible, pursuant to <input type="checkbox"/> plea (<input type="checkbox"/> pursuant to Alford) (<input type="checkbox"/> of no contest) <input checked="" type="checkbox"/> trial by judge <input type="checkbox"/> trial by jury, of							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
17CRS050078	51	AWDW GOVERNMENT OFFICIAL	01/06/2017	14-34.2	F	F	C
17CRS050079	51	POSSESS MARIJUANA UP TO 1/2 OZ	01/06/2017	90-95(D)(4)	M	3	
17CRS050079	52	POSSESS MARIJ PARAPHERNALIA	01/06/2017	90-113.22A	M	3	

In an addendum, the trial court listed the remaining substantive offenses of conviction from the bench trial and also listed “habitual felon.” (R p 68).

STATE VERSUS				ADDITIONAL FILE NO.(S) AND OFFENSE(S)			
Name Of Defendant ROLLINSON,MADERKIS,DEYAWN							
NOTE: Use this page in conjunction with all NCAOC judgment or probationary forms, to list additional offenses of conviction, deferred prosecution, or conditional discharge addressed in the court's order. There are no A, B, C, D, or other variations of this form, so this page can be used to continue an offense list from any of the related forms, for any date(s) of offense or conviction.							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
17CRS050080	51	PWISD COCAINE	01/06/2017	90-95(A)	F	H	D
17CRS050080	52	MAINTN VEH/DWELL/PLACE CS (F)	01/06/2017	90-108(A)(7)	F	I	E
17CRS050080	53	FELONY POSSESSION OF COCAINE	01/06/2017	90-95(D)(2)	F	I	E
18CRS002840	51	HABITUAL FELON	09/10/2018	14-7.1	F		

The Court of Appeals held that listing habitual felon with the substantive offenses for which Mr. Rollinson was convicted by bench trial meant that Mr. Rollinson also attained habitual felon status by bench trial. *Rollinson*, 2021-NCCOA-58, ¶ 26. The Court of Appeals' assumption is incorrect because the preprinted judgment and commitment form does not contain a place to indicate whether the defendant attained habitual felon status by guilty plea, jury trial, or bench trial.

Trial courts routinely list habitual felon status along with the substantive offenses of conviction. Trial courts routinely check the box indicating that the defendant was convicted by jury trial, list the substantive offenses of conviction by the jury, and also list habitual felon status even though it is undisputed that the defendant pleaded guilty to habitual felon status.

Mr. Rollinson asks this Court to take judicial notice of the documents contained in the Record on Appeal in other cases that have come before this Court where the defendant *pleaded guilty* to habitual felon status and habitual felon status is listed on the judgment and commitment along with the other offenses for which the defendant was found guilty pursuant to a jury trial. N.C.G.S. § 8C-1, Rule 201; N.C. R. App. P. 37; *State v. Thompson*, 349 N.C. 483, 497 (1998) (“This Court may take judicial notice of the public records ... within the state judicial system.”); *State v. Strudwick*, 379 N.C. 94, 2021-

NCSC-127, ¶ 24 (taking judicial notice of trial court’s findings of fact in a different action); *State v. Ward*, 338 N.C. 64, 127 (1994) (taking judicial notice of record and appellate opinion in different action); *Swain v. Creasman*, 260 N.C. 163, 164 (1963) (taking judicial notice of record in different action).

In *State v. Tucker*, the jury returned verdicts finding the defendant guilty of multiple offenses. *State v. Tucker*, 2022-NCSC-15, ¶ 4. The defendant pleaded guilty to having attained habitual felon status. *Id.* On the judgment and commitment order in *Tucker*, the trial court checked the box indicating that the defendant was found guilty pursuant to a trial by jury. Habitual felon status was listed among the substantive offenses even though it was undisputed that the defendant pleaded guilty to having attained habitual felon status. *State v. Tucker*, COA19-715, R p 82; (App. 47).⁶

STATE OF NORTH CAROLINA				File No.			
MECKLENBURG County		CHARLOTTE Seat of Court		17CRS234119 51			
NOTE: [Use AOC-CR-342 for DWI offense(s).]				In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division			
STATE VERSUS			JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING) (For Convictions On Or After Jan. 1, 2012) G.S. 15A-1301, -1340.13				
Name Of Defendant TUCKER, MITCHELL, ANDREW			Attorney For Defendant BRANDON L LEONARD				
Race B	Sex M	Date Of Birth 11/03/1957	<input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained		Crt Rptr Initials KLB		
Attorney For State MICHAEL JOSEPH PIERRIE		<input type="checkbox"/> Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney					
The defendant was found guilty/responsible, pursuant to <input type="checkbox"/> plea (<input type="checkbox"/> pursuant to Alford) (<input type="checkbox"/> of no contest) <input type="checkbox"/> trial by judge <input checked="" type="checkbox"/> trial by jury, of							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL	*Pun. CL
17CRS234119	51	BREAKING AND OR ENTERING (F)	09/07/2017	14-54(A)	F	H	
17CRS032613	51	HABITUAL FELON	09/07/2017	14-7.1	F	C	
17CRS234118	51	DVPO VIOL DEADLY WEAPON	09/07/2017	50B-4.1(G)	F	H	

⁶ The relevant pages of the filed Record on Appeal in *State v. Tucker*, COA19-715 are appended to this New Brief. (App. 45-48).

Similarly, in *State v. Austin*, the defendant was convicted of assault on a female and habitual misdemeanor assault following a jury trial. *State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶ 1. The defendant pleaded guilty to having attained habitual felon status. *Id.* As in *Tucker*, the trial court in *Austin* checked the box indicating that the defendant was found guilty pursuant to a trial by jury. Habitual felon status was listed next to the defendant’s convictions of assault on a female and habitual misdemeanor assault even though it was undisputed that the defendant pleaded guilty to having attained habitual felon status. *State v. Austin*, COA19-1110, R p 66; (App. 3).⁷

STATE OF NORTH CAROLINA				File No.			
FORSYTH County		WINSTON SALEM Seat of Court		18CRS051027 52			
NOTE: [Use AOC-CR-342 for DWI offense(s)]				In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division			
STATE VERSUS			JUDGMENT AND COMMITMENT				
Name Of Defendant AUSTIN,JOHN,FITZGERALD			ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING) (For Convictions On Or After Jan. 1, 2012)				
Race B	Sex M	Date Of Birth 12/03/1964	G.S. 15A-1301, -1340.13				
Attorney For State JAMES P DORNFRIED		<input type="checkbox"/> Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney	Attorney For Defendant BRANDON S GOLDSBOROUGH		<input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained Crt Rptr Initials APN		
The defendant was found guilty/responsible, pursuant to <input type="checkbox"/> plea <input type="checkbox"/> pursuant to <i>Alford</i> <input type="checkbox"/> of no contest <input type="checkbox"/> trial by judge <input checked="" type="checkbox"/> trial by jury, of							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pen. CL.
18CRS051027	52	HABITUAL MISDEMEANOR ASSAULT	01/07/2018	14-33.2	F	H	D
18CRS051027	51	ASSAULT ON A FEMALE	01/07/2018	14-33(C)(2)	M	AI	
18CRS000114	51	HABITUAL FELON	01/07/2018	14-7.1	F	D	

⁷ The relevant pages of the filed Record on Appeal in *State v. Austin*, COA19-1110 are appended to this New Brief. (App. 1-4).

Likewise, in *State v. Robinson*, the defendant was convicted of possession of a stolen motor vehicle following a jury trial. *State v. Robinson*, 368 N.C. 402, 404 (2015). The defendant pleaded guilty to having attained habitual felon status. *Id.* As in *Tucker* and *Austin*, the trial court in *Robinson* checked the box indicating that the defendant was found guilty pursuant to a trial by jury. Habitual felon status was listed next to the defendant’s conviction for possession of a stolen motor vehicle even though it was undisputed that the defendant pleaded guilty to habitual felon status. *State v. Robinson*, COA14-224, R p 39; (App. 27).⁸

STATE OF NORTH CAROLINA		MECKLENBURG COUNTY FILE NO. 146		File No. 12CRS202039 51			
MECKLENBURG County		CHARLOTTE Seat of Court		In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division			
NOTE: [This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).]							
STATE VERSUS			JUDGMENT AND COMMITMENT				
Name Of Defendant ROBINSON,STILLOAN,DEVORAY			AT _____ O'CLOCK ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING)				
Race B			Date Of Birth 3/17/1985				
Sex M			G.S. 15A-1301, 15A-1340.13				
Attorney For State WILSON,JOHNATHAN		<input type="checkbox"/> Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney		Attorney For Defendant FRAZIER, THURSTON, E			
		<input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained		Crt Rptr Initials JH			
The defendant <input type="checkbox"/> pled guilty (<input type="checkbox"/> pursuant to <i>Alford</i>) to <input checked="" type="checkbox"/> was found guilty by a jury of <input type="checkbox"/> pled no contest to							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
12CRS202039	51	POSSESS STOLEN MOTOR VEHICLE	1/13/2012	20-106	F	H	D
12CRS016114	51	HABITUAL FELON		14-7.1	F	C	

As shown by the judgment and commitment orders in *Tucker*, *Austin*, and *Robinson*, the fact that habitual felon status is listed with the substantive offenses of conviction does not mean that habitual felon status was attained by the same means of conviction as the substantive offense(s) on the judgment.

⁸ The relevant pages of the filed Record on Appeal in *State v. Robinson*, COA14-224 are appended to this New Brief. (App. 25-28).

Therefore, the Court of Appeals’ assertion that the judgment shows Mr. Rollinson received a habitual felon bench trial because “habitual felon” was listed on the judgment and commitment order along with the substantive offenses for which Mr. Rollinson was found guilty pursuant a bench trial is without merit.

The Court of Appeals also held that Mr. Rollinson was not prejudiced because the trial court’s oral assertions that Mr. Rollinson pleaded guilty to habitual felon status were rectified by the written judgment because it indicated the court “adjudge[d] defendant to be a habitual felon to be sentenced.” *Rollinson*, 2021-NCCOA-58, ¶ 26.

The Court of Appeals’ holding hinged on the trial court’s decision to check box number three on the preprinted judgment and commitment order (AOC-CR-601):

The Court (NOTE: Block 1 or 2 MUST be checked.):

1. makes no written findings because the term imposed is: (a) in the presumptive range. (b) for a Class A felony. (c) for adjudication as a violent habitual felon, G.S. 14-7.12. (d) for drug trafficking. for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

2. finds the Determination of aggravating and mitigating factors on the attached AOC-CR-605. egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.

3. adjudges the defendant to be a habitual felon to be sentenced (offenses committed before Dec. 1, 2011) as a Class C felon. (offenses committed on or after Dec. 1, 2011) four classes higher than the principal felony (no higher than Class C).

4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.

5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.

(R p 66).

Although the judgment and commitment order contains a preprinted finding for the trial court to state the whether the defendant was found guilty of the *substantive offenses* pursuant to a guilty plea, trial by judge, or trial by jury, the same is *not* true for habitual felon status. The judgment and

commitment order does *not* specify whether Mr. Rollinson was adjudged to be a habitual felon pursuant to a guilty plea, trial by judge, or trial by jury. In checking box #3 on the judgment and commitment order, the trial court did not affirmatively state whether it adjudged Mr. Rollinson to be a habitual felon pursuant to a guilty plea, bench trial, or jury trial. (R p 66). The fact that the court “adjudge[d]” Mr. Rollinson to be a habitual felon, does not support the Court of Appeals’ determination that the trial court corrected its mistaken oral pronouncement in its written judgment.

3. Mr. Rollinson was prejudiced.

The trial court’s failure to obtain a knowing and intelligent waiver of Mr. Rollinson’s constitutional right to a jury trial likely resulted in the trial court proceeding as though Mr. Rollinson pleaded guilty, even though he did not. Had the judge addressed Mr. Rollinson personally and conducted the colloquy required by N.C.G.S. § 15A-1201(d)(1), the trial court probably would not have been confused about the legal procedure for adjudging Mr. Rollinson to be an habitual felon. Mr. Rollinson did not plead guilty to habitual felon status in accordance with N.C.G.S. § 15A-1022 and the trial court did not find beyond a reasonable doubt that Mr. Rollinson attained the status of an habitual felon.

The absence of a valid adjudication of habitual felon status cannot be harmless error. Mr. Rollinson was prejudiced because he was erroneously sentenced as an habitual felon in the absence of a knowing and voluntary guilty

plea, a verdict of guilt by twelve peers, or a verdict of guilt by a judge after a knowing and voluntary waiver of the right to a jury trial. Therefore, the judgment sentencing Mr. Rollinson as an habitual felon should be vacated.

CONCLUSION

For the foregoing reasons and authorities, Maderkis Deyawn Rollinson, the Defendant-Appellant herein, respectfully requests this Court to reverse the decision of the Court of Appeals, vacate the judgment sentencing Mr. Rollinson as an habitual felon, and remand for resentencing. In the event this Court affirms the decision of the Court of Appeals, Mr. Rollinson requests that this Court remand to the trial court for resentencing as ordered in *State v. Rollinson*, 2021-NCCOA-58, ¶¶ 27-31.

Respectfully submitted, this the 30th day of March, 2022.

Electronic Submission

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ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the above and foregoing Defendant-Appellant's New Brief was filed by uploading it to the appellate division's electronic filing website in accordance with Rule 26(a)(2).

I further certify that a copy of the foregoing Defendant-Appellant's New Brief was served on John W. Congleton, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by email addressed to: jcongleton@ncdoj.gov.

This the 30th day of March, 2022.

Electronic Submission

Hannah Hall Love

Assistant Appellate Defender

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Iredell County</u>
)	
MADERKIS DEYAWN ROLLINSON)	

APPENDIX

INDEX

<u>Appendix</u> <u>Pages</u>		<u>Appearing in</u> <u>Brief at</u>
1-4	<i>State v. Austin,</i> COA19-1110 – Record on Appeal	51
5-18	<i>State v. Cranford,</i> 2021-NCCOA-511 (unpublished)	29
19-24	<i>State v. French,</i> 2021-NCCOA-606 (unpublished)	28-29
25-28	<i>State v. Robinson,</i> COA14-224 – Record on Appeal	52
29-44	<i>State v. Rollinson,</i> 2021-NCCOA-58 (unpublished)	<i>passim</i>
45-48	<i>State v. Tucker,</i> COA19-715 – Record on Appeal	50

No. COA19-1110

No. COA 19-1110

DISTRICT TWENTY-ONE

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	
v.)	<u>From Forsyth</u>
)	
JOHN FITZGERALD AUSTIN)	

INDEX

Organization of Trial Tribunal.....	1
Arrest Warrant	2
Assignment of Counsel.....	4
Indictments.....	5
State’s Notice of Intent to Use Evidence	9
State’s Demand for Notice of Affirmative Defenses.....	10
State’s Discovery Motion	11
Defendant’s Request/Motion for Discovery	13
Defendant’s Motions in Limine.....	17
Defendant’s Motion to Sequester Witnesses	19
Defendant’s Motion for Complete Recordation	21
Defendant’s Motion for Disclosure of Impeachment Information	22
Defendant’s Motion for Inspection of Tangible Evidence and Reports	23
Defendant’s Motion for Disclosure of Rules 404(b) and 608(b) Evidence	24
Defendant’s Motion for Disclosure of Favorable Evidence	26
Defendant’s Motion to Reveal Agreements, Offers and/or Grants of Immunity	28
Defendant’s Motion to Compel Investigators to Turn Over All Information.....	29
Defendant’s Motion for Preservation of Evidence	31
Defendant’s Motion to Prohibit References to Silence.....	33
Defendant’s Motion in Limine to Reveal the Purpose of 404(b) Evidence.....	35
Defendant’s Motion for Witness Statements and Criminal Records	36
Defendant’s Notice of Intent to Offer Affirmative Defenses	37
Defendant’s Motion to Dismiss the Habitual Felon Indictment	38
Defendant’s Additional Motions in Limine	41
Appearance of Counsel	43
Transcript of Proceedings	43
Exhibits	43
Exhibits/Evidence Log.....	44
Jury Instructions.....	46
Jury Questions.....	56

No.

DISTRICT TWENTY-ONE

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
)
 v.)
)
 JOHN FITZGERALD AUSTIN)

From Forsyth

ORGANIZATION OF TRIAL TRIBUNAL

This case came on to be tried at the May 6, 2019 Criminal Session of Forsyth County Superior Court before Superior Court Judge L. Todd Burke. Mr. Austin was charged with assault on a female, habitual misdemeanor assault and obtaining habitual felon status.

A jury found Mr. Austin guilty of assault on a female and habitual misdemeanor assault. Mr. Austin pled guilty to attaining habitual felon status. Judge Burke entered a consolidated Judgment and Commitment on May 8, 2019. Defendant appealed by oral notice in open court on May 8, 2019.

Record on Appeal Filed 12-10-19
Docketed 12-16-19

STATE OF NORTH CAROLINA

FORSYTH County WINSTON SALEM Seat of Court

File No.

18CRS051027

52

NOTE: [Use AOC-CR-342 for DWI offense(s).]

In The General Court Of Justice
 District Superior Court Division

STATE VERSUS

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)

G.S. 15A-1301, -1340.13

Name Of Defendant
AUSTIN, JOHN, FITZGERALD
Race B Sex M Date Of Birth 12/03/1964

Attorney For State
JAMES P DORNFRIED
 Def. Found Not Indigent Def. Waived Attorney

Attorney For Defendant
BRANDON S GOLDSBOROUGH
 Appointed Retained Crt Rptr Initials APN

The defendant was found guilty/responsible, pursuant to plea (pursuant to *Alford*) (of no contest) trial by judge trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
18CRS051027	52	HABITUAL MISDEMEANOR ASSAULT	01/07/2018	14-33.2	F	H	D
18CRS051027	51	ASSAULT ON A FEMALE	01/07/2018	14-33(C)(2)	M	AI	
18CRS000114	51	HABITUAL FELON	01/07/2018	14-7.1	F	D	

*NOTE: Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).
The Court: 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 21.
Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission to this issue.
 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD LEVEL: I II III IV V VI

The Court (NOTE: Block 1 or 2 MUST be checked.):

- 1. makes no written findings because the term imposed is: (a) in the presumptive range. (b) for a Class A felony. (c) for adjudication as a violent habitual felon, G.S. 14-7.12. (d) for drug trafficking. for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).
- 2. finds the Determination of aggravating and mitigating factors on the attached AOC-CR-605. egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.
- 3. adjudges the defendant to be a habitual felon to be sentenced (offenses committed before Dec. 1, 2011) as a Class C felon. (offenses committed on or after Dec. 1, 2011) four classes higher than the principal felony (no higher than Class C).
- 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.
- 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.
- 6. finds enhancement pursuant to: G.S. 90-95(e)(3) (drugs). G.S. 14-3(c) (hate crime). G.S. 50B-4.1 (domestic violence). G.S. 14-50.22 (gang misdemeanor). Other: _____
- 7. finds that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed the firearm or weapon about his or her person. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission. Pursuant to G.S. 15A-1340.16A, the Court has increased the minimum sentence by (check only one) (Class A-E felony committed prior to Oct. 1, 2013) 60 months. (Class A-E felony committed on or after Oct. 1, 2013) 72 months. (Class F or G felony committed on or after Oct. 1, 2013) 36 months. (Class H or I felony committed on or after Oct. 1, 2013) 12 months.
- 8. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 (check only one) a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One. b. but makes no finding or order concerning registration or satellite-based monitoring due to a sentence of life imprisonment without parole.
- 9. finds the above-designated offense(s) involved the physical or mental sexual abuse of a minor. (NOTE: If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.)
- 10. finds that a motor vehicle commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.
- 11. finds this is an offense involving assault, communicating a threat, or an act defined by G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.
- 12. (offenses committed on or after Dec. 1, 2017, only) finds that the offense was committed as part of criminal gang activity as defined in G.S. 14-50.16A(2). and that the defendant was a criminal gang leader or organizer as defined in G.S. 14-50.16A(3). This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.
- 13. finds the above-designated offense(s) involved (check one) (offenses committed Dec. 1, 2008 - Nov. 30, 2017) criminal street gang activity (offenses committed on or after Dec. 1, 2017) criminal gang activity, G.S. 14-50.25.
- 14. did not grant a conditional discharge under G.S. 90-96(a) because (check all that apply) the defendant refused to consent. (offenses committed on or after Dec. 1, 2013, only) the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.
- 15. finds that the defendant used or displayed a firearm while committing the felony, G.S. 15A-1382.2.
- 16. finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor, G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced (check only one)

to Life Imprisonment Without Parole for Class A Felony. Class B1 Felony. Violent Habitual Felon. egregious aggravation under No. 2, above. in the custody of: N.C. DACJJ. Other: _____

to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.

for a minimum term of: 103 months and a maximum term of: 136 months ASR term (Order No. 4, Side Two) to Death (see attached Death Warrant and Certificates)

The defendant shall be given credit for 422 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

- The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.
- The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date

Material opposite unmarked squares is to be disregarded as surplusage.

The Court further Orders: (check all that apply)

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's fees	SBM Fee	Appt Fee/Misc	Total Amount Due
\$ 4445.00	\$	\$ 0.00	\$ 3142.50	\$ 0.00	\$ 60.00	\$ 7,647.50

*See attached "Restitution Worksheet, Notice and Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

- 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.
- 3. The Court finds just cause to waive costs, as ordered on the attached AOC-CR-618. Other: _____
- 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction and Juvenile Justice, then he or she will be released at the end of the ASR term specified on Side One. G.S. 15A-1340.18.
- 5. Other:

The Court recommends:

- 1. Substance abuse treatment. 2. Psychiatric and/or psychological counseling. 3. Work release should should not be granted.
- 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above. but the Court does not recommend restitution be paid as a condition of post-release supervision. from work release earnings.

The Court further recommends:

ORDER OF COMMITMENT/APEAL ENTRIES

- 1. It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
- 2. The defendant gives notice of appeal from the judgment of the trial court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE		
Date 05/08/2019	Name Of Presiding Judge (type or print) THE HONORABLE L TODD BURKE	Signature Of Presiding Judge 

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Asst. CSC <input type="checkbox"/> Clerk Of Superior Court

CERTIFICATION

- I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.
- Appellate Entries (AOC-CR-350)
 - Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
 - Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
 - Victim Notification Tracking Form
 - Additional File No.(s) And Offense(s) (AOC-CR-626)
 - Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
 - Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
 - Additional Findings (AOC-CR-618)
 - Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
 - Other: _____

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Asst. CSC <input type="checkbox"/> Clerk Of Superior Court	SEAL

Material opposite unmarked squares is to be disregarded as surplusage.

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

2021-NCCOA-511

No. COA20-781

Filed 21 September 2021

Lincoln County, No. 17 CRS 53484-85

STATE OF NORTH CAROLINA

v.

ROBERT BRADLEY CRANFORD

Appeal by defendant from judgment entered 27 February 2020 by Judge Lisa C. Bell in Lincoln County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant

TYSON, Judge.

¶ 1 Robert Bradley Cranford (“Defendant”) appeals from a judgment entered after the trial court found him guilty of two counts of disseminating an obscenity. We affirm.

I. Background

¶ 2 Defendant and Lori Wallace were involved in a romantic relationship from

2012 until July 2017. During this time, Defendant and Wallace photographed and documented sexual acts they engaged in individually and with each other using a cellular phone's camera. Wallace sent photos of herself in various stages of undress and engaging in individual sexual acts to Defendant. Upon sending the photos, Wallace deleted the pictures from her cellular phone's camera memory.

¶ 3 Defendant and Wallace ended their relationship in July 2017. Defendant requested Wallace to respond to friends' and acquaintances' inquiries about why they had ended their relationship with "It didn't work out." Around 27 July 2017, Defendant contacted Wallace via Facebook Messenger and threatened to publish the photographs described above to mutual friends if she did not respond as instructed. Wallace blocked Defendant from communicating with her on Facebook Messenger. Defendant continued to attempt to contact her through emails, text messages, and by driving to her workplace.

¶ 4 On 3 September 2017, William Church, a mutual friend of Wallace and Defendant received the above-described unsolicited photographs of Wallace through Facebook Messenger from Defendant. Defendant included the text "I warned her" with the photographs.

¶ 5 Bennett Johnson also received unsolicited photographs of Wallace via a text message around the same time. Defendant included the text "I warned her" along with the photographs.

¶ 6 Johnson notified Wallace of the subject matter in the photographs and deleted the photographs sent by Defendant in front of her. Defendant was indicted on two counts of felonious dissemination of obscenities on 21 May 2018.

¶ 7 During a recess in jury selection, Defendant's counsel and the State attended a chamber conference to discuss Defendant's requested waiver of his right to a jury trial. Upon returning to open court and on the record, Defendant waived his right to a jury trial. Defendant and his counsel both signed the detailed waiver of jury trial. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court denied Defendant's motion.

¶ 8 Following trial, the court entered a verdict of guilty of both charges and imposed a suspended sentence of 4 to 14 months and placed Defendant on 24 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

¶ 10 Defendant argues the trial court: (1) erred by holding an insufficient colloquy with Defendant regarding the waiver of his right to a jury trial, allowed Defendant to consent to a bench trial without a knowing and voluntary waiver of his rights, and held a bench trial within the N.C. Gen. Stat. § 15A-1201(e) (2019) ten-day period to

revoke his waiver; (2) made insufficient findings of fact to support its determination the photographs were “obscene” within the meaning of N.C. Gen. Stat. § 14-190.1 (2019) and the First Amendment; and, (3) erred by denying his motion to dismiss because the photographs were not “obscene” within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment.

IV. Waiver of Jury Trial

¶ 11 The North Carolina Constitution provides the accused with the option and right to a bench trial subject to the trial court’s approval. *See* N.C. Const. art I, § 24. Our General Assembly amended N.C. Gen. Stat. § 15A-1201 to allow criminal defendants in non-capital cases to waive the right to a trial by jury in superior court. In 2015, the statute was further amended to include provisions requiring advance notice, a revocation period, and judicial consent to a bench trial. N.C. Gen. Stat. § 15A-1201 (2019).

A. Standard of Review

¶ 12 This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 835, 811 S.E.2d 215, 220 (2018), *aff’d as modified*, 372 N.C. 226, 827 S.E.2d 288 (2019).

B. Colloquy to Determine a Knowing and Voluntary Waiver

¶ 13 Defendant argues the trial court conducted an improper inquiry into whether

- App. 9 -
STATE V. CRANFORD
2021-NCCOA-511
Opinion of the Court

his waiver of a jury trial was knowing and voluntary. Defendant asserts the trial court's colloquy with him consisted of a single question, failed to explain the charges he was facing or the possible punishments, did not explain the function of the trial court in a bench trial, or Defendant's rights in a jury trial.

¶ 14 Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor any case from our Supreme Court or this Court has “established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.” *State v. Rutledge*, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019).

¶ 15 N.C. Gen. Stat. § 15A-1201(d)(1) requires a trial court to “Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.” N.C. Gen. Stat. § 15A-1201(d)(1). In *Rutledge*, this Court declined to “read such further specifications into” N.C. Gen. Stat. § 15A-1201(d)(1). *Rutledge*, 267 N.C. App. at 98, 832 S.E.2d at 748.

¶ 16 Here, Defendant appeared in court with his attorney on the scheduled day of trial. Defendant's attorney initiated and informed the trial court during jury selection of Defendant's desire to waive a jury trial and proceed with a bench trial during a chamber conference between the attorneys and the trial court. Defendant and his attorney both signed a written waiver of jury trial form. The trial court conducted the following exchange:

[THE COURT]: Before I ask you all to resume, [Defendant], I just had a conference in chambers with your attorney, . . . and [the State], and there's been representation to me with regard to how the matter will proceed, and [your attorney] had your permission and you agree with what he has represented to me as to how the matter will proceed; is that right?

DEFENDANT: Yes, ma'am.

¶ 17 The record does not indicate the representations Defendant's counsel made during the chamber conference. The better practice is to further describe on the record Defendant's request to waive trial by jury and exercise his right to a bench trial. Even if we were to presume error in the violation of the statutory mandate, N.C. Gen. Stat. § 15A-1201(d)(1), Defendant cannot establish prejudice to warrant a new trial.

C. Ten-Day Revocation Period

¶ 18 Defendant argues the trial court erred by conducting the bench trial the day after he waived his right to jury trial, within the ten-day period provided by N.C. Gen. Stat. § 15A-1201(e).

¶ 19 N.C. Gen. Stat. § 15A-1201(e) provides "Once waiver of a jury trial has been made and consented to by the trial judge . . . , the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice[.]" Defendant asserts this language must be interpreted as a "mandatory cooling-off period." Defendant's interpretation is inconsistent with the plain language of our

General Statutes, the intent of the Legislature, and his trial strategy. *See An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary III of the H. Comm. on the Judiciary, 2015 Leg.*

¶ 20 Defendant's interpretation would allow a defendant to force a mandatory ten-day continuance at the scheduled trial, even during jury selection. Nothing in our General Statutes, prior precedents, or in the legislative history shows an intention for the revocation period to create or allow a mandatory continuance at or near a scheduled trial and incur unnecessary delays. *See Rutledge, 267 N.C. App. at 99, 832 S.E.2d at 749.*

¶ 21 The intent of the General Assembly was to prevent a defendant from forcing undue delays by invoking the revocation provision as late as the day of their trial and effecting a ten-day continuance. *See An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary III of the H. Comm. on the Judiciary, 2015 Leg.* (Proposed amendment to allow the defendant the right to withdraw waiver of jury trial up to when the first witness testified failed.).

D. Prejudice

¶ 22 Were we to presume Defendant could show the trial court erred by granting his request for waiver of a jury trial, he must also show the actions of the trial court

prejudiced him in order to receive a new trial. *See State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) (“However, a new trial does not necessarily follow a violation of [a] statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation.”) (internal citations omitted).

¶ 23 N.C. Gen. Stat. § 15A-1443 places the burden upon Defendant to show a “reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial.” N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 24 Presuming, without deciding, the trial court’s grant of Defendant’s requested waiver was error under N.C. Gen. Stat. § 15A-1201, Defendant cannot show he suffered reversible prejudice under N.C. Gen. Stat. § 15A-1443. Defendant waited until the day of trial and during jury selection to formally announce his intention to and request to waive his right to trial by jury. Defendant and his attorney both signed a written waiver.

¶ 25 Defendant made the choice to request a bench trial, signed the AOC-CR-405 Waiver of Jury Trial form indicating he was informed of the potential consequences of his request, and proceeded to a bench trial. Defendant fails to show why the trial court’s grant of this request, even if shown to be a violation of N.C. Gen. Stat. § 15A-2101, was prejudicial. Defendant’s arguments are overruled.

V. Obscenity

¶ 26 Defendant argues the trial court erred in denying his motion to dismiss the charges of disseminating obscenity because the images and material depicted in the photographs were not “obscene” within the meaning of N.C. Gen. Stat. § 14-190.1 and the First Amendment.

A. Standard of Review

¶ 27 “The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009); *see also Piedmont Triad Reg’l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.”).

B. Analysis

N.C. Gen. Stat. § 14-190.1 classifies a material as “obscene” if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C. Gen. Stat. § 14-190.1(b)(2019).

¶ 28 While the State possesses the burden to prove the material is obscene, the State is not required to offer affirmative testimony addressing each of the N.C. Gen. Stat. § 14-190.1(b) criteria. The materials entered into evidence can “speak for themselves” and when admitted are sufficient evidence for the court to determine the question of obscenity. *See Paris Adult Theatre I v. Slaten*, 413 U.S. 49, 37 L. Ed. 2d 446, *reh’g denied*, 414 U.S. 881, 38 L. Ed. 2d 128 (1973). “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it[.]” *Jacobellis v. Ohio*, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 803-04 (1964) (Stewart, J., concurring).

¶ 29 Our General Statutes define “sexual conduct” as:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

N.C. Gen. Stat. § 14-190.1(c) (2019).

¶ 30 Each of the twenty-four photographs was entered into evidence and depicted “sexual conduct” as is defined by N.C. Gen. Stat. § 14-190.1(c). The photographs

depicted Wallace engaged in sexual acts with Defendant and by herself, including oral intercourse, masturbation, and exposed genitals. Testimony before the trial court asserted these photographs were not taken nor disseminated for the purpose of promoting “serious literary, artistic, political or scientific value.” N.C. Gen. Stat. § 14-190(b)(3). The “average person applying contemporary community standards” could find each of the photographs “appeals to the prurient interest in sex.”

¶ 31

This Court has reasoned:

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, *excretory functions* and lewd exhibition of the genitals.

Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 562, 351 S.E.2d 305, 316 (1986)

(emphasis original) (citation omitted).

¶ 32

The content depicted in the twenty-four photographs falls under each category above. N.C. Gen. Stat. § 14-190.1 is “aimed at the *dissemination* of obscenity which is not protected by any constitutional guarantees.” *Id.* at 557, 351 S.E.2d at 314 (emphasis original). Defendant’s argument is overruled.

VI. Findings of Fact

¶ 33 Defendant argues the trial court made incomplete findings of fact to support its determination the photographs were “obscene.”

A. Standard of Review

In reviewing a trial judge’s findings of fact, we are strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.

State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (internal quotation marks omitted) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (“[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.” (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

B. Analysis

¶ 34 Defendant asserts the trial court failed to find the photographs appealed to a “prurient” interest in sex, the images lacked any “serious literary, artistic, political, or scientific value,” and that the photographs are not protected or privileged under the Constitution of the United States or the North Carolina Constitution.

¶ 35 Defendant does not challenge any testimony or exhibit. In a criminal bench trial, a trial court does not have to make detailed findings of fact or conclusions of law and can merely enter a general verdict. “In a criminal bench trial, the trial court is not required to set forth the law it will follow in the form of jury instructions or to make detailed findings of fact and conclusions of law.” *State v. Cheeks*, 267 N.C. App. 579, 591-92, 833 S.E.2d 660, 670 (2019). Sufficient facts were presented to the trial court to find the above elements of the crimes and conclude they were proven beyond a reasonable doubt. Defendant’s argument is overruled.

VII. Conclusion

¶ 36 Defendant clearly initiated his choice for a bench trial on the day of trial. He has failed to show his own strategic choice to waive his right to a jury trial on the day of trial during jury selection prejudiced him in any way. The evidence was sufficient to support the trial court’s findings and conclusions of law the photographs were obscene under N.C. Gen. Stat. § 14-190.1 and the First Amendment. The trial court properly denied Defendant’s motion to dismiss.

¶ 37 The trial court did not make incomplete findings of fact or unsupported conclusions of law. Defendant’s convictions and the judgment entered thereon are affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

- App. 18 -

STATE V. CRANFORD

2021-NCCOA-511

Opinion of the Court

Report per Rule 30(e).

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

2021-NCCOA-606

No. COA20-767

Filed 2 November 2021

Craven County, No. 18CRS051178

STATE OF NORTH CAROLINA

v.

HEATHER GABRIELLE FA FRENCH, Defendant.

Appeal by Defendant from judgment entered 6 July 2020 by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott K. Beaver, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for the Defendant.

DILLON, Judge.

¶ 1

Defendant Heather French appeals from a judgment convicting her of possession of five or more counterfeit instruments. Specifically, she argues that she was not properly advised when she chose to be tried without a jury.

I. Background

¶ 2 Defendant was charged with possession of five or more counterfeit instruments after a deputy found her in possession of twenty-nine (29) counterfeit dollar bills during a traffic stop.

¶ 3 Defendant gave notice of intent to waive her right to a jury trial. The trial court commenced its colloquy with Defendant concerning her decision (errors in original):

THE COURT: Your attorney has indicated that you wish to waive your right to your constitutional right to trial by jury; is that correct?

MS. FRENCH: Yes.

THE COURT: You do have a right to trial by jury in this court guaranteed to you by the constitution. Our legislature has adopted a law which permits defendants for certain charges to give up that constitutional right and to have what's called a bench trial.

Let me tell you a little bit about the difference between those two types of trials. If you had jury trial we would have a number of your fellow citizens who would be summons to court. Twelve of them would be called to the jury box. The State would have a chance to question them. Your lawyer would have a chance to question them, and we they continue to go through that process until twelve were selected to hear your case.

At that point both the State and you would have the right to present evidence. The jury would be the ones who would find -- determine what the truth was. They would find what the facts are. I would instruct them as to what law they should apply to the facts and then they would reach a verdict and decide whether you were guilty or not guilty. If

they find you guilty then I would sentence you.

The process with a bench trial is different, obviously we don't select a jury. With a bench trial the judge would decide what the truth is. He would decide what the facts are and would apply the same law that would be applied otherwise, and it would be up to the judge, not the jury, to determine whether the State had satisfied him beyond a reasonable doubt of your guilt.

So I mean the big difference is instead of needing to satisfy the twelve jurors, court would need to satisfy one. At the same time if it failed to satisfy this one it would be a not guilty verdict.

Do you understand the difference between the two types of trials?

MS. FRENCH: Yes.

THE COURT: With that understanding is it your intent to waive your right to trial by jury?

MS. FRENCH: Yes.

THE COURT: All right. We'll need to have her sign the -- it's an AOC has a form that you sign to waive your right to a jury trial.

¶ 4

Following this colloquy, Defendant signed the written waiver form, which the trial court accepted. Defendant was found guilty of possession of five or more counterfeit instruments at the conclusion of her bench trial. Defendant appealed to our Court.

II. Analysis

¶ 5 Defendant argues on appeal that the trial court violated her constitutional right to a jury trial by conducting a bench trial. We examine this argument under the statutory framework of N.C. Gen. Stat. § 15A-1201(d)(1) (2018), as Defendant’s constitutional argument is not preserved. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (stating that constitutional questions not raised and passed upon at trial will not ordinarily be considered on appeal). We review *de novo* whether a trial court has violated a statutory mandate. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

¶ 6 Criminal defendants may waive their right to a jury trial. *See* N.C. Const. art. I, §24; *see also* N.C. Gen. Stat. § 15A-1201. However, our General Statutes provide that “[b]efore consenting to a defendant’s waiver of the right to trial by jury, the trial judge shall . . . address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury.” N.C. Gen. Stat. § 15A-1201(d)(1).

¶ 7 Our Court has stated that N.C. Gen. Stat. § 15A-1201(d)(1) does not establish “a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.” *State v. Rutledge*, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019). In *Rutledge*, the trial court’s colloquy included informing the defendant that “the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be

present.” *Id.* at 98, 832 S.E.2d at 748. The trial court also informed the defendant of the maximum possible sentence that could be imposed for his non-capital offense. *Id.* at 98, 832 S.E.2d at 749.

¶ 8 Here, Defendant argues that the trial court failed to include several essential components of the *Rutledge* colloquy, specifically: (1) the class of her felony, (2) the maximum possible punishment for her crime, and (3) the requirement that a jury verdict be unanimous. The alleged failure to include these instructions, according to Defendant, resulted in her failing to understand and appreciate the consequences of waiving the right to a jury trial as required by N.C. Gen. Stat. § 15A-1201(d)(1). Defendant misunderstands the key conclusion of *Rutledge*: that our Court will not require a trial court to ask a particular set of questions to satisfy N.C. Gen. Stat. § 15A-1201(d)(1). *See Rutledge*, 267 N.C. App. at 97, 832 S.E.2d at 748.

¶ 9 In this case, the trial court personally addressed Defendant to explain the differences between a bench trial and a jury trial. Defendant was informed that in a bench trial the judge would be the sole factfinder, whereas a jury consists of twelve (12) fellow citizens who must *all* be “satisf[ied.]”¹ When asked if she understood the differences between the two types of trials and if she wished to waive her right to a

¹ While the trial court did not use the specific word “unanimous,” we note that Defendant’s contention that she was not informed of the requirement of a unanimous jury was addressed in the colloquy.

jury trial, Defendant answered, “Yes.” The trial court’s colloquy established that Defendant fully understood and appreciated the consequences of her decision to waive the right to trial by jury. *See* N.C. Gen. Stat. § 15A-1201(d)(1). Therefore, we affirm the trial court’s judgment.

III. Conclusion

¶ 10

Defendant received a fair trial, free from reversible error.

AFFIRMED.

Chief Judge STROUD and Judge TYSON concur.

Report per Rule 30(e).

No. COA 14-224

TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
)
 v.)
)
 STILLOAN DEVORAY ROBINSON)

From Mecklenburg
12 CRS 202039-40-6111

CLERK OF COURT OF APPEALS
OF NORTH CAROLINA
2014 FEB 24 A 7:38

FILED

INDEX

Organization of Trial Tribunal 1

Warrants for Arrest..... 2

Indictments 4

Appearance of Counsel 11

Transcript of Proceedings..... 11

Exhibits..... 11

Transcript Pages with Jury Instructions 12

Verdict Forms..... 30

Transcript of Plea (Habitual Felon)..... 33

Prior Record Level Worksheet 37

Judgment and Commitment Form..... 39

Transcript Page with Notice of Appeal 41

Appellate Entries 43

Appointment of the Appellate Defender 45

Orders Extending Time 46

Stipulation and Settlement of Record..... 48

Certificate of Settlement..... 49

Proposed Issues on Appeal..... 50

Names of Counsel 51

Certificate of Service..... 52

No.

TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)
)
 v.)
)
 STILLOAN DEVORAY ROBINSON)

From Mecklenburg
12 CRS 202039-40, 16114

ORGANIZATION OF TRIAL TRIBUNAL

On February 6, 2012, a Mecklenburg County grand jury indicted defendant-appellant Stilloan Devoray Robinson for possession of a stolen motor vehicle, breaking and entering a motor vehicle, and larceny of a motor vehicle. On April 2, 2012, Mr. Robinson was indicted for having attained habitual felon status. On May 20, 2013, in two superseding indictments, Mr. Robinson was indicted for possession of a stolen motor vehicle, breaking an entering a motor vehicle, and larceny of a motor vehicle.

On August 30, 2013, before the Honorable Robert T. Sumner, a jury found Mr. Robinson guilty of possession of a stolen motor vehicle. The jury found Mr. Robinson not guilty of breaking and entering a motor vehicle and larceny of a motor vehicle. Following the jury's verdict, Mr. Robinson admitted to having attained habitual felon status. Judge Sumner sentenced Mr. Robinson, as a prior record level III offender, to an active term of 84 to 113 months in prison.

Mr. Robinson gave oral notice of appeal in open court.

Record on Appeal filed 2-24-14
Docketed 2-24-14

STATE OF NORTH CAROLINA		MECKLENBURG COUNTY FILE 146	MECKLENBURG COUNTY FILE 146	File No. 12CRS202039 51			
MECKLENBURG County		CHARLOTTE Seat of Court	In The General Court Of Justice <input type="checkbox"/> District <input checked="" type="checkbox"/> Superior Court Division				
NOTE: [This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).] AUG 30 2013							
STATE VERSUS		JUDGMENT AND COMMITMENT					
Name Of Defendant ROBINSON, STILLOAN, DEVORAY		AT _____ O'CLOCK _____ ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING)					
Race B	Sex M	Date Of Birth 3/17/1985	SUPERIOR COURT Convictions On Or After Jan. 1, 2012				
Attorney For State WILSON, JOHNATHAN		<input type="checkbox"/> Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney	Attorney For Defendant FRAZIER, THURSTON, E				
			<input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained	Crt Rptr Initials JH			
The defendant <input type="checkbox"/> pled guilty (<input type="checkbox"/> pursuant to <i>Alford</i>) to <input checked="" type="checkbox"/> was found guilty by a jury of <input type="checkbox"/> pled no contest to							
File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
12CRS202039	51	POSSESS STOLEN MOTOR VEHICLE	1/13/2012	20-106	F	H	D
12CRS016114	51	HABITUAL FELON		14-7.1	F	C	
*NOTE: Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).							
The Court: <input checked="" type="checkbox"/> 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be <u>6</u> . Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.							
<table border="0" style="width:100%;"> <tr> <td style="width: 60%;"></td> <td style="text-align: right;">PRIOR RECORD LEVEL: <input type="checkbox"/> I <input checked="" type="checkbox"/> III <input type="checkbox"/> V <input type="checkbox"/> II <input type="checkbox"/> IV <input type="checkbox"/> VI</td> </tr> </table>						PRIOR RECORD LEVEL: <input type="checkbox"/> I <input checked="" type="checkbox"/> III <input type="checkbox"/> V <input type="checkbox"/> II <input type="checkbox"/> IV <input type="checkbox"/> VI	
	PRIOR RECORD LEVEL: <input type="checkbox"/> I <input checked="" type="checkbox"/> III <input type="checkbox"/> V <input type="checkbox"/> II <input type="checkbox"/> IV <input type="checkbox"/> VI						
<p>The Court: (NOTE: Block 1 or 2 MUST be checked.):</p> <input checked="" type="checkbox"/> 1. makes no written findings because the term imposed is: <input checked="" type="checkbox"/> (a) in the presumptive range. <input type="checkbox"/> (b) for a Class A felony. <input type="checkbox"/> (c) for adjudication as a violent habitual felon. G.S. 14-7.12. <input type="checkbox"/> (d) for drug trafficking <input type="checkbox"/> for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). <input type="checkbox"/> (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a). <input type="checkbox"/> 2. makes <input type="checkbox"/> the aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605. <input type="checkbox"/> the findings of egregious aggravation for conviction under G.S. 14-27.2A or G.S. 14-27.4A, as set forth on the attached AOC-CR-618 incorporated herein by reference, which require a sentence in excess of that authorized by G.S. 15A-1340.17. <input checked="" type="checkbox"/> 3. adjudges the defendant to be an habitual felon to be sentenced <input type="checkbox"/> (offenses committed before December 1, 2011) as a Class C felon. <input checked="" type="checkbox"/> (offenses committed on or after December 1, 2011) four classes higher than the principal felony (no higher than Class C). <input type="checkbox"/> 4. adjudges the defendant to be an habitual breaking and entering status offender, to be sentenced as a Class E felon. <input type="checkbox"/> 5. finds enhancement pursuant to: <input type="checkbox"/> G.S. 90-95(e)(3) (drugs). <input type="checkbox"/> G.S. 14-3(c) (hate crime). <input type="checkbox"/> G.S. 50B-4.1 (domestic violence). <input type="checkbox"/> G.S. 14-50.22 (gang). <input type="checkbox"/> Other: _____ . This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue. <input type="checkbox"/> 6. finds that the defendant used, displayed, or attempted to use or display a firearm or a deadly weapon at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue. <input type="checkbox"/> 7. finds the above designated offense(s) is a reportable conviction under G.S. 14-208.6 (check only one) <input type="checkbox"/> a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One. <input type="checkbox"/> b. but makes no finding or order concerning registration or satellite-based monitoring due to defendant's sentence of life imprisonment without parole. <input type="checkbox"/> 8. finds the above designated offense(s) involved the <input type="checkbox"/> physical or mental <input type="checkbox"/> sexual abuse of a minor. (NOTE: If offense(s) is not also a reportable conviction in No. 7 above, this finding requires no further action by the court.) <input type="checkbox"/> 9. finds that a <input type="checkbox"/> motor vehicle <input type="checkbox"/> commercial motor vehicle was used in the commission of the offense and this conviction shall be reported to DMV. <input type="checkbox"/> 10. finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim. <input type="checkbox"/> 11. (offenses committed on or after December 1, 2008, only) finds the above designated offense(s) involved criminal street gang activity G.S. 14-50.25. <input type="checkbox"/> 12. finds that the defendant refused to consent to conditional discharge under G.S. 90-96(a).							
The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced (check only one)							
<input type="checkbox"/> to Life Imprisonment Without Parole for <input type="checkbox"/> Class A Felony; <input type="checkbox"/> Class B1 Felony.		in the custody of:					
<input type="checkbox"/> Violent Habitual Felon. <input type="checkbox"/> G.S. 14-27.2A or G.S. 14-27.4A with egregious aggravation.		<input checked="" type="checkbox"/> N.C. DAC.					
<input type="checkbox"/> to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A.		<input type="checkbox"/> Other: _____					
for a minimum term of: 84 months	and a maximum term of: 113 months	<input type="checkbox"/> ASR term (Order No. 4, Side Two) _____ months		<input type="checkbox"/> to Death (see attached Death Warrant and Certificates)			
The defendant shall be given credit for <u>155</u> days spent in confinement prior to the date of this Judgment as a result of this charge(s).							
<input type="checkbox"/> The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.							
<input type="checkbox"/> The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:							
File No.	Offense	County	Court	Date			

The Court further Orders: (check all that apply)

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's Fees	SBM Fee	Appt Fee/Misc	Total Amount Due
\$	\$	\$	\$	\$	\$	\$

*See attached "Restitution Worksheet, Notice and Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

- 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.
- 3. The Court finds just cause to waive costs, as ordered on the attached AOC-CR-618. Other: _____
- 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction, then he or she will be released at the end of the ASR term specified on Side One. G.S. 15A-1340.18.
- 5. Other: _____

The Court recommends:

- 1. Substance abuse treatment. 2. Psychiatric and/or psychological counseling. 3. Work release should should not be granted.
- 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above. but the Court does not recommend restitution be paid as a condition of post-release supervision. from work release earnings.

The Court further recommends:

ATTY FEE LIEN \$1,400.00

ORDER OF COMMITMENT/APEAL ENTRIES

- It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
- The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date 8/30/2013	Name Of Presiding Judge (Type Or Print) ROBERT T. SUMNER	Signature Of Presiding Judge 
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ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified
-----------------------	---------------------------------	----------------------------------

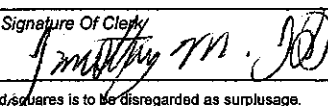
It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and commit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court
------	--------------------	--

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

- Appeal Entries (AOC-CR-350)
- Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
- Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
- Victim Notification Tracking Form
- Additional File No.(s) And Offense(s) (AOC-CR-626)
- Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
- Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
- Additional Findings (AOC-CR-618)
- Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
- Other: _____

Date 8/30/2013	Date Certified Copies Delivered To Sheriff 8/30/2013	Signature Of Clerk 	<input checked="" type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> CSC	SEAL
-------------------	---	--	--	-------------

Material opposite unmarked squares is to be disregarded as surplusage.

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

2021-NCCOA-58

No. COA20-42

Filed 2 March 2021

Iredell County, No. 18 CRS 2840

STATE OF NORTH CAROLINA

v.

MADERKIS DEYAWN ROLLINSON

Appeal by defendant from judgment entered 14 May 2019 by Judge Mark Klass
in Iredell County Superior Court.

Attorney General Joshua H. Stein, by Assistant Attorney General John Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah Hall Love, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1

Maderkis Deyawn Rollinson (“Defendant”) appeals from judgment entered after the trial court found him guilty of one count of assault with a deadly weapon on a government official, possession of up to one-half ounce of marijuana, possession of marijuana paraphernalia, possession with intent to sell and deliver (“PWISD”) a

Schedule II Controlled Substance, maintaining a vehicle for keeping and selling controlled substances, possession of cocaine, and having attained habitual felon status. We find no prejudicial error in part, vacate in part, and remand for new sentencing hearing.

I. Background

¶ 2 On 6 January 2017, a confidential informant told Detective Pitts of the Iredell County Sherriff's Department he could purchase crack cocaine from Defendant. The buy was set up to take place at the Home Depot. When Defendant arrived, Sergeant Hayes and Sergeant Line blocked Defendant's car in with their marked patrol cars. Defendant reversed and bumped Sergeant Hayes' vehicle. Defendant drove forward, hit Sergeant Line's patrol car, and continued to press the gas causing the tires to spin. Defendant threw two bags of cocaine out of his car at the scene, and the rest of the contraband was found in his car and on his person.

¶ 3 On 10 January 2019, a bench trial was held in Iredell County Superior Court before the Honorable Mark Klass. The court dismissed one count of assault with a deadly weapon on a government official for insufficient evidence and found Defendant guilty of the remaining charges. When Defendant's case was called for trial on 13 May 2019, the prosecutor informed the court that "it's [her] understanding that [Defendant] now wishes to elect to have a bench trial instead of a jury trial," and asked the court to have a colloquy with Defendant. Defendant was present and

represented by counsel. The prosecutor then read Defendant's charges including the charge of having obtained habitual felon status. Immediately thereafter, the following colloquy transpired:

Court: Mr. Rollinson, if you will stand up, please.

Mr. Rollinson stands

Court: Do you understand you're charged with the charges she just read to you?

Defendant: Yes, sir.

Court: Do you understand you have a right to be tried by a jury of your peers?

Defendant: Yes, sir.

Court: At this time you wish to waive your right to a jury and have this heard as a bench trial by me?

Defendant: Yes, sir.

Court: If you will sign the appropriate form.

¶ 4 Defendant, defense counsel, and the court signed form AOC-CR-405 ("Waiver of Jury Trial form") declaring Mr. Rollinson provided notice of his intent to waive a jury trial in accordance with N.C. Gen. Stat. § 15A-1201(c) by giving notice on the record in open court. The court did not check either box regarding the court's consent to Defendant's waiver of jury trial. After the court announced its verdict on the

substantive charges, the prosecutor informed the court Defendant had been indicted as an habitual felon.

Prosecutor: I would contend [Mr. Rollinson]’s waived his, the jury trial for both of them. But if you feel like you need to have another colloquy with him about that, we need to have that so we can proceed.

Court: I’ll do that. At this point in the trial it’s a separate trial. The jurors are coming back to hear the habitual felon matter, or you can waive your right to a jury trial and we can proceed.

Defense Counsel: Just one second, please, your Honor.

Brief pause

Defense Counsel: ...[A]fter speaking with my client on an habitual felon hearing, trial, he is not requesting a jury trial on that matter and is comfortable with a bench trial.

Prosecutor: Your Honor, I’m ready to proceed.

Court: Go ahead.

¶ 5

Defendant, defense counsel, and the court signed the Waiver of Jury Trial form declaring Defendant provided notice of his intent to waive jury trial in open court. The court checked the consent box on this form. Three certified, self-authenticating prior felony judgments were admitted without objection. Counsel for Defendant was given the opportunity to ask questions and present evidence; however, no questions were asked, and Defendant presented no evidence in the adjudicatory stage of the

habitual felon trial. Both the State and counsel for Defendant made arguments regarding sentencing. Thereafter, the trial court announced:

Court: Upon consideration of the record, the evidence presented, answers of [Mr. Rollinson], statements of the lawyers, I find there's a factual basis for entry of the plea. [Mr. Rollinson] is satisfied with his attorney, he's competent to stand trial, and the plea is the informed choice made freely, voluntarily, and understandingly. The defendant's plea is hereby accepted by the Court and ordered recorded.

[Mr. Rollinson] having been found guilty of [six substantive charges], and admitting his habitual felon, or pleading to the habitual felon, I consolidate them into one sentence.

¶ 6 The court sentenced Defendant to 101-134 months in prison. After the court announced its judgment, the prosecutor noted, "the only thing is he ... didn't admit the habitual felon." The court responded, "He pled guilty to that." Defendant gave notice of appeal in open court following the entry of judgment.

II. Jurisdiction

¶ 7 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 8 The issues on appeal are (1) whether the trial court erred in allowing Defendant to waive his right to a jury trial on the substantive charges against him, thereby acting in contravention of N.C. Gen. Stat. § 15A-1201; (2) whether the trial court erred by sentencing Defendant as an habitual felon; and (3) whether the trial

court erred by sentencing Defendant for both possession of cocaine and possession with intent to sell or deliver the same cocaine.

IV. Analysis

A. Waiver of Right to Jury Trial on Substantive Charges

¶ 9 In order to prove the trial court erred by accepting his waiver of the right to a jury trial, Defendant must show: (1) the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201; and (2) Defendant was prejudiced by the error. *State v. Swink*, 252 N.C. App. 218, 221, 797 S.E.2d 330, 332 (2017), *appeal dismissed and disc. rev. denied*, 369 N.C. 754, 799 S.E.2d 870 (2017). This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 836, 811 S.E.2d 215, 220 (2018).

¶ 10 Defendant argues the trial court erred when it failed to require Defendant's compliance with the notice provision outlined by N.C. Gen. Stat. § 15A-1201(c). The statute allows a defendant charged with a non-capital offense to give notice of his intent to waive his right to a trial by jury in any of the three following ways:

(1) Stipulation, which may be conditioned on each party's consent to the trial judge, [and] signed by both the State and the defendant . . .

(2) Filing a written notice of intent to waive a jury trial with the court . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a

calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).

(3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

¶ 11 Defendant gave notice of his intent to waive the right to trial by jury on the substantive charges against him pursuant to N.C. Gen. Stat. § 15A-1201(c)(2) through his filing of a Waiver of Jury Trial form, and through N.C. Gen. Stat. § 15A-1201(c)(3) by announcing his intent in open court. Defendant argues, however, that his notice of intent was not timely because it was given at the time the matter was called for trial. Any such error was invited error and was not prejudicial to Defendant.

¶ 12 In *State v. Rutledge*, this Court held:

. . . [t]he filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial.

State v. Rutledge, 267 N.C. App. 91, 97, 832 S.E.2d 745, 748 (2019).

¶ 13 Nothing in the record before us indicates whether Defendant requested or received a formal arraignment separate from the day of trial. Likewise, nothing in the record indicates when either the calendar setting under N.C. Gen. Stat. § 7A-49.4(b) or the setting of the definite trial date under N.C. Gen. Stat. § 7A-49.4(c) occurred in this case. Consent from both the trial court and the State was made clear by the statements of the judge and prosecutor. Any error arising from technical non-compliance with N.C. Gen. Stat § 15A-1201(e) was invited by Defendant and was not prejudicial to Defendant.

¶ 14 The revocation provision states in relevant part, “. . . the defendant may revoke the waiver . . . within 10 business days of the defendant’s initial notice . . . if the defendant does so in open court with the State present or in writing to both the State and the judge.” N.C. Gen. Stat § 15A-1201(e). Strict compliance with the ten-day revocation period was made impossible by Defendant’s choice to waive his right to jury trial on the actual trial date. Therefore, all three elements of the *Rutledge* test are met in the case at bar. “If Defendant wanted to take advantage of the ten-day revocation rule, he should have given advance notice and requested arraignment prior to trial.” *Rutledge*, 267 N.C. App. at 99, 832 S.E.2d at 749.

¶ 15 Defendant next argues the trial court did not properly engage Defendant in a colloquy as required by N.C. Gen. Stat. § 15A-1201(d). Under subsection (d) of this statute, the judge must both: (1) “[a]ddress the defendant personally and determine

whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury" and (2) "[d]etermine whether the State objects to the waiver, and, if so, why." N.C. Gen. Stat. § 15A-1201(d).

¶ 16 Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to waive his right to a jury trial. *Rutledge*, 267 N.C. App. at 98, 832 S.E.2d at 748. In fact, this Court has refused to read into law the requirement for a "script" for the colloquy. *Id.*, 832 S.E.2d at 748.

¶ 17 The transcript reflects the trial court judge addressed Defendant personally, asked Defendant whether he understood his right to be tried by a jury of peers, and asked whether he wished to instead have the case heard as a bench trial by the judge. Defendant responded "yes, sir" to all three questions by the trial court judge. Further, the transcript reflects consent to waive jury trial by both the judge and the State. Therefore, both elements of N.C. Gen. Stat. § 15A-1201(d) regarding the required colloquy are met in this case in accord with the precedent of this Court.

¶ 18 Citing *State v. Evans*, Defendant next argues "[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute." 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002). The Court in *Evans* was referring to the statute allowing a defendant's waiver of assistance of counsel and the right to proceed *pro se*. *Id.* at 314, 569 S.E.2d at 674. Here, Defendant's argument that the execution

of the Waiver of Jury Trial form did not properly serve as a substitute for compliance by the trial court with N.C. Gen. Stat. § 15A-1201 is unpersuasive. Defendant was represented by counsel, and Defendant’s counsel signed the Waiver of Jury Trial form certifying that counsel had fully explained all the waiver implications to him. There are no facts in the record before us to indicate Defendant’s waiver of his right to a jury trial was not knowingly, intelligently, or voluntarily waived, or that his waiver was exclusively at the direction of counsel and not his choice. The issue of ineffective assistance of counsel has not been raised on appeal.

¶ 19 Finally, without raising the issue of insufficient evidence, Defendant argues that “[b]ecause the evidence showed Mr. Rollinson did not intend to assault either officer, there is a reasonable probability that a jury would not have convicted him of either count of assault. Therefore, Defendant was prejudiced by the trial court’s failure to comply with N.C. Gen. Stat. § 15A-1201 before proceeding with a bench trial.” The evidence that Defendant pressed the gas pedal and continued to spin the tires on his vehicle after colliding with Sergeant Hayes’ marked patrol car undermines this argument.

¶ 20 This Court finds that no error arose from Defendant’s waiver of jury trial or Defendant’s invited noncompliance with the statutory revocation period allowed by N.C. Gen. Stat. § 15A-1201(e). While the trial court technically erred in failing to check the box on the Waiver of Jury Trial form indicating consent of the court to allow

Defendant's waiver of jury trial, the court's consent to waiver was made clear at trial. Therefore, where the trial judge's consent to waiver was shown through his words in open court, we find no prejudicial error arising from the absence of a check box alone not being populated.

B. Sentencing as an Habitual Felon

¶ 21 Next, we consider whether the trial court erred by sentencing Defendant as an habitual felon. A determination of error here requires a discussion of (1) whether Defendant properly waived his right to a jury trial; and (2) whether the trial court properly found Defendant guilty of attaining habitual felon status, or improperly accepted a guilty plea from Defendant when Defendant did not enter a plea. This Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, 257 N.C. App. 829, 836, 811 S.E.2d 215, 220 (2018).

1. Waiver of Right to Jury Trial on Habitual Felon Status

¶ 22 The relevant analysis for the waiver of jury trial is the same as stated above regarding the bifurcated bench trial on Defendant's substantive charges.

¶ 23 Defendant gave notice of his intention to waive a jury trial in open court pursuant to N.C. Gen. Stat. § 15A-1201(c). The transcript shows the trial court complied with N.C. Gen. Stat. § 15A-1201(d)(1), which requires the court to (1) “[a]ddress the defendant personally and determine whether the defendant fully

understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury” and (2) “[d]etermine whether the State objects to the waiver, and, if so, why.” N.C. Gen. Stat. § 15A-1201(d).

¶ 24 Again, the trial court addressed Defendant personally. (“[Y]ou can waive your right to a jury trial” (emphasis added)). No part of the colloquy suggests Defendant did not understand or appreciate the consequences of the waiver. Although defense counsel answered for Defendant after speaking to him, N.C. Gen. Stat. § 15A-1201(d)(1) does not forbid an answer from counsel on a defendant’s behalf. An answer by counsel on behalf of Defendant does not negate the fact that the trial court judge had otherwise properly complied with the requirement that the judge address Defendant “personally.” Defendant has not raised an issue regarding ineffective assistance of counsel.

¶ 25 The State did not object to the waiver; rather, the transcript shows it was the prosecutor who brought the waiver to the trial court’s attention. Therefore, adherence to the requirements of N.C. Gen. Stat. § 15A-1201(d)(2) were met. Lastly, Defendant again invited noncompliance with the statutory revocation period of N.C. Gen. Stat. § 15A-1201(e) when he, after receiving advice of counsel, chose to waive his right to a jury of his peers on the day of trial.

2. Lapsus Linguae Regarding Guilty Plea

¶ 26

Defendant argues the trial court's mistake in stating Defendant pleaded guilty to attaining habitual felon status constitutes prejudicial error. We agree that the statement by the trial court that Defendant pleaded guilty to attaining habitual felon status when he did not so plead was error, though not prejudicial error.

“Lapsus linguae is an error in a court's oral findings that does not align with the facts of the case or the court's actual intent. This typically arises where a court's misspoken oral finding appears inconsistent with the court's more carefully crafted and deliberate written finding. In this circumstance, a trial court may conform its written judgment to the court's actual intent, notwithstanding its oral ruling.”

State v. McCurry, 244 N.C. App. 544, 781 S.E.2d 351 (2015) (internal citations omitted). The transcript shows the trial court judge intended to state Defendant was found guilty, not that he pleaded guilty. After inquiring whether Defendant wished to waive his right to a jury trial, the trial court received evidence presented by the State, and provided defense counsel the opportunity to ask questions and to present evidence on behalf of Defendant. The trial court then heard concluding statements from both the State and Defendant. These facts indicate that the trial judge simply misspoke when he stated “[h]e pled guilty to that” in reference to Defendant's habitual felon status charge. Further, the issue was rectified on the written judgment indicating that Defendant received a trial by judge, and where it was correctly

indicated that the trial court “adjudges defendant to be a habitual felon to be sentenced.”

C. Sentencing for PWISD Cocaine and Possession of Same

¶ 27 As to the issue whether the trial court erred by sentencing Defendant for both possession of cocaine and possession with intent to sell or deliver the same cocaine, “[we review alleged sentencing errors for] ‘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) (quoting N.C. Gen. Stat. § 15A-1340.14(f) (2011)). Even though Defendant did not object to the sentence imposed, sentencing errors may be reviewed on appeal absent an objection. *State v. Moses*, 205 N.C. App. 629, 638, 698 S.E.2d 688, 695 (2010).

¶ 28 The State concedes the trial court erred in sentencing Defendant for both PWISD cocaine and possession of the same cocaine. We hold Defendant is entitled to a new sentencing hearing. The fact the convictions were consolidated into one judgment for purposes of sentencing did not cure the error. “When the trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error, the proper remedy is to remand for resentencing” *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015). Defendant’s conviction for possession of cocaine was consolidated with his other five convictions. It is unclear

what weight the trial court gave each of the separate convictions in calculating the imposed sentence. Therefore, Defendant is entitled to a new sentencing hearing.

¶ 29 Defendant indicated his choice for bench trials on the substantive charges against him and on the issue of his having attained the status of habitual felon. The record provides no indication that Defendant's choice to do so was made unknowingly or without an understanding of the consequences of doing so. Except where noncompliance with the statutory ten-day revocation period was provided by Defendant's own choices, the requirements of N.C. Gen. Stat. § 15A-1201 were met. Defendant has not shown that his choice to waive his right to a jury trial on the day of trial prejudiced him.

¶ 30 Although the judge stated Defendant "pleaded guilty" to attaining habitual felon status, Defendant failed to show the *lapsus linguae* was prejudicial. The trial court properly adjudged Defendant guilty of attaining habitual felon status.

¶ 31 There was no prejudicial error in the bench trials conducted by the trial court. The trial court erred in sentencing Defendant for both PWISD cocaine and possession of the same cocaine. As a result, we vacate and remand for a new sentencing hearing.

It is so ordered.

VACATED AND REMANDED FOR NEW SENTENCING HEARING.

Judges HAMPSON and JACKSON concur.

STATE V. ROLLINSON

2021-NCCOA-58

Opinion of the Court

Report per Rule 30(e).

No. COA19-715

No. COA 19-715

JUDICIAL DISTRICT 26

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	<u>From Mecklenburg</u>
v.)	17 CRS 234118-119,
)	122-123 & 17 CRS 32613
MITCHELL ANDREW TUCKER)	

RECORD ON APPEAL

INDEX

Organization of Trial Tribunal1
Appearance of Trial Counsel3
Statement Regarding Exhibits.....3
Transcript of Proceedings.....3
Magistrate's Orders4
Assignment of Counsel8
Indictments9
Motion for Protective Order/Motion for Discovery..... 13
Notice of Intent to Introduce Evidence at Trial 15
Notice of Intent to Prove Aggravating Factors
or Prior Record Level Point 16
Superseding Indictment (17 CRS 234119) 18
Speedy Trial Demand20
Motion and Order for Joinder 21
Motion for Complete Recordation 22
State's Witness List 23
Motion to Sequester Witnesses 24
Motions in Limine25
Defendant's Witness List..... 28
Proposed Limiting Instruction Regarding
Protective Order File 29

No.

JUDICIAL DISTRICT 26

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)	
)	<u>From Mecklenburg</u>
v.)	17 CRS 234118-119,
)	122-123 & 17 CRS 32613
MITCHELL ANDREW TUCKER)	

ORGANIZATION OF TRIAL TRIBUNAL

On 30 May 2018, a jury in Mecklenburg County Superior Court returned verdicts finding the Defendant-Appellant, Mr. Mitchell Andrew Tucker, guilty of violating a domestic violence protective order while in possession of a deadly weapon (17 CRS 234118) and felonious breaking or entering in violation of a valid domestic violence protective order (17 CRS 234119). Mr. Tucker also pled guilty to attaining habitual felon status (17 CRS 32613).

Additionally, the jury returned verdicts finding Mr. Tucker guilty of assault with a deadly weapon (17 CRS 234122) and assault on a female (17 CRS 234123).

On that same date, the Honorable Jesse B. Caldwell III accepted the jury verdicts and Mr. Tucker's plea. The trial court consolidated 17 CRS 234118 and 17 CRS 234119 and sentenced Mr. Tucker in the mitigated range to a prison term of 95 to 126 months, with 206 days of jail credit. The trial court also sentenced Mr. Tucker to a term of 60 days in 17 CRS 234122, with the term to begin at the expiration of the sentence in the prior judgment. The trial court also sentenced Mr. Tucker to a term of 30 days in 17 CRS 234123, with the sentence to run consecutive to the sentence in 17 CRS 234122.

On 30 May 2018, Mr. Tucker gave oral notice of appeal in open court from those judgments.

STATE OF NORTH CAROLINA

MECKLENBURG County CHARLOTTE

Seat of Court

File No.

17CRS234119

51

NOTE: [Use AOC-CR-342 for DWI offense(s).]

In The General Court Of Justice
 District Superior Court Division

STATE VERSUS

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)

Name Of Defendant
TUCKER, MITCHELL, ANDREW

Race B Sex M Date Of Birth 11/03/1957

G.S. 15A-1301, -1340.13

Attorney For State MICHAEL JOSEPH PIERRIE
 Def. Found Not Indigent Def. Waived Attorney
Attorney For Defendant BRANDON L LEONARD
 Appointed Retained
Crt Rptr Initials KLB

The defendant was found guilty/responsible, pursuant to plea pursuant to Alford of no contest trial by judge trial by jury, of

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
17CRS234119	51	BREAKING AND OR ENTERING (F)	09/07/2017	14-54(A)	F	H	
17CRS032613	51	HABITUAL FELON	09/07/2017	14-7.1	F	C	
17CRS234118	51	DVPO VIOL DEADLY WEAPON	09/07/2017	50B-4.1(G)	F	H	

*NOTE: Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).

The Court: 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be 18.
Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the determination of this issue by the trier of fact beyond a reasonable doubt or the defendant's admission to this issue.
 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

PRIOR RECORD I III V
LEVEL: II IV VI

The Court (NOTE: Block 1 or 2 MUST be checked.):

- 1. makes no written findings because the term imposed is: (a) in the presumptive range. (b) for a Class A felony. (c) for adjudication as a violent habitual felon, G.S. 14-7.12. (d) for drug trafficking. (e) for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). (f) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).
- 2. finds the Determination of aggravating and mitigating factors on the attached AOC-CR-605. egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.
- 3. adjudges the defendant to be a habitual felon to be sentenced (offenses committed before Dec. 1, 2011) as a Class C felon. (offenses committed on or after Dec. 1, 2011) four classes higher than the principal felony (no higher than Class C).
- 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.
- 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.
- 6. finds enhancement pursuant to: G.S. 90-95(e)(3) (drugs). G.S. 14-3(c) (hate crime). G.S. 50B-4.1 (domestic violence). G.S. 14-50.22 (gang misdemeanor). Other: _____
This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.
- 7. finds that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed the firearm or weapon about his or her person. This finding is based on the jury's determination of this issue beyond a reasonable doubt or on the defendant's admission. Pursuant to G.S. 15A-1340.16A, the Court has increased the minimum sentence by (check only one)
 (Class A-E felony committed prior to Oct. 1, 2013) 60 months. (Class A-E felony committed on or after Oct. 1, 2013) 72 months.
 (Class F or G felony committed on or after Oct. 1, 2013) 36 months. (Class H or I felony committed on or after Oct. 1, 2013) 12 months.
- 8. finds the above-designated offense(s) is a reportable conviction under G.S. 14-208.6 (check only one)
 a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
 b. but makes no finding or order concerning registration or satellite-based monitoring due to a sentence of life imprisonment without parole.
- 9. finds the above-designated offense(s) involved the physical or mental sexual abuse of a minor.
(NOTE: If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.)
- 10. finds that a motor vehicle commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.
- 11. finds this is an offense involving assault, communicating a threat, or an act defined by G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.
- 12. (offenses committed on or after Dec. 1, 2017, only) finds that the offense was committed as part of criminal gang activity as defined in G.S. 14-50.16A(2). and that the defendant was a criminal gang leader or organizer as defined in G.S. 14-50.16A(3). This finding is based on the determination of this issue by the trier of fact beyond a reasonable doubt or on the defendant's admission.
- 13. finds the above-designated offense(s) involved (check one) (offenses committed Dec. 1, 2008 - Nov. 30, 2017) criminal street gang activity (offenses committed on or after Dec. 1, 2017) criminal gang activity. G.S. 14-50.25.
- 14. did not grant a conditional discharge under G.S. 90-96(a) because (check all that apply) the defendant refused to consent. (offenses committed on or after Dec. 1, 2013, only) the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.
- 15. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.
- 16. finds that this was an offense involving child abuse or an offense involving assault or any of the acts as defined in G.S. 50B-1(a) committed against a minor. G.S. 15A-1382.1(a1).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced (check only one)

to Life Imprisonment Without Parole for Class A Felony. Class B1 Felony. Violent Habitual Felon. egregious aggravation under No. 2, above. in the custody of: N.C. DACJJ. Other: _____

to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 81B, Part 2A. Other: _____

for a minimum term of: 95 months and a maximum term of: 126 months ASR term (Order No. 4, Side Two) months to Death (see attached Death Warrant and Certificates)

The defendant shall be given credit for 266 days spent in confinement prior to the date of this Judgment as a result of this charge in STEARNS COUNTY

The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.
 The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date
				NOV 20 2018

Material opposite unmarked squares is to be disregarded as surplusage.

AT _____ O'CLOCK _____ M
BY _____
CLERK OF SUPERIOR COURT

The Court further Orders: (check all that apply)

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs \$ 0.00	Fine \$	Restitution* \$ 0.00	Attorney's fees \$ 0.00	SBM Fee \$ 0.00	Appt Fee/Misc \$ 0.00	Total Amount Due \$
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*See attached "Restitution Worksheet, Notice and Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

- 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.
- 3. The Court finds just cause to waive costs, as ordered on the attached AOC-CR-618. Other: ACTIVE SENTENCE
- 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction and Juvenile Justice, then he or she will be released at the end of the ASR term specified on Side One. G.S. 15A-1340.18.
- 5. Other:
CIVIL JUDGMENT COURT COSTS AND ATTORNEY FEES. REMIT JAIL FEES.

The Court recommends:

- 1. Substance abuse treatment. 2. Psychiatric and/or psychological counseling. 3. Work release should should not be granted.
- 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
 but the Court does not recommend restitution be paid as a condition of post-release supervision. from work release earnings.

The Court further recommends:

PHYSICAL AND MENTAL HEALTH EXAMINATION. PARTICIPATE IN REHABILITATIVE/VOCATIONAL PROGRAMS.

ORDER OF COMMITMENT/APPEAL ENTRIES

- 1. It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
- 2. The defendant gives notice of appeal from the judgment of the trial court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date 05/30/2018	Name Of Presiding Judge (type or print) THE HONORABLE JESSE B CALDWELL III	Signature Of Presiding Judge
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ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified
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It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency two certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Asst. CSC <input type="checkbox"/> Clerk Of Superior Court
-------------	---------------------------	--

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

- Appellate Entries (AOC-CR-350)
- Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
- Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
- Victim Notification Tracking Form
- Additional File No.(s) And Offense(s) (AOC-CR-626)
- Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
- Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
- Additional Findings (AOC-CR-618)
- Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
- Other:

Date 05/30/2018	Date Certified Copies Delivered To Sheriff 5-31-18	Signature Of Clerk 	<input checked="" type="checkbox"/> Deputy CSC <input type="checkbox"/> Asst. CSC <input type="checkbox"/> Clerk Of Superior Court	SEAL
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Material opposite unmarked squares is to be disregarded as surplusage.