NO. 119PA21 **TWENTY-TWO A DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Iredell County**
	)	
MADERKIS DEYAWN ROLLINSON	**)**	

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NEW BRIEF FOR THE STATE
(Appellee)

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NEW BRIEF FOR THE STATE
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ISSUES PRESENTED

I. **WHETHER THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT COMPLIED WITH N.C.G.S. § 15A-1201(D)(1) WHERE THE TRIAL COURT PERSONALLY ENGAGED WITH MR. ROLLINSON TO DETERMINE WHETHER HE WANTED TO HAVE A BENCH TRIAL ON HABITUAL FELON STATUS AND UNDERSTOOD THE CONSEQUENCES OF WAIVING HIS RIGHT TO A JURY TRIAL?**

II. **WHETHER THE COURT OF APPEALS PROPERLY HELD THAT EVEN IF THE TRIAL COURT DID NOT PROPERLY COMPLY WITH N.C.G.S. § 15A-1201(D), DEFENDANT WAS NOT PREJUDICED BY THE ERROR?**

STATEMENT OF THE CASE

Defendant 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 10 January 2019, defense counsel filed a motion to suppress which was heard on 24 January 2019 before the Honorable Lori Hamilton. An order denying the motion to suppress was filed on 22 February 2019. (R pp 39-49)

On 13 May 2019, defendant waived his right to a jury trial and 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 trial 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 trial court found defendant guilty of the remaining charges. (R p 60; T p 135)

Defendant also waived his right to a jury trial and requested a bench trial to determine whether he had attained habitual felon status and signed a

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[1] Both volumes of the May 13-14, 2019 trial transcript are paginated sequentially and are cited collectively as (T p *)

Waiver of Jury Trial form acknowledging that his waiver was both knowing and voluntary. (R pp 61-63; T p 136) After a hearing, the trial court found defendant guilty of attaining habitual felon status. (T pp 143-44) The court consolidated defendant's convictions for judgment and sentenced defendant as a habitual felon to 101-134 months in prison. (R pp 66-69) Defendant gave notice of appeal in open court following the entry of judgment. (R p 69; T p 144)

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 of 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)

The informant did not know what time "D" would arrive or what car he would be driving. However, the informant received updates from "D" about his location while in route. The informant got off the phone with "D" about one minute before "D" arrived. 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)

Sergeants Leo Hayes and Ernie Line of the Iredell County Sheriff's Office waited in marked patrol cars behind Home Depot. (T pp 20, 88, 108) When Det. Pitts communicated that the subject had arrived, Sgts. Hayes and Line attempted to stop the car. (T pp 23-25, 86-87)

With their blue lights activated, one patrol car pulled behind the white car and the "other [patrol] car tried to block it[.]" (T pp 24-25, 108) More specifically, Sgt. Line pulled his marked Dodge Charger patrol vehicle up to the front of defendant's vehicle, putting the left front corner of his vehicle in the middle of the front end of defendant's vehicle. (T pp 87-88) At the same time, Sgt. Hayes pulled his fully marked Chevrolet Tahoe patrol vehicle, that was even marked "Sheriff" in big letters on the hood, directly in behind defendant's vehicle, and activated his blue lights. (T pp 108-09) Defendant saw Sgt. Hayes and initially opened his door, as if he was going to run from the vehicle. However, Officer Hayes also opened his door, began to get out and began yelling at defendant to get on the ground. Defendant then threw his car in reverse and bumped Sgt. Hayes' vehicle. After bumping Sgt. Hayes' vehicle, defendant then "floored it" and rammed Sgt. Line's marked and occupied patrol vehicle that was stopped in front of defendant. Defendant's vehicle hit the

bumper, drivers quarter panel of Sgt. Line's vehicle, then stood on the gas. Sgt. Line also hit the gas in an attempt to hold the vehicle in place. The vehicles engaged in a kind of "tug of war" for a moment. (T pp 108-10, 115)

Sgt. Line also opened his door to get out when defendant opened his door. As Sgt. Line began to step out, defendant floored his vehicle and rammed Sgt. Line's occupied patrol vehicle. When defendant's vehicle hit Sgt. Line's marked cruiser, defendant then "gassed it" and stood on the gas in an attempt to push Sgt. Line's vehicle out of the way. Sgt. Line "gassed" his vehicle in response in an attempt to hold defendant's vehicle in place and the two vehicles stayed in place for a few moments. (T pp 89-90) Sgt. Line was in uniform as this encounter occurred. Defendant's vehicle broke free and then drove down the front of Sgt. Line's vehicle bumper, and defendant's lug nuts cut into the plastic bumper cover of Sgt. Line's patrol vehicle. (T p 90)

It was snowing and defendant's tires were spinning. (T pp 24, 89, 109) Sgt. Line and Sgt. Hayes believed the driver was trying to leave the parking lot when he struck their patrol cars. (T pp 24-25, 93, 103, 117) After a short chase, Sgt. Line executed the "pit" maneuver on defendant's car and caused it

to spin out. (T pp 24-25, 104, 110) Sergeants Line and Hayes then blocked the white car with their patrol cars. (T pp 24-25, 93-94)[2]

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

Defendant was identified as the driver of the white Dodge Intrepid. (T pp 26-27, 97-98, 110-11) When Defendant was searched, officers found a "wad of money" in his pants pocket and a plastic bag of what appeared to be marijuana in his jacket pocket. (T pp 112, 116) Blunt wrappers were found inside defendant's car. (T pp 40-41, 46)

The green vegetable matter and off-white substance were sent to NMS Laboratories to be tested for the presence of a controlled substance. (T pp. 68-70; State's Exs. 17A, 17B) A forensic chemist conducted a chemical analysis of both substances and concluded the substances were cocaine and marijuana. (T pp 66, 70-72, 77, 82; State's Exs. 21-22) Because the combined weight of the two bags that contained cocaine weighed less that the trafficking amount of 28

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[2] The dash cam video from Sgt. Line's patrol car was admitted at trial. (T pp 98-99; State's Ex. 23)

grams, the lab only tested the contents of one bag. The contents of the bag tested was determined to be cocaine. (T pp 72, 74)

On 20 January 2017, defendant told Det. Pitts in a recorded statement that on 6 January 2017, he purchased 3.4 grams of cocaine for $200 and planned to sell it to "Duke" for $250. (T pp 49-53; State's Ex. 20)

Upon calling the case for trial on 13 May 2019, the prosecutor informed the court that it was her understanding that defendant wished to have a bench trial instead of a jury trial, and asked the court to have a colloquy with defendant. (T p 4) The prosecutor then explained that defendant 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, defendant, defense counsel, and the court signed form AOC-CR-405, titled "Waiver of Jury Trial." (R pp 52-53) The form declared that defendant 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)

At the close of all evidence, the court granted defendant'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 defendant 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)

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

> [PROSECUTOR]: I would contend that [defendant]'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)

On 14 May 2019, defendant, defense counsel, and the court signed another form AOC-CR-405, titled "Waiver of Jury Trial" with regard to the habitual felon trial whereby defendant acknowledged that his waiver was informed, knowing and voluntary. (R pp 61-62)

During the habitual felon phase, the State moved to admit three judgments as evidence that defendant had attained habitual felon status. The judgments were admitted without objection. The prosecutor declined to make

a closing argument. (T pp 136-38) Defendant presented no evidence to contradict the State's evidence, and merely conceded that defendant had intended to collaterally attack one of the prior judgments, but had been unsuccessful. (T p 138)

The court found defendant guilty of habitual felon and sentenced him to 101-134 months in prison. (R pp 66-68; T p 144)

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT THE TRIAL COURT COMPLIED WITH N.C.G.S. § 15A-1201(D)(1) WHERE THE TRIAL COURT PERSONALLY ENGAGED WITH MR. ROLLINSON TO DETERMINE WHETHER HE WANTED TO HAVE A BENCH TRIAL ON HABITUAL FELON STATUS AND UNDERSTOOD THE CONSEQUENCES OF WAIVING HIS RIGHT TO A JURY TRIAL.

A. Applicable Legal Principles

In his first assignment of error, defendant argues that the trial court erred by failing to personally address defendant in a proper colloquy regarding his waiver of his right to a jury trial. This issue is without merit.

At the outset, defendant does not allege that his waiver of a jury trial was unknowing or involuntary. Rather, the crux of defendant's argument is that that the trial court failed to comply with the statutory requirements of N.C.G.S. § 15A-1201(d) before accepting his waiver. Or, put more succinctly, " . . . defendant contends that the trial court's failure to follow the statutorily

prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want." State v. Hamer, 2021-NCSC-67, ¶ 18.

In order to prove that the trial court erred by accepting his waiver of the right to a jury trial, defendant must show: (1) that the trial court violated the waiver requirements set forth in N.C.G.S. § 15A-1201; and (2) that Defendant was prejudiced by the error. When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. State v. Ashe, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

This Court recently clarified the scope of the longstanding "rule that a statute's mandate must be directed to the trial court in order to automatically preserve a statutory violation as an issue for appellate review[.]" In re E.D., 372 N.C. 111, 117, 827 S.E.2d 450, 454 (2019). "[A] statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge, or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial, or at specific courtroom proceedings that the trial judge has authority to direct[.]" Id. at 121, 827 S.E.2d at 457 (citations and quotation marks omitted).

B. The Court of Appeals properly found that the trial court complied with N.C.G.S. § 15A-1201(d)(1) where it addressed defendant personally regarding his decision to waive his right to a jury trial and in doing so, determined that defendant's waiver was knowing and voluntary.

Defendant first argues that the trial court did not properly engage defendant in a colloquy prior to his being tried for habitual felon as required by N.C.G.S. § 15A-1201(d). This issue is without merit.

N.C.G.S. § 15A-1201(d)(1) states as follows:

> (d) Judicial Consent to Jury Waiver. - Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. 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. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:
>
> (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.

Id. Defendant argues that the trial court did not properly address defendant as required by subsection (d)(1). Defendant then addresses the colloquy from the trial court just prior to the habitual felon trial. However, in order to understand the trial court's determination regarding the voluntariness of

defendant's waiver of his right to a jury trial for habitual felon, this Court must review the totality of the circumstances in order to understand the entire context of the case in which the waiver arose.

At the outset, the initial cases against defendant were called to be tried before a jury. However, prior to defendant's initial trial, defendant approached the State with the request to waive a jury trial as to the original charges. It is critical to note that the request to waive a jury trial and proceed with a bench trial was defendant's own request. The State brought this to the attention of the trial court as follows:

> MS. FLOYD: Maderkis Rollinson, he is on your Trial calendar. Ms. Dalton and I are prepared to go forward in that case, but it's my understanding that the defendant now wishes to elect to have a bench trial instead of a jury trial. So if we can have that colloquy with him, your Honor is okay with that, and then we would need to then address the jury.
>
> THE COURT: What page is this on?

Then, in an effort to facilitate the trial court's colloquy with defendant and accommodate his wish to have a bench trial, rather than a jury trial, the State continued:

> MS. FLOYD: There are several matters we need to address with your Honor as well. He is charged with two counts of assault with a deadly weapon on a government official. Possession of marijuana. Possession of marijuana paraphernalia. Possession with intent to sell and deliver

> cocaine. Felony maintaining. Felony possession of cocaine, and habitual felon.
>
> THE COURT: Mr. Rollinson, if you will stand up, please. [Defendant stands.]
>
> THE COURT: Do you understand you're charged with the charges she just read to you?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand you have a right to be tried by a jury of your peers?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: At this time you wish to waive your right to a jury and have this heard as a bench trial by me?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: If you will sign the appropriate form.

(R pp 54-55; T pp 4-5) Defendant then filled out the written waiver of jury trial form. (R pp 52-53) Subsection 1(c) of the form, which defendant signed, acknowledged that defendant understood that he had a right to a trial by a jury of 12 of his peers, that he may participate in the selection of those jurors and that jury verdicts must be unanimous. (R p 52) Further, subsection 1(d) of that same form acknowledged that defendant understood that if he waived a trial by jury, the judge alone will decide his guilt or innocence and that the trial judge alone will determine any aggravating sentencing factors in his case.

(R p 52) And finally, subsection 1(e) of that form specifically confirms that the defendant fully understands and appreciates the consequences of the decision to waive his right to a jury trial as evidenced by defendant's signature. (R p 52) Defendant acknowledged all of these things when he elected to sign the waiver form at the request of the trial court as a part of its colloquy with defendant.

Further, it should be noted that when defendant knowingly and voluntarily waived his right to a jury trial, and signed an official court form confirming same, defendant was fully represented by counsel. Defendant's counsel explained to defendant the charges against him. Counsel also explained to defendant the nature of and statutory punishment for each charge and the nature of the proceedings against him. Counsel explained to defendant his right to be tried by a jury of twelve (12) of his peers and his right to participate in the selection of the jurors. Counsel explained to defendant that a jury verdict must be unanimous and that upon his waiver the trial judge would determine his guilt or innocence. Counsel also explained to defendant that the trial court would determine any aggravating sentencing factors in his case. Defendant's counsel signed the waiver of jury trial form certifying that counsel had fully explained all of these waiver implications above to defendant. (R p 52) Thus, the record unambiguously reflects that defendant's choice to waive his right to a jury trial was both knowing and voluntary, and was made

upon receiving comprehensive advice on the matter from his attorney. And, as noted by the Court of Appeals, defendant does not raise any issue of ineffective assistance of counsel. The fact that defendant had previously been addressed personally by the trial court with regard to his waiver of a jury trial the day prior to the habitual felon trial must be taken into consideration in any analysis of whether defendant's subsequent waiver of his right to a jury trial in his habitual felon trial was also knowing and voluntary.[3]

While it is true that the transcript does not reflect the trial judge comprehensively quoting the waiver form language, this Court has noted that there is no established script for the colloquy that should occur between a judge and a defendant to determine whether the defendant understands and appreciates the consequences of the decision to waive a jury trial. "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 exercise his right to waive a jury trial." State v. Hamer, 272 N.C. App. 116, 125, 845 S.E.2d 846, 852 (2020) (citing State v. Rutledge, 267 N.C. App. 91, 96, 832 S.E.2d 745, 748 (2019)). "Beyond that which is expressly prescribed by statute, '[n]o . . . specific inquiries are required' for the

[3] Defendant has not assigned error to, or petitioned this Court to review his waiver of jury trial with regard to the substantive charges.

trial court to determine whether the defendant understands and appreciates the consequences of the decision to waive a jury trial. (citation omitted) This Court will not read such further specifications into law." Id.

In this case, the trial court personally addressed defendant after the State advised defendant of all of the substantive charges against him. (T p 4) Further, the trial court directed defendant to fill out the waiver of jury trial form, which contained all of the necessary declarations to determine that defendant was properly advised and that his waiver of a jury trial was both knowing and voluntary. Defendant signed this form acknowledging same. When addressed the following day with regard to waiving a jury trial as to the habitual felon trial following his conviction on the substantive charges, defendant was not uneducated as to the implications of a waiver. Thus, the requirement that the trial court personally address defendant was clearly met when the trial court asked if he would waive his right to a jury trial as to the habitual felon charge.

After being found guilty by the trial court, the State called the habitual felon matter for trial. The State indicated its belief that defendant had waived his right to a jury trial as to both the underlying cases and the habitual felon indictment. However, the trial court indicated that it wished to readdress defendant as a separate matter as follows:

> [MS. FLOYD]: Your Honor, at this time the State has also indicted the defendant as an habitual felon. We need to have that -- I would contend that he'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.
>
> [THE 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.
>
> [MS. DALTON]: Just one second, please, your Honor.
>
> [Brief pause]
>
> [MS. DALTON]: Judge, may it please the Court, after 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.

(T pp 135-36) (Emphasis added).

The Court of Appeals properly determined that the trial court personally addressed defendant where it acknowledged that the jury was coming in to hear the habitual felon matter, and inquired "or you can waive your right to a jury trial and we can proceed." While this inquiry was not technically phrased in the form of a traditional question, it is clear from the context that the trial court was offering the choice of a bench or jury trial, and inquiring whether defendant also sought to waive his right to a jury trial with regard to the habitual felon charge. Upon this inquiry, defendant, who had properly waived

his right to a jury the day before with regard to the substantive charges, did not simply assent to the trial court's inquiry. Rather, before making his decision, defendant first consulted with his counsel on the issue before making the choice to waive his right to a jury trial. (T p 136) Thus, there existed sufficient evidence from which the trial court could conclude that defendant understood the consequences of his waiver and consent to same.

1. The fact that a defendant chooses to respond to a court's inquiry through counsel does not violate the requirement that a trial court address the defendant personally.

Defendant next argues that because defendant answered the trial court through counsel, he was not personally addressed. This argument is also without merit.

As noted by the Court of Appeals, it was clear that the trial court addressed defendant personally where it inquired "[…] or ***you*** can waive ***your*** right to a jury trial […]". The trial court did not address defendant's counsel. The fact that defendant chose to respond to the trial court's personal address and waive his right to a jury trial through counsel does not negate his knowledge and voluntary waiver of his right to a jury trial. The express language of the statute only requires that the trial court personally address defendant. The statute does not prohibit a defendant from responding through

counsel or otherwise expressly require that the defendant, and only the defendant, personally respond to the trial court.

In support of his argument, defendant cites this Court's opinion in State v. Pruitt, 322 N.C. 600, 369 S.E.2d 590 (1988). However, that case is clearly distinguishable. In Pruitt, the defendant sought to waive his right to counsel and represent himself at trial. However, the relevant statute provided that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> > (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
> >
> > (2) Understands and appreciates the consequences of this decision; and
> >
> > (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1983). However, Pruitt is distinguishable. In that case, the trial court made no effort whatsoever to address the defendant. Rather, defendant's counsel informed the Court that the defendant wished to represent himself, spoke with the trial court in a bench conference without defendant present, and the trial court simply instructed the defendant to take his attorney's seat without ever addressing the defendant at all. This Court also

noted that "[. . .] there is nothing in the record which shows that defendant understood and appreciated the consequences of proceeding *pro se* nor is there anything in the record which shows that defendant understood the 'nature of the charges and proceedings and the range of permissible punishments.'" State v. Pruitt, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988).

By contrast, in this case, the trial court did address defendant personally as required by statute. Defendant then consulted with his counsel regarding the inquiry and responded to that inquiry through counsel. Defendant did not object to, or disagree with, his counsel's response to the trial court following their discussion. Defendant executed a written waiver of his right to a jury trial indicating that his waiver was informed, knowing and voluntary. Defendant does not raise any issue of ineffective assistance of counsel regarding his counsel's recitation of his response to the trial court's address and inquiry. Indeed, as the Court of Appeals noted, there is no evidence whatsoever that defendant ever wanted a jury trial in this matter.

There is, however, overwhelming evidence in the record in the form of two (2) waiver of jury forms signed by both defendant and his counsel that show that defendant was fully advised and aware of all of the material issues surrounding his waiver of his right to a jury trial, and that he knowingly and voluntarily did so. Where the trial court addressed defendant personally

regarding his decision to waive his right to a jury trial, defendant conferred with his counsel before making a decision and there existed sufficient evidence in the record in the form of the waiver of jury forms to determine that defendant's waiver of a jury trial was informed, knowing and voluntary, defendant's argument is without merit.

2. The Court of Appeals properly held that defendant's waiver was both knowing and voluntary.

In his next argument on appeal, defendant argues that the record must affirmatively show that the defendant knowingly and voluntarily waived his constitutional right to a jury trial. To that end, he argues that an appellate court "cannot presume a voluntary waiver of the right to trial by jury from a silent record." Citing Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). However, the record in this case is anything but silent, and there exists overwhelming evidence that defendant's waiver was both knowing and voluntary.

As set forth in more detail above, during the trial of this matter, the trial court addressed defendant personally regarding the waiver of his right to a jury trial not once, but twice. Defendant was first personally addressed and knowingly and voluntarily waived his right to a jury trial as to the original substantive charges. Immediately following the trial of the original charges,

and prior to being tried for habitual felon, the trial court again personally addressed defendant regarding the waiver of his right to a jury trial with regard to the habitual felon charge. Prior to making his decision to waive his right to a jury trial, defendant consulted with his counsel in open Court. After consultation with his attorney in open court, defendant responded to the trial court through his counsel and expressed his desire to again waive a trial by jury.[4] Further, defendant did not object or otherwise give any disagreement to his counsel's recitation of his decision to waive a jury trial. And finally, in addition to his direct assent to the trial court in both instances, defendant also acknowledged and signed two (2) separate written waiver of jury forms indicating in detail that he had been appropriately advised of his right to a jury trial and that his waiver of same was both knowing and voluntary. (R pp 52-53, 61-62)

Defendant again fails to acknowledge that he himself affirmed via written waiver form that his waiver was informed, knowing and voluntary.

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[4] Defendant's counsel stated that defendant did "not want a jury trial" and "was comfortable with" a bench trial. While this response does not expressly use the term "waive", it is made in response to the Court's inquiry as to whether defendant would "***waive your right*** to a jury trial and we can proceed". (Emphasis added) Thus, where the trial court was expressly inquiring about a waiver, it is clear that defendant's response to the inquiry, however worded, was intended to affirm a waiver.

Further, despite his arguments alleging insufficiency with regard to his counsel conveying his willingness to waive his right to a jury trial on the habitual felon charge, and despite his failure to object or dissent to same when made, defendant has failed to allege ineffective assistance of counsel with regard to counsel's conveyance of his waiver to the trial court. As the Court of Appeals correctly observed, there is no evidence whatsoever that defendant's waiver was anything but knowing and voluntary.

3. This case is consistent with prior cases on this issue, and is directly on point with this Court's opinion in State v. Hamer.

In his next argument on appeal, defendant argues that this case is distinguishable from all other cases. However, assuming for the sake of argument that this Court finds that the trial court did not properly address defendant, this case remains directly on point with this Court's recent opinion in State v. Hamer. In Hamer, the defendant's counsel informed the trial court that the defendant did not want a jury trial. However, the trial court never addressed defendant pursuant to N.C.G.S. § 15A-1201(d) prior to beginning his bench trial. At the close of the state's case-in-chief, the trial court realized that it was required to address defendant personally pursuant to N.C.G.S. § 15A-1201. At that point, the trial court addressed defendant personally and engaged in a colloquy as required by the statute. The defendant affirmed that

he knowingly and voluntarily waived his right to a jury trial. On appeal, the defendant argued that the trial court's colloquy did not satisfy the statute because it was not done until after the state's case-in-chief. Defendant further argued that the trail court's failure to comply with N.C.G.S. § 15A-1201(d) constituted structural error. This court rejected that argument. Rather, this court rejected that argument and held that the violation did not rise to the level of structural error, and that the prejudicial error standard must be met. This is exactly the same issue present in this case.

In this case, defendant also never wanted a jury trial. Prior to trial on the original substantive charges, the trial court addressed defendant personally and engaged in a colloquy to determine that defendant's waiver of a jury trial was knowing and voluntary. As a part of that colloquy, the trial court requested defendant to execute a written waiver of jury trial form. Defendant then executed the written waiver form and submitted same to the trial court. Thus, defendant was fully advised and knew and appreciated the gravity of the decision to waive his right to a jury. This first waiver is not at issue before this Court.

Following the conviction on the underlying substantive charges, the trial court then turned to the matter of the habitual felon charge. The state informed the trial court that if it wished to conduct a separate inquiry as to

defendant waiving his right to a jury trial as to the habitual felon, it needed to do so at that time. The trial court correctly responded that the habitual felon proceeding would be a separate trial, and that it needed to address defendant again as to his right to a jury trial with regard to the habitual felon matter, and did so as follows:

> [Trial Court] I'll do that. At this point in the trial, it is 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.

(T p 136) (Emphasis added)

After being addressed by the trial court as set forth above, defendant then conferred with his counsel before making his decision. Defendant indicated through counsel that he did not want a jury trial and was comfortable with a bench trial. (T p 136) When defendant's counsel informed the trial court of the defendant's position, the defendant never objected or gave any indication of dissent to his counsel's representation of his position. Further, defendant again executed a written waiver of jury trial form, and submitted same to the trial court. By execution of the form, defendant swore under oath that he was fully informed of the charges against him, the nature of the punishment for each charge, and the nature of the proceedings against him. He further swore

under oath that he had been advised that he had a right to a trial by jury of 12 members, had a right to participate in the selection of those jurors and that the jury's verdicts must be unanimous. He further swore under oath that he had been advised that if he waived his right to a jury, that the trial court alone would decide his innocence or guilt and any aggravating factors against him. He further swore under oath that he fully understood and appreciated the consequences of his decision to waive his right to a jury. And finally, he swore under oath that he "freely, voluntarily and knowingly" waived his right to a jury trial. His counsel also certified on the written waiver form that she had fully advised defendant as to his right to a jury trial. (R p 61)

Thus, even if the trial court had erred in this case by not engaging in a more comprehensive colloquy of defendant prior to the trial of the habitual felon matter, defendant himself affirmed the knowing and voluntariness of his waiver by executing the written waiver of jury trial form and submitting same to the trial court. This is perfectly analogous to Hamer, where the trial court did not address the defendant prior to trial, but the defendant subsequently affirmed his waiver. And, as in Hamer, the trial court's statutory violation is "simply an error in the trial process itself 'that did not' affect the framework within which the trial proceed[ed]." Id. at 508, 858 S.E.2d at 782. And because the error in this case also relates to a right not arising under the United States

Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. Id. at 508, 858 S.E.2d at 782; see also State v. Pruitt, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988); State v. Lawrence, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012).

Here, just as in Hamer, defendant knowingly and voluntarily waived his right to a jury trial as evidenced by the transcript and his sworn written waiver of jury trial forms contained in the record on appeal. As this Court so astutely observed in Hamer, "[h]ere, defendant's argument does not relate to the constitutional sufficiency of a properly functioning jury. Rather, defendant contends that the trial court's failure to follow the statutorily prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want." Id. at 508, 858 S.E.2d at 781-82. The error, if any, is statutory in nature and not constitutional. Therefore, this case is not distinguishable from Hamer and defendant must show prejudice to prevail on his claims.

4. The written waiver form is proof that defendant's waiver was knowing and voluntary, and a trial court can consider a defendant's execution of same in its decision to consent to the waiver.

In his next argument, defendant argues that a sworn, written waiver or jury trial form is not a substitute for the statutory procedures set forth in N.C.G.S. § 15A-1201(d). While technically true, that argument is a "straw

man". The state does not argue, and the Court of Appeals did not hold, that a written waiver of jury trial was a complete substitute for, or an alternative to, compliance with the statutory process. The statute itself requires the trial court to address a defendant personally to determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury in order to determine whether to consent to the waiver. However, it does not expressly dictate what the trial court must ask, what it may consider, or provide limitations on how the trial court must ascertain whether defendant understands and appreciates those consequences. In its opinion, the Court of Appeals noted that the trial court in this case did address the defendant personally with regard to his waiver of a jury trial as to the habitual felon charge. Specifically, the Court of Appeals noted that the trial court addressed defendant personally when it indicated the need to again address defendant personally, and did so by addressing defendant specifically that "***you*** can waive ***your*** right to a jury trial [. . .]". (T p 132) State v. Rollinson, 2021-NCCOA-58, ¶ 24 (unpublished). Thus, the trial court complied with the statute's requirement that the trial court address the defendant personally.

It is clear from the context of the transcript that the trial court was asking defendant if he wished to have a jury trial or waive his right and proceed

with a bench trial. Having so addressed defendant personally, the trial court needed only to determine whether defendant understood and appreciated the consequences of his decision to waive his right to a jury trial. In looking at the totality of the circumstances surrounding this address, it has to be noted that the trial court had already addressed defendant regarding his waiver of jury trial as to the underlying substantive charges the day prior and defendant knowingly and voluntarily waived same orally and in writing. (R p 52) Upon being addressed as to the habitual felon trial, defendant first conferred with his counsel before responding to the court's personal address. Defendant then expressed his desire in open court, through counsel, to again waive his right to a jury trial and have a bench trial. And, just as he did the day before in waiving his right to a jury trial as to the underlying substantive charges, defendant executed a detailed sworn written waiver form indicating that his waiver was "freely, voluntarily and knowingly" given and submitted same to the court. (R p 61) Accordingly, the Court of Appeals was correct in finding that the trial court did personally address defendant, and that his response and written waiver form were sufficient for the trial court to determine that his waiver was both knowing and voluntary for purposes of giving its consent. This argument is without merit.

II. THE COURT OF APPEALS PROPERLY HELD THAT EVEN IF THE TRIAL COURT DID NOT PROPERLY COMPLY WITH N.C.G.S. § 15A-1201(D), DEFENDANT WAS NOT PREJUDICED BY THE ERROR.

Defendant next argues that the Court of Appeals erred in applying the prejudicial error standard in this case. This issue is equally without merit.

A. Applicable Legal Principles

Violations of a criminal defendant's right to a jury trial by twelve impartial jurors is structural error or reversible error *per se*. State v. Bunning, 346 N.C. 253, 257, 485 S.E.2d 290, 292 (1997); State v. Bindyke, 288 N.C. 608, 621-22, 220 S.E.2d 521 (1975); State v. Hudson, 280 N.C. 74, 80, 185 S.E.2d 189 (1971). However, the United States Supreme Court has long recognized that a defendant charged with an offense serious enough to trigger the Sixth Amendment right to a jury trial may waive that right. See, e.g., Patton v. United States, 281 U.S. 276, 312–13, 74 L. Ed. 854, 870 (1930), abrogated on other grounds by Williams v. Florida, 399 U.S. 78, 26 L. Ed. 2d 446 (1970). But "this Court has consistently held that '[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.' " State v. Meadows, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (citation omitted); accord State v. Garcia, 358 N.C. 382, 410–11, 597 S.E.2d 724, 745 (2004), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Generally, this is true even

when a defendant claims the trial court's statutory error violated his substantive constitutional rights. See, e.g., State v. Lawrence, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), cert. denied, 531 U.S. 148, L. Ed. 2d 684 (2001); State v. Tate, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978); State v. Tirado, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004); State v. Roache, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004). But, "[I]t is well established that 'when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.' " Matter of E.D., 372 N.C. 111, 116, 827 S.E.2d 450, 454 (2019) (citation omitted). Whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused is dependent upon the unique circumstances of each case. Adams v. United States ex rel. McCann, 317 U.S. 269, 278, 63 S. Ct. 236 (1942).

B. This Court's opinion in State v. Hamer holds that a violation of N.C.G.S. §15A-1201 does not amount to structural error.

In his next argument, defendant acknowledges that this Court has held that the failure to address a defendant pursuant to N.C.G.S. § 15A-1201 does not constitute structural error. However, defendant argues that this Court's holding in State v. Hamer only applies to "technical violations" of the statute. This argument is also without merit.

In Hamer, the trial court never addressed defendant at all prior to trial. Rather, the trial court simply accepted the purported waiver of jury trial and request for a bench trial from defendant's counsel. However, at the close of the state's evidence, the trial court realized that the statute required it to personally address defendant to ascertain whether he understood the consequences of his waiver. The trial court then conducted a colloquy with defendant, and defendant affirmed his knowing and voluntary decision to waive his right to a jury trial. On appeal, the defendant in Hamer argued that a violation of N.C.G.S. § 15A-1201 amounted to structural error. This Court rejected that argument.

In his brief, defendant mischaracterizes this Court's holding in its opinion in Hamer. Specifically, defendant argues that by its discussion of defendant's reliance on State v. Garcia in its opinion in Hamer, this Court held that a "substantial violation" of N.C.G.S. § 15A-1201 amounted to structural error. (Def. Brief p 36) However, this Court did no such thing. To the contrary, this Court specifically held in Hamer that:

> The cases cited by defendant in support of his structural error argument relate to the make up and proper function of the jury. While the deprivation of a properly functioning jury may be a constitutional violation, ***the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation.***

Id. at 507, 858 S.E.2d at 781 (2021). *Emphasis added*. This Court then went on to explain that in Garcia, as in Hamer, the alleged violation was not a constitutional violation because it did not relate to the constitutional sufficiency of a properly functioning jury. Rather, the argument only involved a violation of the underlying statute. Id. at 508, 858 S.E.2d at 781. This Court then noted pointedly that defendant's argument regarding the failure to conduct the required colloquy of N.C.G.S. § 15A-1201(d) did not "relate to the constitutional sufficiency of a properly functioning jury. Rather, defendant contends that the trial court's failure to follow the statutorily prescribed procedure for waiver of a jury trial deprived him of a jury trial that he did not want." Id. at 508, 858 S.E.2d at 781-82. This is the exact circumstance presented in this case.

Defendant then appears to argue that this Court in Hamer recognized some undefined distinction between "technical" and "substantial" statutory errors. However, that ignores this Court's clear holding in Hamer that " . . . the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is a statutory violation." Id. at 507. This is true because the purpose of the required colloquy in N.C.G.S. § 15A-1201(d) is not required to determine whether defendant's waiver itself is knowing and

voluntary and thus, constitutional. Rather, the colloquy in N.C.G.S. § 15A-1201(d) instead relates to the trial court's decision whether to consent to a defendant's knowing and voluntary waiver. Nothing in N.C.G.S. § 15A-1201 expressly requires the trial court to consent to a defendant's knowing and voluntary waiver.

Thus, even if the trial court's address of defendant in this case was insufficient to satisfy the statutory requirement, Hamer correctly holds that such error alone does not rise to the level required to elevate this error to a constitutional violation absent some additional showing that the error itself somehow related to the constitutional sufficiency of a properly functioning jury. Because the mere noncompliance with the statute does not so relate, any error is merely statutory and not structural.

C. Based on the totality of the circumstances, any error in this case is statutory error and not structural or *per se* error.

Defendant next argues that the proper standard to violations of N.C.G.S. § 15A-1201(d) is structural or *per se* error. This argument is also without merit.

In his argument, defendant relies on the presumption that the violation of N.C.G.S. § 15A-1201(d) in this case, if any, is a fundamental violation to his right to a jury trial. In order to reach that result, defendant misconstrues the

trial court's inquiry in the statute as being required in order to ascertain whether defendant's waiver was knowing and voluntary. However, the statutory inquiry at issue is instead used by the Court to satisfy itself that defendant understands the consequences of his actions, so that it may then decide whether or not to consent to defendant's otherwise knowing and voluntary waiver. Further, this Court has previously held in Hamer that the failure to conduct the inquiry in N.C.G.S. § 15A-1201(d) was merely a statutory error and not structural.

Despite defendant's attempts to distinguish this case from Hamer, even if this Court were to hold that the trial court in this case did not address defendant personally as required by N.C.G.S. § 15A-1201(d), the two cases remain materially identical. In Hamer, the trial court did not address defendant at all prior to trial as is required by the statute. At the close of the State's evidence, the trial court addressed defendant, and defendant affirmed his waiver of his right to a jury trial. In this case, the trial court addressed the defendant prior to his habitual felon trial when it offered him the choice of the jury coming in to decide the matter or waiving his right to a jury trial and proceeding. (T p 136)[5] After conferring with his counsel, defendant responded

[5] The trial court's address to defendant was not technically phrased as a question. However, it is completely clear from the context that the trial court's

through counsel in an affirmative manner to the trial court's inquiry as to whether he wished to waive his right to a jury trial. And finally, defendant executed a written waiver of jury trial form whereby he swore under oath that his waiver was informed, knowing and voluntary. Where all of the evidence in the record indicates that defendant never wanted a jury trial and knowingly and voluntarily waived same, the trial court's consent to his wish, even if that consent was based on an insufficient inquiry, did not rise to a level of a structural constitutional error.

D. If the trial court was found to have violated the statute, defendant was not prejudiced by the error.

Defendant next argues that he was prejudiced by the trial court's alleged error in consenting to his waiver of his right to a jury trial. This argument is also without merit.

1. The issue of the trial court's lapsus linguae was not included in the issues listed in the Petition for Discretionary Review, and defendant's attempt at relitigating this issue is not proper.

Defendant first attempts to re-litigate the issue of lapsus linguae. However, this argument was not raised or argued in defendant's Petition for

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statement was intended to offer defendant the choice between having the jury decide the matter or waiving his right to a jury trial - and to solicit a response to that offer of choice.

Discretionary Review. Further, defendant's proposed issue for review in this Court as set forth in the PDR is:

> 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 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?

The trial court's lapsus linquae regarding whether defendant was found guilty by the trial court or pled guilty before the trial court is neither relevant nor material to the issue of whether the defendant was prejudiced by the trial court's alleged failure to engage in the N.C.G.S. § 15A-1201(d) colloquy. As such, it is completely beyond the scope of the issue brought forward in the Petition for Discretionary review, is improperly raised before this Court and should be stricken in its entirety.

2. Defendant's argument regarding the written judgment as it relates to the unpreserved issue of lapsus linguae is also improperly raised before this Court.

Defendant next continues his attempt to relitigate the issue of lapsus linguae. However, as set forth above, this argument was not raised or argued in defendant's Petition for Discretionary Review. The trial court's lapsus linquae regarding whether defendant was found guilty by the trial court or pled guilty before the trial court is neither relevant nor material to the issue

of whether the defendant was prejudiced by the trial court's alleged failure to engage in the N.C.G.S. § 15A-1201(d) colloquy. As such, it is completely beyond the scope of the issues brought forward in the Petition for Discretionary review, is improperly raised before this Court and should be stricken in its entirety.

3. Even if the trial court erred by not properly addressing defendant, defendant can show no prejudice from the trial court's grant of his knowing and voluntary waiver of his right to a jury trial.

In his brief, defendant argues that he was prejudiced by the trial court's alleged failure to engage in the statutorily required colloquy before granting his waiver of jury trial. However, defendant cannot show prejudice.

As set forth in detail above, there exists overwhelming evidence in the record that defendant did not want a jury trial and knowingly and voluntarily waived same after being informed of the consequences and fully briefed by his counsel. As the Court of Appeals noted, there is absolutely no evidence that defendant's waiver was not knowing and voluntary. To the contrary, all of the evidence, including defendant's response to the trial court's inquiry as to his waiver and his accompanying written waiver of jury trial form, indicates that defendant's waiver was informed, knowing and voluntarily given after having been fully advised by his counsel.

Even if the trial court did not properly address defendant before consenting to his request to waive his right to a jury trial, any such error in consenting to defendant's waiver could not prejudice defendant because his waiver was informed, knowing and voluntary. Defendant was not prejudiced by receiving the very bench trial he himself wanted, requested and knowingly and voluntarily waived his right to a jury trial in order to receive.

Further, with specific regard to the habitual felon trial, the state proffered overwhelming evidence that defendant had been convicted of three (3) prior felonies. More specifically, the State introduced into evidence criminal judgments showing that on 3 March 2010 defendant was convicted of the felony offense of possession with intent to sell and deliver cocaine; that on 8 April 2015, defendant was convicted of the felony offense of indecent liberties with a child; that on 5 January 2016, defendant was convicted of the felony offense of failure to appear on a felony charge; and that on 4 May 2016 defendant was convicted of the felony offense of failure to appear on a felony charge. Further, the State introduced these judgments without objection. (T pp 136-38) Materially, defendant presented no defense or rebuttal to the State's evidence. Further, defendant's response to the State's case was simply to inform the trial court that his defense strategy as to the habitual felon charge was to collaterally attack one of the proffered convictions prior to trial and hopefully

vacate same, but that he had not actually done so. More specifically, defendant's entire defense, or lack thereof, was as follows:

> [MS. DALTON]: Judge, my client did indicate to me that he was attempting some sort of a collateral attack on the second felony, which was the indecent liberties conviction, but at this time he has not successfully been able to set that matter aside. I would submit that for the record. Do you have a work sheet?

In effect, defendant admitted to the existence of the prior felonies submitted by the State. Where defendant has practically stipulated to the evidence against him as to the habitual felon charge, and presented no actual defense whatsoever, he could not possibly be prejudiced by his guilt being determined by the trial court as opposed to a jury. There is simply no reasonable possibility of a jury reaching a different outcome given defendant's wholesale acquiescence to the State's evidence of his guilt as to this charge. And this is especially true where defendant has failed to raise any issue of ineffective assistance of counsel. Accordingly, defendant cannot show prejudice arising from the statutory violation, and his arguments are without merit.

CONCLUSION

For the reasons argued above, the Court of Appeals opinion should be affirmed.

Electronically submitted this the 31st day of May, 2022.

JOSHUA H. STEIN
ATTORNEY GENERAL

Electronically Submitted
John W. Congleton
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: 919-716-6539
State Bar No.: 29159
E-mail: jcongleton@ncdoj.gov

* *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing NEW BRIEF FOR THE STATE upon the DEFENDANT by electronic mail, addressed to his ATTORNEY OF RECORD as follows:

Brandon B. Mayes
Email: brandon.b.mayes@nccourts.org

Electronically submitted this the 31st day of May, 2022.

Electronically Submitted
John W. Congleton
Assistant Attorney General

APPENDIX

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 Tillery, 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.

Report per Rule 30(e).