NO. 279A20 **EIGHTEENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

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

****

NEW BRIEF FOR THE STATE
Appellee

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ISSUE PRESENTED

I. WHETHER THE COURT OF APPEALS' MAJORITY ERRED BY CONCLUDING DEFENDANT'S TRIAL WAS FREE FROM PREJUDICIAL ERROR?

STATEMENT OF THE CASE

On 12 January 2018, Demon Hunter ("Defendant") was charged by uniform citation with reckless driving and speeding 94 miles per hour ("mph") in a 65-mph zone. On 26 July 2018, Defendant was convicted in district court of Class 3 misdemeanor speeding. He was ordered to pay court costs and a $50.00 fine. (Rp. 2) On 6 August 2018, eleven days later, Defendant filed written notice of appeal. (Rpp. 3–4)

The matter came on for a bench trial at the 26 November 2018 Criminal Session of Superior Court, Orange County, before the Honorable Michael J. O'Foghluda. (Tp. 1) The trial court treated Defendant's untimely notice of appeal as a petition for writ of certiorari ("PWC") and allowed the PWC. (Tp. 6) After approving Defendant's request to waive trial by jury, the trial court conducted a bench trial and found Defendant guilty of speeding. He was ordered to pay court costs. (Rp. 9) On 7 December 2018, Defendant filed written notice of appeal to the Court of Appeals. (Rp. 10)

Before the Court of Appeals, Defendant argued the trial court erred by granting his request for a bench trial because the trial court failed to comply with Section 15A-1201(d)'s requirements governing judicial consent to a jury trial waiver and did not personally address him at all to ensure his waiver was knowing and voluntary. (See Def's Br. in No. COA19-473)

By published opinion filed 16 June 2020, a majority of the Court of Appeals (Judge Zachary authoring; Judge Dietz concurring), found no prejudicial error. See State v. Hamer, ___ N.C. App. ___, ___, 845 S.E.2d 846 (2020). It concluded that the trial court violated Section 15A-1201(d)(1)'s procedure in consenting to Defendant's jury trial waiver absent first personally addressing him, but that Defendant was not entitled to a new trial because he failed to show he was materially prejudiced from the statutory error. Chief Judge McGee dissented. Id. at ___, 845 S.E.2d at 853–70. The dissenting judge agreed with the majority that the trial court erred by consenting to Defendant's jury trial waiver before having first personally addressed him but determined Defendant's state constitutional right to trial by jury had been violated, constituting error per se for which he was entitled to a new trial absent any showing of prejudice. Id. at ___, 845 S.E.2d at 870.

On 19 June 2020, Defendant filed in this Court a motion for temporary stay ("MTS") and a petition for writ of supersedeas ("PWS"). By orders filed 22 June and 14 July 2020, this Court allowed the MTS and the PWS, respectively. On 13 July 2020, Defendant filed a notice of appeal based on the dissent. He did not file notice of appeal based on a constitutional question nor file a petition for discretionary review of additional issues. (See Docket in case No. 279A20)

On 5 August 2020, this Court allowed Defendant's request for an extension of time to file his appellant brief. On 7 August 2020, Defendant filed a motion to amend the record on appeal. On 8 September 2020, Defendant filed his appellant brief. The State sought and received one thirty-day extension of time and one ten-day extension of time to file its new appellee brief. (See Docket in case No. 279A20)

STATEMENT OF THE FACTS

TRIAL EVIDENCE.

The State's evidence at trial tended to show the following facts. The weather was overcast but the visibility was clear in Hillsborough on 12 January 2018. (Tpp. 26–27) That day, North Carolina State Highway Patrol Troopers Tracey Hussey and Michael Dodson were stationed on Interstate 40 (I-40) monitoring traffic. (Tpp. 16, 48) Trooper Dodson was sitting in his patrol car, and Trooper Hussey was standing outside facing the eastward lane of travel doing speed estimations and speed clocks on vehicles traveling westward. He was operating a true flight speed radar detector that uses a laser to measure speed, which he calibrated before starting his shift. (Tpp. 20, 24) The traffic was medium, a normal travel day. (Tpp. 26–27)

At around 12:45 p.m., Trooper Hussey observed Defendant driving westbound in a black jeep at a speed of approximately 94 mph in a 65-mph

zone. (Tp. 17–18, 26) Trooper Hussey clocked the vehicle with his radar gun traveling 94 mph. (Tpp. 26) Trooper Hussey advised Trooper Dodson there was a black jeep traveling 94 mph, in lane one. Once Trooper Dodson saw the vehicle, he pulled out, activated his blue lights, and initiated a traffic stop. (Tpp. 49-50) He issued Defendant a citation for reckless driving and speeding 94 mph in a 65-mph zone. (Rp. 2)

During Defendant's case-in-chief, Defendant's counsel asked the trial court to take judicial notice of two statutes and a regulation promulgated by the Department of Natural and Cultural resources concerning the retention schedule for law enforcement dash camera videos. (Tpp. 62–66) Defendant testified on own his behalf. He admitted that, on 12 January 2018, he was pulled over by the North Carolina Highway Patrol and received a traffic citation. (Tpp. 67–68) Defendant testified that despite repeatedly asking for a video of the traffic stop, by the time his case was heard in district court, he was informed that the video no longer existed. (Tpp. 69–70) The State noted at the end of trial that Defendant "took the stand and didn't even contest the speed. The evidence is that he was speeding. He admitted that he was driving." (Tp. 72) The trial court found Defendant guilty of speeding. (Tp. 73)

JURY TRIAL WAIVER.

The following relevant exchange occurred at the start of the bench trial concerning Defendant's jury trial waiver:

> [STATE]: Your Honor, whenever you are ready, we can address Mr. Demon Hamer, which is margin nine. He is charged with speeding 94 in a 65 and reckless driving.
>
> THE COURT: All right. So this is a bench trial; correct?
>
> [THE STATE]: Yes, sir. And I understand it –
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Okay. And I presume that there is a statute that allows that?
>
> [DEFENSE COUNSEL]: That is correct, Your Honor. We have -- the State and I have -- the State has consented. We have -- there is no disagreement about the bench trial.
>
> THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?
>
> [DEFENSE COUNSEL]: If I'm not mistaken, Your Honor –
>
> THE COURT: I know that one requires the consent of the State.
>
> . . . .

> [THE STATE]: Your Honor, I believe it's controlled by 15A-1201 –
>
> THE COURT: Okay. Which does allow waiver of trial in a misdemeanor?
>
> [THE STATE]: That's correct, Your Honor. Or I believe any charge except a capital offense.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: It's 15A-1201 subsection (b).
>
> THE COURT: Thank you, sir. So just as a technical matter, this is a -- so that -- that's accepted by the Court under that statute since the State consents.

(Tpp. 3–4) Soon after, and before the bench trial started, the following exchange occurred:

> THE COURT: Okay. Now let me just -- before we start, can we -- can we do this without -- and I will do it with any formality you would like -- but can we treat it like a district court trial and simply hear the evidence and have me rule? Is there any objection to that? We don't have to go through any extra procedural hoops?
>
> [THE STATE]: Your Honor, the State would prefer that. Mr. Berne has filed a motion for complete recordation, which includes pretrial hearings, motions hearings, bench conferences, opening statements, and closing arguments.
>
> THE COURT: Well, that would be allowed.
>
> [DEFENSE COUNSEL]: That's correct, Your Honor. So in full disclosure, I got this case on appeal from district court.
>
> THE COURT: Yes, sir.

> [DEFENSE COUNSEL]: So as long as everyone is okay with that, I will be fine treating this like a district court.
>
> THE COURT: All right, sir. Your motion is allowed. . . .

(Tp. 7)

The State's evidence is summarized above. After the State rested its case, and before Defendant presented his case, the trial court recognized that Section 15A-1201(d)(1) required it personally to address Defendant concerning his jury trial waiver:

> THE COURT: . . . . I was just reading . . . [Section] 15A-1201, we complied completely with that statute 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. Would you just explain that to your client.
>
> (Pause in proceedings while [defense counsel] consulted with the defendant.)
>
> [DEFENSE COUNSEL]: Okay, Your Honor.
>
> . . . .
>
> 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 defendant (sic) 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 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.
>
> THE COURT: Thank you so much. You may have a seat.

(Tpp. 57–58) The bench trial resumed. After Defendant presented his case, the trial court found him guilty of speeding and ordered him to pay $352.00 in court costs. (Rp. 9) Defendant appealed to the Court of Appeals.

COURT OF APPEALS' DECISION

Before the Court of Appeals, Defendant argued in his principal brief that the trial court erred by granting his request for a bench trial because it "did not comply with Section 15A-1201(d) at all" nor "address [him] at all." (Def's Br. p. 15 COA19-473) He asserted that the "record shows nothing at all about [his] knowledge of his right to a jury trial or the consequences of waiver" nor "whether [he] wanted to waive his right to a jury trial and, if he did, that his choice was voluntary." (Def's Br. p. 15 COA19-473) Defendant claimed "prejudice is inherent in the courts' failure to ensure that a defendant's waiver of the right to a jury trial is made knowing and voluntary" and because a

reasonable possibility existed that at least one juror would have accepted his reasonable-doubt defense (as to the officers' identification of his car, the accuracy of the speed estimations, and the destruction of dash cam video) and voted to acquit him. (See Def's Br. pp. 15–17 COA19-473) In his reply brief, Defendant acknowledged that the trial court did personally address him about his jury trial waiver, but he asserted that a waiver "must be knowingly and voluntarily made *before* the trial begins" and challenged that the colloquy was insufficient. (See Def's Reply Br. COA19-473)

The Court of Appeals' majority held that Defendant received a fair trial, free of prejudicial error. See State v. Hamer, ___ N.C. App. ___, 845 S.E.2d 846 (2020). Citing N.C. R. App. P. 10(a)(1), the majority noted that Defendant failed to object to the trial court's actions below, but it determined that whether the trial court violated Section 15A-1201(d)(1)'s procedural requirements in consenting to Defendant's jury trial waiver was automatically preserved for appellate review. Id. at ___, 845 S.E.2d at 849. Citing State v. Swink, 252 N.C. App. 218, 222–23, 797 S.E.2d 330, 333–34, appeal dismissed and disc. rev. denied, 369 N.C. 754, 799 S.E.2d 870 (2017); State v. Rutledge, 267 N.C. App. 91, 832 S.E.2d 745, 749 (2019); and Section 15A-1443(a), the Court of Appeals' majority concluded that to be entitled to appellate relief from the trial court's statutory procedural error in granting his request for a bench trial, Defendant

bore the burden of establishing prejudice. Id. at ___, 845 S.E.2d at 853. It rejected Defendant's assertion that the trial court did not comply with Section 15A-1201(d) "at all," and determined that the trial court "did eventually conduct the requisite waiver colloquy with Defendant." Id. at ___, 845 S.E.2d at 852. The majority also rejected Defendant's showing that, "absent the trial court's error in consenting to his wavier and conducting a bench trial, " '[t]here is a reasonable possibility that at least one of the twelve jurors would have had a reasonable doubt and voted to acquit' him of speeding." Id. at ___, 845 at 853. It held that Defendant failed to show he was materially prejudiced from the trial court's violation of Section 15A-1201(d)'s procedural requirement personally addressing him before consenting to his jury trial waiver and determined his trial was free from prejudicial error. Id.

The dissenting judge agreed with the majority that the trial court violated Section 15A-1201(d)(1) by consenting to Defendant's jury trial waiver before having first personally addressed him but opined Defendant's state constitutional right to trial by jury had been violated, thereby constituting error per se. Id. at ___, 845 S.E.2d at 870. The dissenter reasoned that, prior to North Carolina law allowing a defendant to waive a jury trial, "unless a defendant pleaded guilty, only a properly constituted jury of twelve jurors—all of whom had operated as the finders of fact for the entire trial—could convict

a defendant of a criminal offense in superior court." Id. at ___, 845 S.E.2d at 855. The dissenting judge opined that a trial judge is a "properly constituted' finder[ ] of fact" only "if the defendant has waived the right to a jury trial pursuant to the requirements of art. I, § 24, and the trial court has properly 'consented' to the waiver[.]" Id. at ___, 845 S.E.2d at 858. According to the dissenting judge, "[w]hether a jury or the trial court acts as the trier of fact, it must be 'properly constituted,' and the same trier of fact must act in that capacity for all necessary stages of trial." Id. at ___, 845 S.E.2d at 858.

The dissenting judge concluded that, "absent a properly executed and accept waiver of the right, . . . the pre-amendment precedents and supporting reasoning, . . . are still controlling law." Id. at ___, 845 S.E.2d at 857. Citing State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414 (2001); State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997); and State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), the dissenting judge reasoned that "[v]iolation of the right that a verdict could only be rendered by a properly constituted jury, consisting of the same twelve jurors, resulted in 'structural error' requiring a new trial." Id. at ___, 845 S.E.2d at 855. The dissenting judge would have "h[e]ld that Defendant's right to a trial by a properly constituted jury of twelve was violated, that this violation constituted structural error, and that a new trial is required." Id. at ___, 845 S.E.2d at 870.

ARGUMENT

I. THE COURT OF APPEALS' MAJORITY DID NOT ERR BY CONCLUDING DEFENDANT RECEIVED A FAIR TRIAL, FREE FROM PREJUDICIAL ERROR.

The dissenting judge and Defendant contend the trial court's error in consenting to Defendant's jury trial waiver violated his state constitutional right to trial by jury, constituting "structural error"[1] for which Defendant need not show prejudice to be awarded a new trial, citing State v. Poindexter, 353 N.C. 440, 545 S.E.2d 414 (2001); State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997); and State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971). Yet those decisions are simply inapplicable. The defendants there had not—and indeed could not have—waived their rights to trial by jury, they were charged with serious offenses for which no conviction could be sustained but for a valid jury verdict, the verdicts there were nullities because they were rendered not by a jury comprised of twelve qualified persons, and the state constitutional guarantee deprived was the right to a verdict rendered by a jury of twelve.

---

[1] In North Carolina, we "apply a form of structural error known as error per se." State v. Lawrence, 365 N.C. 506, 514, 723 S.E.2d 326, 331–32 (2012). "Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice"; however, "federal structural error and state error per se have developed independently[.]" Id.

A. Defendant raises issues not properly before this Court.

This Court reviews the Court of Appeals' opinion for errors of law. N.C. R. App. P. 16(a); State v. Brooks, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). When the sole ground of the appeal is a dissent, review by this Court is limited to those issues that are: (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs. N.C. R. App. P. 16(b). Unless review of additional issues is allowed, "only those issues presented in accordance with the rules referenced above are properly before the Court." In re R.L.C., 361 N.C. 287, 290, 643 S.E.2d 920, 922 (2007), cert. denied, 552 U.S. 1024, 169 L. Ed. 2d 396 (2007). "Absent exceptional circumstances, it is vital that we adhere to the procedural rules[.]" State v. Rankin, 371 N.C. 885, 895-96, 821 S.E.2d 787, 796 (2018).

The Court of Appeals unanimously agreed the trial court violated Section 15A-1201(d)(1)'s procedure in consenting to Defendant's waiver without having first personally addressed him. The majority held, however, that Defendant was not entitled to a new trial because he failed to satisfy his burden of showing material prejudice. The dissenting judge opined the trial court's error violated Defendant's state constitutional right to a jury trial, constituting error per se.

Hence, the ultimate basis of the dissent was whether Defendant was required to show prejudice to be entitled to a new trial.

In his notice of appeal to this Court based solely on the dissent, Defendant identified the issue as follows: "Did the Court of Appeals majority err by determining that [he] knowingly and voluntarily waived his right to a jury trial and by affirming the trial court's judgment." (Def's 7/13/20 NOA p. 1 in Docket No. 279A20) Defendant now argues the Court of Appeals' majority erred by holding that (1) "the trial court's untimely colloquy was sufficient to show a knowing and voluntary waiver of [his] right to a jury trial" and (2) he "was required to show prejudice and failed to do so." (Def's Br. p. 20, 22)

Whether the Court of Appeals' majority erred by holding the trial court's "untimely colloquy was sufficient" to show a knowing and voluntarily waiver of his jury trial right is not properly before this Court. To be sure, the Court of Appeals' majority rejected Defendant's argument that the trial court wholly failed to comply with Section 15A-1201(d) because it did not personally address him "at all." But insofar as Defendant argues the Court of Appeals' majority erred by concluding the record was insufficient to show a constitutionally valid waiver of his right to a jury trial, he misconstrues that the Court of Appeals' majority addressed only whether Defendant was entitled to a new trial based on the trial court's noncompliance with Section 15A-1201(d)(1) procedural

requirement. Indeed, as the dissenting judge recognized, the Court of Appeals' majority did "not address Defendant's argument that his waiver was not made 'knowingly and voluntarily 'under our amended constitution' and [Section] 15A-1201(b)[.]" Id. at ___, 845 S.E.2d at 870. Hence, the only issue properly before this Court on the basis of the dissent is whether the Court of Appeals' majority erred by holding that Defendant was required to show prejudice from the trial court's procedure in consenting to his jury trial waiver pursuant to Section 15A-1201(d)(1) before he may be entitled to a new trial.

B. Right to a Jury Trial.

The United States Constitution guarantees a criminal defendant the right to trial by jury. U.S. Const. amend. VI; see also Duncan v. State of La., 391 U.S. 145, 149, 20 L. Ed. 2d 491 (1968) (holding the Sixth Amendment jury-trial right applies to the states through the Fourteenth Amendment). Yet "[t]he Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses[.]" Lewis v. United States, 518 U.S. 322, 323–24, 135 L. Ed. 2d 590, 594 (1996); accord Blanton v. City of N. Las Vegas, Nev., 489 U.S. 538, 541, 103 L. Ed. 2d 550 (1989). Generally, an offense is "petty" if the maximum possible prison term does not exceed six months. See Lewis, 518 U.S. at 326, 135 L. Ed. 2d at 595–96; accord State v. Speights, 280 N.C. 137, 139, 185 S.E.2d 152, 154 (1971) ("[A]ny crime the maximum authorized punishment for which

does not exceed six months in prison is a petty offense for which the offender may be tried without a jury[.]" (citations omitted)); Blue Jeans Corp. v. Amalgamated Clothing Workers of Am., AFL-CIO, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969) (holding the defendants charged with criminal contempt had no state constitutional right to trial by jury because the maximum punishment authorized rendered it "a petty offense with no constitutional right to a jury trial").

The Constitution of North Carolina guarantees that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24 (1971). However, "[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." Id. Construing our 1868 Constitution, this Court interpreted the phrase "right of appeal" to confer upon a defendant convicted of a misdemeanor in an inferior court, "when the appeal is taken, the right of trial by jury in the superior court[.]" State v. Pulliam, 184 N.C. 681, 684, 114 S.E. 394, 395 (1922) (citations omitted)); accord State v. Pasley, 180 N.C. 695, 696, 104 S.E. 533, 534 (1920) ("[W]hen a defendant asserts his right of appeal and the case comes up in the superior court, the defendant's right of trial by jury, as guaranteed by the Constitution, is preserved to him." (citation omitted)).

C. Waiver of a Jury Trial.

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). It has recognized that the "choice of procedure" between trial by judge or jury is one in which a defendant "is as capable as any lawyer of making an intelligent choice[.]" Adams v. U.S. ex rel. McCann, 317 U.S. 269, 280, 87 L. Ed. 268, 275 (1942). A defendant's jury trial waiver must be knowing, voluntary, and intelligent; the government must consent; and the trial court must approve "with sound and advised discretion, . . . and with a caution increasing in degree as the offenses dealt with increase in gravity." Patton, 281 U.S. at 312–13, 74 L. Ed. at 870. And such a waiver cannot be presumed from a silent record. See Boykin v. Alabama, 395 U.S. 238, 242–43, 23 L. Ed. 2d 274, 279 (1969). Accordingly, the Federal Rules of Criminal Procedure allow a defendant to waive trial by jury in federal prosecutions triggering the Sixth Amendment provided: "(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." Fed. R. Crim. Pro. 23(a) (2019). The Fourth Circuit has held that, although it might be better practice, "neither Rule 23(a) nor the

Sixth Amendment requires the district court 'to interrogate defendants as to the voluntariness of their waiver of a jury trial[.]" United States v. Boynes, 515 F.3d 284, 287 (4th Cir. 2008); accord United States v. Khan, 461 F.3d 477, 491–92 (4th Cir. 2006), as amended (Sept. 7, 2006), cert. denied, 550 U.S. 956, 167 L. Ed. 2d 1130 (2007).

The 1776 Constitution of North Carolina guaranteed the right of every person charged with an offense, no matter the grade, to trial by jury. N.C. Const. of 1776, Declaration of Rights, § 9. Our 1868 Constitution provided an exception for "other means of trial, for petty misdemeanors, with the right of appeal." N.C. Const. art. I, § 13 (1868); accord State v. Powell, 97 N.C. 417, 1 S.E. 482, 484 (1887); State v. Shine, 149 N.C. 480, 62 S.E. 1080, 1081 (1908). Our 1971 Constitution provided that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." N.C. Const. art. I, § 24 (1971). But since 1868, the right to a jury trial for an offense within the jurisdiction of an inferior court, though protected by an unfettered statutory right of appeal to superior court, had to be invoked; it thus was not an absolute constitutional guarantee. See, e.g., State v. Sparrow, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970); State v. Spencer, 276 N.C. 535, 545, 173 S.E.2d 765, 772 (1970); State

v. Broome, 269 N.C. 661, 663, 153 S.E.2d 384, 385 (1967); State v. Norman, 237 N.C. 205, 212, 74 S.E.2d 602, 608 (1953). Cf. State v. Lakey, 191 N.C. 571, 574, 132 S.E. 570, 571 (1926).

A defendant could also plead guilty and waive his right to a jury trial. State v. Rogers, 162 N.C. 656, 660, 78 S.E. 293, 294 (1913). "Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary." State v. Agnew, 361 N.C. 333, 335, 643 S.E.2d 581, 583 (2007) (citation omitted)). Before a superior court may accept a guilty plea to a felony, it must first personally address the defendant and advise him that, *inter alia*, he is waiving his right to a jury trial and also must determine on the record that the plea is the product of an informed choice. See N.C.G.S. § 15A-1022(a)–(b) (2017).

But a superior court may accept a guilty plea to a misdemeanor without having personally addressed the defendant at all. See N.C.G.S. § 15A-1022(a) (2017) (carving out an exception in "misdemeanor cases in which there is a waiver of appearance"); see also N.C.G.S. § 15A-1011(a)(3) (2017) ("A plea may be received only from the defendant himself in open court except when[,]" among other situations, "[i]n misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge[.]"); accord

State v. Ferebee, 266 N.C. 606, 609, 146 S.E.2d 666, 668 (1966) ("In felonies less than capital the right to be present can be waived only by the defendant himself, but in misdemeanors the right may be waived by the defendant through his counsel with the consent of the court." (citations omitted)).

However, previously an accused on trial before the superior court who pleaded "not guilty" could not waive his right to a jury trial. See, e.g., State v. Hill, 209 N.C. 53, 182 S.E. 716, 717 (1935); State v. Lewis, 274 N.C. 438, 442, 164 S.E.2d 177, 180 (1968). Cf. State v. Hudson, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). "The State, like the defendant, is entitled to a jury[.]" State v. Williams, 286 N.C. 422, 427, 212 S.E.2d 113, 117 (1975) (citation omitted).

In 2013, the General Assembly passed legislation to submit a state constitutional amendment to the voters. Act of July 9, 2013, ch. 300, 2013 Session Laws 821, 821–22. The amendment was approved by the voters on 4 November 2014. Article I, Section 24 now provides:

> 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 for which the State is not seeking a sentence of death in superior court 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. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. Art. I, § 24.

Section 15A-1201 was amended to initiate enactment of the amendment to Article I, Section 24 and governs the procedures for waiver of a jury trial. Essentially, a defendant must provide notice to the State of his intent to waive a jury trial, the State must be afforded an opportunity to object, and the trial court must approve the defendant's request for a bench trial. See N.C.G.S. § 15A-1201(b)–(d) (2017). Relevant here, subsection (b) provides:

> 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 of law and fact . . . shall be heard and judgment given by the court.

N.C.G.S. § 15A-1201(b). And the procedures governing a trial court's approval of the waiver provide 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.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d).

D. The Court of Appeals' Majority did not err by rejecting Defendant's claim that the record was insufficient to show he knowingly and voluntarily waived a jury trial.

Defendant argues "[t]he Court of Appeals' majority erred by holding that the trial court's untimely colloquy was sufficient to show a knowing and voluntary waiver of [his] right to a jury trial." (Def's Br. p. 20) He claims a "constitutionally valid waiver of a jury trial must occur prior to trial" and the "trial court's colloquy with [him] was not sufficient to show a knowing and voluntary waiver[.]" (Def's Br. pp. 14–17, 17–20) Defendant fails to show the Court of Appeals' majority erred by rejecting his claim.

1. Defendant failed to preserve a constitutional claim.

"It 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). 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).

Here, Defendant waived his right to a jury trial and requested a bench trial. He did not object to the trial court's action in consenting to his jury trial waiver. Defendant did not assert that the trial court's decision to grant his request for a bench trial violated his state constitutional right to trial by jury. After the trial court rendered its verdict of guilty, Defendant appealed to the Court of Appeals, arguing the trial court erred by conducting a bench trial because it wholly failed to comply with Section 15A-1201(d)(1) in that it did not personally address him at all. The Court of Appeals' majority addressed only whether the trial court violated Section 15A-1201(d)(1)'s procedural

requirements, and whether Defendant satisfied his burden of showing the error materially prejudiced him.

The Court of Appeals' majority did not err by rejecting the constitutional issue addressed by the dissenter. It is not the role of appellate courts to create an appeal for an appellant. Viar v. N. Carolina Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); cf. N.C. R. App. P. 28(b). Here, the dissenting judge believed the trial court's error in consenting to Defendant's jury trial waiver constituted a violation of his state constitutional jury trial right. As the majority noted, however, "Defendant did not object to the trial court's action below" and thus it addressed only whether the trial court violated a statutory mandate in Section 15A-1201(d)(1)'s procedure for when it consented to his jury trial waiver. Hamer, ___ N.C. App. at ___, 845 S.E.2d at 849. The Court of Appeals' majority did not err by not addressing an unpreserved constitutional claim for the first time on appeal.

2. In any event, Defendant's argument is meritless.

"The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards." Boykin, 395 U.S. at 243, 23 L. Ed. 2d at 279 (citation omitted). For waiver of the Sixth Amendment right to trial by jury "to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' "

McCarthy v. United States, 394 U.S. 459, 466, 22 L. Ed. 2d 418, 425 (1969) (citation omitted). Generally, for a waiver of fundamental federal constitutional rights to be valid, like the right to counsel, "the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will." State v. Thacker, 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980) (citation omitted).

This Court has long recognized that, generally, "[a] party may waive statutory or constitutional provisions by express consent or conduct inconsistent with a purpose to insist upon it." State v. Horner, 310 N.C. 274, 283, 311 S.E.2d 281, 287 (1984) (citation omitted). Indeed, even a fundamental constitutional right may be waived "by conduct inconsistent with a purpose to insist upon it." State v. Hutchins, 303 N.C. 321, 341–42, 279 S.E.2d 788, 801 (1981) (citation omitted).

When a personally colloquy is statutorily mandated to ensure a defendant's waiver of fundamental federal constitutional rights is valid, the question on review is whether the record shows sufficient information was elicited from the defendant to support a trial court's determination that the waiver was made knowing and voluntary. See, e.g., State v. Rich, 346 N.C. 50, 62, 484 S.E.2d 394, 402 (1997); State v. Carter, 338 N.C. 569, 583, 451 S.E.2d

157, 164 (1994); cert. denied, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995); State v. Wynn, 278 N.C. 513, 517–18, 180 S.E.2d 135, 138 (1971). Cf. State v. Pruitt, 322 N.C. 600, 604, 369 S.E.2d 590, 593 (1988) (awarding the defendant a new trial when the trial court failed to inquire of him at all about his decision to waive his fundamental constitutional right to counsel and proceed pro se).

Here, the record showed that, prior to the start of trial, the trial court knew that Defendant sought to appeal his Class 3 misdemeanor conviction, that he was represented by counsel, and that he had requested a bench trial. In open court—and in Defendant's presence—the trial court confirmed with both parties that this was to be a bench trial, it confirmed with Defendant's counsel that Defendant desired to waive a jury trial, and it determined that the State did not oppose the request for a bench trial. (Tpp. 3–5) It also explained that the bench trial would proceed as it did in district court, with it hearing evidence and rendering a decision. (Tp. 7) The trial court granted Defendant's request and presided over the bench trial. After the State rested its case and before Defendant presented evidence, the trial court realized that Section 15A-1201(d)(1) required it personally to address Defendant and ensure he fully understood and appreciated the consequences of his decision to waive a jury trial. (Tp. 57) The trial court directed Defendant's counsel to explain to Defendant the consequences of his jury trial waiver, it explained to Defendant

the maximum punishment for the charge, and it personally inquired of Defendant about his decision to waive a jury trial. Defendant confirmed on the record that he had voluntarily waived his right to a jury trial. (Tpp. 57–58) He raised no objection below to the procedure nor made any argument that the trial court's action violated his constitutional right to a jury trial.

Defendant appealed, arguing before the Court of Appeals for the first time that the trial court erred by granting his request for a bench trial as "the record does not reflect that [he] knowingly and voluntarily waived his right to a jury trial because the court made no inquiry at all of him." (Def's Br. p. 13 COA19-473) The Court of Appeals' majority rejected this claim, noting that the trial court did indeed personally address Defendant about his jury trial waiver and "did eventually conduct the requisite waiver colloquy with Defendant." Hamer, ___ N.C. App. at ___, 845 S.E.2d at 852. The Court of Appeals' majority noted that neither Section 15A-1201 nor case law has mandated what questions a trial court must ask a defendant to determine whether he fully understands and appreciates the consequences of his decision to waive a jury trial. Id. It overruled Defendant's "arguments concerning the sufficiency of the trial court's inquiry in determining whether his waiver was knowing and voluntary." Id. at ___, 845 S.E.2d at 853.

The Court of Appeals' majority did not err by rejecting Defendant's claim that the record failed to show a knowing and voluntary waiver. As stated above, Defendant had no constitutional guarantee to trial by jury for his Class 3 misdemeanor. See, e.g., Lewis, 518 U.S. at 323–24, 135 L. Ed. 2d at 596–97; Blue Jeans Corp., 275 N.C. at 511, 169 S.E.2d at 872. Indeed, it appears defendant failed to give timely notice of appeal to protect his right to trial by jury. Further, based on the maximum punishment authorized for the offense, had Defendant pleaded guilty, the superior court could have accepted his plea without having first personally informed him that he was waiving his right to a jury trial. See N.C.G.S. § 15A-1022(a); N.C.G.S. § 15A-1011(a)(3); cf. Ferebee, 266 N.C. at 609, 146 S.E.2d at 668.

But even if Defendant's waiver here had to satisfy federal constitutional standards, the record here was sufficient to show it was knowing, voluntary, and intelligent. See, e.g., Patton, 281 U.S. at 312–13, 74 L. Ed. at 870; Adams, 317 U.S. at 280, 87 L. Ed. at 275; Boynes, 515 F.3d at 287 (4th Cir. 2008); Khan, 461 F.3d at 491–92. Defendant was represented by counsel, he was present when the trial court confirmed this was to be a bench trial, when the parties discussed the authority authorizing waiver of a jury trial, when his attorney confirmed that he had desired to waive a jury trial, and when the trial court explained how a bench trial would proceed. Nothing in the record

suggests that Defendant exhibited any objection or surprise that his case would not be tried by a jury before the bench trial started. The trial court later directed counsel to explain to Defendant the consequences of waiving a jury trial and personally addressed him, explaining the maximum punishment authorized for the offense, and securing his confirmation that his waiver had been voluntarily made, all before the case had been submitted for final determination and the trial court rendered its verdict. The Court of Appeals' majority did not err by rejecting Defendant's claim that the record here failed to show a valid waiver.

The dissenting judge's assertion that the record failed to show a valid waiver because Defendant failed to comply with Section 15A-1201(c)'s notice requirements or the State did not schedule the matter to be heard in open court as required by Section 15A-1201(d) were not arguments raised by Defendant and are untenable. The record showed both that Defendant had provided notice to the State of his intent to waive a jury trial, and the trial court's decision of whether to grant Defendant's request for a bench trial was made on the record in open court, and by the same judge who presided over the trial. Insofar as the trial court did not personally address Defendant before granting his request to waive a jury trial, as stated above, the record shows that Defendant's decision to waive a jury trial was made knowing and voluntary.

E. The Court of Appeals' Majority did not err by holding that Defendant was not entitled to a new trial.

"*Preserved* legal error is reviewed under the harmless error standard of review." State v. Lawrence, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). If federal constitutional error has been preserved for appellate review by timely objection below, the State bears the burden of showing the error was harmless beyond a reasonable doubt. Id at 513, 723 S.E.2d at 331; see also N.C.G.S. § 15A-1443(b) (2017). Generally, "[a]n error is harmless beyond a reasonable doubt if it did not contribute to the defendant's conviction." State v. Bunch, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (citation omitted).

In contrast, if the preserved error "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." Lawrence, 365 N.C. at 513, 723 S.E.2d at 331. Hence, to be entitled to appellate relief for preserved statutory error, a defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(b) (2017); accord State v. Braxton, 352 N.C. 158, 178, 531 S.E.2d 428, 439 (2000); State v. Nobles, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999); State v. Jones,

336 N.C. 490, 498, 445 S.E.2d 23, 27 (1994). Further, "[a] defendant is not prejudiced by the granting of relief which he has sought[.]" N.C. Gen. Stat. § 15A-1443(c) (2017).

"Structural error is a rare form of [federal] constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function *as a vehicle for determination of guilt or innocence*.' " Garcia, 358 N.C. at 409, 597 S.E.2d at 744 (2004) (emphasis added) (citation omitted). "North Carolina courts also apply a form of structural error known as error per se" that requires no showing of prejudice. Lawrence, 365 N.C. at 514, 723 S.E.2d at 331–32.

"It is elementary that the jury provided by law for the trial of *indictments* is composed of twelve persons[.]" State v. Hudson, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (emphasis added)). The "jury" guaranteed by our Constitution "contemplates no more or less than a jury of twelve persons." State v. Bunning, 346 N.C. 253, 256, 485 S.E.2d 290, 292 (1997). Hence, a violation of a defendant's previously unwaivable constitutional right to not be convicted of a felony but by a verdict rendered by a jury of twelve qualified persons when he pleaded not guilty has been deemed error per se. See State v. Poindexter, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) (finding per se error where a guilty verdict was rendered "by a jury composed of less than twelve qualified jurors");

State v. Bunning, 346 N.C. 253, 256, 485 S.E.2d 290, 292 (1997) (finding per se error where a verdict recommending the death penalty was rendered by a jury composed of "more than twelve persons"); State v. Hudson, 280 N.C. 74, 80, 185 S.E.2d 189, 193 (1971) (finding per se error where a guilty verdict constituted a "nullity" because it was rendered by a jury composed of eleven persons). These decisions, however, were issued before a defendant could waive his right to trial by jury for a felony offense originating in superior court.

Here, Defendant waived his right to a jury trial and requested a bench trial. He did not object to the trial court's action in consenting to his jury trial waiver. Defendant did not assert that the trial court's decision to grant his request for a bench trial violated his state constitutional right to trial by jury. After the trial court rendered its verdict of guilty, Defendant appealed to the Court of Appeals, arguing the trial court erred by conducting a bench trial because it failed to comply with Section 15A-1201(d)(1)'s requirements governing judicial consent of a jury trial waiver because it did not address him at all. The Court of Appeals' majority addressed only whether the trial court violated Section 15A-1201(d)(1)'s procedural requirements of consenting to a defendant's jury trial waiver, and it determined that, despite the trial court's statutory procedure error, Defendant was not entitled to a new trial because he failed to satisfy his burden of showing material prejudice. The dissenting

judge addressed whether the trial court's decision to consent to Defendant's jury trial waiver violated his state constitutional right to trial by jury, concluded that it had, and determined that it amounted to error per se.

The Court of Appeals' majority did not err by holding that Defendant was not entitled to a new trial. Defendant had not preserved a constitutional claim for appellate review. See, e.g., Meadows, 371 N.C. at 749, 821 S.E.2d at 407; Garcia, 358 N.C. at 410–11, 597 S.E.2d at 745. He was therefore required to show that he was materially prejudiced from the trial court's statutory procedural error before being entitled to relief. See, e.g., Lawrence, 352 N.C. at 13, 530 S.E.2d at 815; Tate, 294 N.C. at 198, 239 S.E.2d at 827; Tirado, 358 N.C. at 571, 599 S.E.2d at 529; Roache, 358 N.C. at 284, 595 S.E.2d at 408. As the Court of Appeals' majority concluded, Defendant failed to satisfy his burden of establishing trial court's procedure in approving his waiver materially prejudiced him. Hamer, ___ N.C. App. at ___, 845 S.E.2d at 853. He failed to show a reasonable possibility that, had the trial court complied with Section 15A-1201(d)(1)'s requirement personally to address him before approving his bench trial request, a different result would have been reached at trial. See N.C.G.S. § 15A-1443(a).

Further, even had Defendant preserved a constitutional claim for review and shown a violation of his constitutional right trial by jury, the trial court's

procedure here in consenting to his jury trial waiver was harmless beyond a reasonable doubt in light of the uncontradicted evidence of his guilt presented at the bench trial. See Bunch, 363 N.C. at 845, 689 S.E.2d at 869. Indeed, the trial court's procedural error had no bearing at all on the reliability of the proceeding as a fair vehicle to determine Defendant's factual guilt or innocence. In any event, the trial court here granted Defendant's request for a bench trial. See N.C.G.S. § 15A-1443(c).

Defendant argues the Court of Appeals majority "erred by holding that the trial court's error in failing to follow the procedure for waiver of a jury trial was subject to harmless error review." He contends the trial court's error in consenting to his waiver in violation Section 15A-1201(d)(1)'s procedures constituted error per se, citing Poindexter, Bunning, and Hudson. (Def's Br. pp. 21–22) Defendant's reliance on these cases is misplaced.

In Poindexter, after the jury rendered a verdict of guilty of first-degree murder, the trial court disqualified one juror from continuing to serve during the defendant's capital sentencing proceeding based on the juror's misconduct during guilt-innocence deliberations. Id. at 441–42, 545 S.E.2d at 415. On review, this Court concluded that the juror's "misconduct during deliberations resulted in a guilty verdict by a jury composed of less than twelve qualified jurors." Id. at 444, 545 S.E.2d at 416. Therefore, it held the defendant's

"constitutional right to have the verdict determined by twelve jurors" was violated, constituting error per se. Id.

In Bunning, the trial court excused one juror—during the middle of jury deliberations in a capital sentencing proceeding—and replaced her with an alternate. The jury returned a verdict recommending the death penalty. Id. at 256, 485 S.E.2d at 292. On review, this Court concluded that where "eleven jurors fully participated in reaching a verdict, and two jurors participated partially[,]" "[t]his is not the twelve jurors required to reach a valid verdict in a criminal case." Id. at 256, 485 S.E.2d at 292. Therefore, it held the defendant's constitutional right to a properly constituted jury was violated, constituting error per se, and awarded a new capital sentencing proceeding. Id. at 257, 485 S.E.2d at 293.

In Hudson, between the conclusion of evidence and jury charge, one juror had to be excused, the defendant "waived trial by twelve," and a verdict of guilty of assault with intent to commit rape was rendered by a jury of eleven. Id. at 78, 185 S.E.2d at 192. On review, this Court reiterated "[i]t is elementary that the jury provided by law for the trial of indictments is composed of twelve persons" and "a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains 'not guilty.' " Id. at

79, 185 S.E.2d at 192. It thus deemed the verdict rendered by eleven persons a "nullity" and awarded a new trial. Id. at 80, 185 S.E.2d at 193.

Hence, Poindexter, Bunning, and Hudson stand for the principle that, when a defendant is charged with a felony originating in superior court and pleads "not guilty" (unless he knowingly and voluntarily waives trial by jury), he has a state constitutional right to have his guilt or capital sentencing decision determined by a jury of twelve. When that particular constitutional right guaranteed by Article I, Section 24 is violated—that is, when a verdict is declared by a jury not comprised of twelve qualified persons, rendering it a nullity on which judgment may not be pronounced—it constitutes error per se. That is simply not what happened here.

Moreover, the dissenting judge's analogy that a single judge is not a "properly constituted" trier of fact absent strict compliance with the procedural requirements of Section 15A-1201 and results in the same sort of per se error as a verdict rendered by an improperly constituted jury is untenable. The state constitution does not require that the same twelve jurors "operate[ ] as the finders of fact for the entire trial." Hamer, ___ N.C. App. at ___, 845 S.E.2d at 855. Or that "the same trier of fact must act in that capacity for all necessary stages of trial." Id. at ___, 845 S.E.2d at 858. The "essential attributes of trial by jury" at common law as guaranteed by our Constitution were "number,

impartiality, and unanimity[.]" State v. Dalton, 206 N.C. 507, 512, 174 S.E. 422, 425 (1934). The right to a jury of twelve is a guarantee that "[f]rom the beginning to the end of the trial the *number* never varies, and by a jury of twelve men the verdict is declared." Id. (emphasis added). It is a guarantee that the same twelve jurors who sat on the jury *when the case was finally submitted for determination* also render the verdict. See, e.g., State v. Nelson, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979) ("It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel.").

In sum, Defendant fails to show the Court of Appeals' majority opinion contains any error of law in reaching its decision that he received a fair trial, free of prejudicial error.

CONCLUSION

WHEREFORE, the State of North Carolina respectfully requests that this Court affirm the decision of the Court of Appeals.

Electronically submitted this the 23rd day of November, 2020.

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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:

W. Michael Spivey
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Email: mspivey@earthlink.net

Electronically submitted this the 23rd day of November, 2020.

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