No. COA21-277 FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Duplin County

 )

WILLIAM TAYLOR )

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**DEFENDANT-APPELLANT’S BRIEF**

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**DEFENDANT-APPELLANT’S BRIEF**

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# ISSUES PRESENTED

1. **Did the trial court lack subject matter jurisdiction over the charge of injury to personal property because the indictment was facially invalid?**
2. **Did the trial court err in accepting Mr. Taylor’s guilty plea when there was not a sufficient factual basis to support guilty pleas to larceny, safecracking, or injury to personal property?**
3. **Did the trial court err by failing to follow the procedures established in N.C.G.S. § 15A-1024 when sentencing Mr. Taylor?**

# STATEMENT OF THE CASE

On 26 November 2018, the Duplin County Grand Jury indicted William Taylor for two counts of felony breaking and entering, and one count each of larceny after breaking and entering, possession of stolen goods, safecracking, injury to personal property, and for having attained habitual breaking and entering status and having attained habitual felon status. (Rpp 12-19).

The matter came on for a hearing at the 15 April 2019, Regular Criminal Session of the Duplin County Superior Court, the Honorable L. Lamont Wiggins presiding. (Tp 1). In exchange for the State’s dismissal of the charges of possession of stolen goods and having attained habitual breaking and entering status, Mr. Taylor entered an *Alford* plea of guilty to all remaining charges. (Rpp 21-24).

The trial court accepted Mr. Taylor’s plea and found him to be a Prior Record Level V for sentencing purposes. (Tp 14; Rpp 25-26). The trial court imposed a sentence of 111 to 146 months of imprisonment for one count of breaking and entering, followed by a consolidated, consecutive sentence of 89 to 119 months for the remaining charges. (Rpp 28-33). Mr. Taylor filed a written notice of appeal on 24 April 2019. (Rp 34).

Mr. Taylor filed a motion for appropriate relief on 28 May 2019, followed by an amended motion for appropriate relief on 28 June 2019. (Rpp 35-55). In an order signed 17 December 2020, Judge R. Kent Harrell denied Mr. Taylor’s motion for appropriate relief on the grounds that the trial court was divested of jurisdiction due to Mr. Taylor’s notice of appeal. (Rpp 56-57). Appellate Entries were created that same day and were served upon the court reporter on 5 January 2021. (Rpp 58-59).

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Mr. Taylor appeals pursuant to N.C. R. App. P. 21 and N.C.G.S. § 15A-1444(e). Review of the issues contained within this brief are dependent on this Court’s grant of the contemporaneously-filed petition for a writ of certiorari. The first issue addresses the subject matter jurisdiction of the trial court based on a defective indictment. The second issue addresses whether there was a sufficient factual basis to support Mr. Taylor’s guilty plea. The third issue addresses the trial court’s failure to comply with the procedures mandated by N.C.G.S. § 15A-1024. Each of these issues may be reviewed in the Court of Appeals pursuant to a writ of certiorari. *See, e.g., State v. Collins*, 221 N.C. App. 604, 605-06, 727 S.E.2d 922, 924 (2012) (granting certiorari to review factual basis for guilty plea and sufficiency of indictment after guilty plea); and *State v. Blount*, 209 N.C. App. 340, 345, 703 S.E.2d 921, 925 (2011) (granting certiorari to review compliance with N.C.G.S. § 15A-1024). Contemporaneously with this brief, Mr. Taylor is filing a petition for a writ of certiorari, seeking appellate review on these grounds. Mr. Taylor is also filing a petition for a writ of certiorari out of an abundance of caution in the event that this Court finds his notice of appeal to be defective. N.C. R. App. P. 4(b).

# STATEMENT OF THE FACTS

When providing the factual basis for Mr. Taylor’s guilty plea, the State asserted the following. At approximately noon on 28 September 2017, the home of Reginald Kenan was broken into. (Tp 12). The break-in occurred through a French door on the second story of Kenan’s home, which was “somehow damage[ed]” to allow entry. (Tp 12). Law enforcement was called out to investigate and Kenan was contacted. (Tpp 12-13). Kenan came to his home and determined that nothing had been stolen. (Tp 13).

After Kenan’s inspection, Mr. Fennell,[[1]](#footnote-1) “an informant in that case” contacted law enforcement and told them Mr. Taylor “had a plan to go back to that same residence to steal property.” (Tp 13). Kenan knew Mr. Taylor because he had hired him in the past to clean Kenan’s house. (Tp 12).

The officers began to surveil Fennell, and “operated somewhat as a sting.” (Tp 13). Two undercover officers hid in a closet inside Kenan’s home while a detective updated them on Fennell’s location. (Tp 13). Later, “it appeared that the garage door leading into the kitchen, leading into the house, had been unlocked and . . . [the officers] sort of fake arrested the informant[.]” (Tp 13). At the same time, the officers “caught [Mr. Taylor] inside the house with gloves on, and . . . he had been trying to access the safe.” (Tp 13). Mr. Taylor was “caught red-handed literally as he went into that residence.” (Tp 14). Officers executed a search warrant on “the vehicle” and found “some toolbars, some sort of instruments that we believe that he would have used to get into that safe.” (Tp 14).

The State also described three prior convictions as a basis for Mr. Taylor’s guilty plea to having attained habitual felon status. (Tp 9). Mr. Taylor added nothing to the factual basis. (Tp 14). The trial court found there was a factual basis and accepted Mr. Taylor’s guilty plea and ordered it to be recorded. (Tp 14).

After the trial court accepted Mr. Taylor’s plea, the trial court addressed sentencing and heard an unsworn victim impact statement from Kenan. (Tpp 19-22). During his victim impact statement, Kenan stated that the Sheriff’s department had “clued [him] in” that, during the first break-in, Mr. Taylor “couldn’t take the safe out, so he went back home or somewhere and found a dolly so he could put my safe on it.” (Tp 20). Kenan stated that “when [Mr. Taylor] got the dolly loaded up with my safe on it, [the officers] come out the closet, and he tries to run away.” (Tpp 20-21).

# STANDARDS OF REVIEW

The question of whether an indictment adequately contains facts supporting every element of the criminal charge is a question of law which this Court reviews *de novo*. *Collins*,221 N.C. App. at 610, 727 S.E.2d at 926. Likewise, whether a trial court complied with N.C.G.S. § 15A-1022 when finding a factual basis for a plea and N.C.G.S. § 15A-1024 when sentencing are questions of statutory interpretation which are reviewed *de novo*. *State v. Robinson*, 852 S.E.2d 915, 918 (N.C. Ct. App. 2020). Under *de novo* review, this Court should consider the matter anew and substitute its judgment for that of the trial court. *Id.*

# ARGUMENT

## The trial court lacked subject matter jurisdiction over the charge of injury to personal property because the indictment was facially invalid.

The indictment purporting to charge Mr. Taylor with injury to personal property alleged that Mr. Taylor damaged a back door on the second story of a building. A back door to a building is real property, not personal property. The indictment was therefore facially invalid and the trial court lacked jurisdiction over the charge of injury to personal property.

### A valid indictment is necessary for the trial court to acquire jurisdiction.

It is well-established that “a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Corey*, 373 N.C. 225, 233, 835 S.E.2d 830, 836 (2019) (cleaned up). “As a prerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge[.]” *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (cleaned up). “An arrest of judgment is proper when the indictment . . . fails to state some essential and necessary element of the offense of which the defendant is found guilty.” *Id*. at 593, 724 S.E.2d at 636 (cleaned up). “There can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity.” *Id*. (cleaned up); *see also State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 474 (2006) (vacating judgment due to a defective indictment following a guilty plea and upon *Anders* review).

### The indictment charging injury to personal property in this case is facially invalid.

“The essential elements of injury to the personal property of another are (1) that *personal property* was injured; (2) that the personal property was that of another . . .; (3) that the injury was inflicted wantonly and willfully; and (4) that the injury was inflicted by the person or persons accused.” *State v. McNair*, 253 N.C. App. 178, 197, 799 S.E.2d 631, 644 (2017) (cleaned up, emphasis added). Additionally, our appellate courts have recognized for over a century that “[i]n indictments for injuries to property, it is necessary to lay the property truly,” *State v. Mason*, 35 N.C. 341, 342 (1852), and indictments for crimes involving personal property must describe the property sufficiently to enable the jury to conclude the property alleged to be the subject of the crime is the same as the evidence shows, and to protect the defendant against a subsequent prosecution for the same offense. *State v. Ingram*, 271 N.C. 538, 541, 157 S.E.2d 119, 122 (1967).

The indictment charging Mr. Taylor with injury to personal property contains the following allegation:

[T]he jurors for the State upon their oath present that on or about the date of offense shown and in Duplin County the defendant named above unlawfully and willfully did wantonly *injure personal property*, *the second story back door of 521 Landfill Road*, Rose Hill, North Carolina, the property of Reginald Kenan. The damage caused was in excess of $200.00.”

(Rp 18, emphasis added).

The indictment in the present case is fatally defective because it fails to allege that Mr. Taylor damaged any *personal property*. The indictment alleges only that Mr. Taylor injured “the second story back door of 521 Landfill Road[.]” In a recent unpublished opinion, this Court succinctly restated the well-established fact that “[a] door attached to a building and the door’s component parts are *real property*.” *In re A.D.S.*, 2020 N.C. App. LEXIS 21, \*5 (N.C. Ct. App. 2020) (unpublished) (emphasis added); *see also State v. Zigler*, 42 N.C. App. 148, 152, 256 S.E.2d 479, 482 (1979) (holding that “the defendant wilfully and wantonly fired the shotgun and shattered the glass door of the police station, causing damage to real property.”). Similarly, this Court has held that damage to the door and wall of a school constitutes injury to real property. *In re Pineault*, 152 N.C. App. 196, 198, 566 S.E.2d 854, 857 (2002). Thus, because the property alleged to be injured was, as a matter of law, real property instead of personal property, the indictment in the present case fails to charge Mr. Taylor with injury to personal property.

This Court has previously addressed a similar facial defect in an indictment in *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008). In *Moncree*, the defendant had been charged with attaining habitual felon status and the indictment alleged three prior felony convictions, one of which occurred in New Jersey. *Moncree*, 188 N.C. App. at 233, 655 S.E.2d at 472. This Court noted that “under the laws of New Jersey, defendant’s conviction in New Jersey was considered a high misdemeanor, not a felony.” *Id.* This Court therefore held “the habitual felon indictment did not set forth three predicate felony offenses[.]” *Id*. This Court also held that “[b]ecause defendant argues the indictment failed to include each of the elements specified in N.C. Gen. Stat. § 14-7.3, the issue is jurisdictional and may be raised at any time.” *Id*. at 233-34, 655 S.E.2d at 472. Thus, when an indictment purports to charge a crime, but one of the allegations fails to satisfy the requirements of the statute “as a matter of law,” the indictment fails to set forth an essential element and is therefore defective. *Id.* at 234, 655 S.E.2d at 472.

The reasoning of *Moncree* is controlling in this case. In *Moncree*, the defective indictment alleged that the defendant had been convicted of three prior felonies, but one of the felonies was, as a matter of law, only a misdemeanor. Here, the indictment alleged that Mr. Taylor injured personal property, but the property described was, as a matter of law, *real property*. Because a door attached to a building is not personal property, Mr. Taylor was not charged with injury to personal property by the indictment alleging he caused damage to “the second story back door of 521 Landfill Road[.]” Therefore, the indictment was fatally defective and failed to confer jurisdiction on the trial court, rendering the proceedings thereon and the conviction a nullity. *See* *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636.

### Mr. Taylor was not charged with the offense he pled guilty to, was convicted of, and had judgment entered upon.

While the State purported to charge Mr. Taylor with injury to personal property, the body of the indictment may have been sufficient to charge injury to real property save for its failure to actually allege that the property was “real property”. However, Mr. Taylor’s guilty plea was to injury to personal property and judgment and commitment was entered against Mr. Taylor for injury to personal property. This was error because without a valid indictment charging injury to personal property, the trial court had no jurisdiction to enter judgment against him for that offense. “It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.” *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). As Mr. Taylor was not indicted for injury to personal property, the offense for which he was convicted, the trial court did not have jurisdiction to enter judgment and commitment against him for that offense. And, assuming the indictment properly charged Mr. Taylor with injury to real property, he nevertheless did not plead guilty to that offense, was not convicted of that offense, and no judgment was entered against him on that offense.

### The sufficiency of an indictment can be raised at any time.

A guilty plea “waives all defenses other than the sufficiency of the indictment.” *State v. McGee*, 175 N.C. App. 586, 587, 623 S.E.2d 782, 784 (2006). Because of this rule, “when an indictment is alleged to be facially invalid, thereby depriving the trial court of jurisdiction, the indictment may be challenged at any time.” *Id.* at 587-88, 623 S.E.2d at 784. As described above, this Court has previously issued a writ of certiorari to allow review of the sufficiency of an indictment following a guilty plea. *See Collins*, 221 N.C. App. at 605-06, 727 S.E.2d at 924. Therefore, Mr. Taylor has submitted a petition for writ of certiorari contemporaneously with this brief.

Alternatively, Mr. Taylor requests that this Court invoke Rule 2 to suspend the requirements of the Rules of Appellate Procedure and review Mr. Taylor’s challenge to the defective indictment to the extent this Court deems it necessary. The issue of a defective indictment which deprives the trial court of jurisdiction is the sort of legal error which must be corrected in order to prevent manifest injustice. *See e.g., State v. Jones*, 161 N.C. App. 60, 65, 588 S.E.2d 5, 9, n.3 (2003), *overruled in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). As this Court has explained, “[i]f this Court were to ignore the jurisdictional flaw, injustice would result since defendant would be subjected to a court that lacks jurisdiction due to an invalid indictment.” *Id.* Indeed, in *Frink*, this Court vacated a conviction based on an invalid indictment after a guilty plea on *Anders* review, when the defendant failed to raise the issue either below or even on appeal. *Frink*, 177 N.C. App. at 147, 627 S.E.2d at 474. Accordingly, the defective indictment in this case, which deprived the trial court of jurisdiction, constitutes a manifest injustice which warrants the invocation of Rule 2.

### Conclusion

“[A] court has no authority to accept a plea to a charge until it has properly acquired jurisdiction.” *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798, 798 (1974). A judgment entered by a court that lacks jurisdiction is a nullity. *See* *Harris*, 219 N.C. App. at 593, 724 S.E.2d at 636. When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment, and the “effect of arresting judgment . . . is to vacate the plea of guilty and the judgment.” *Brown*, 21 N.C. App. at 89, 202 S.E.2d at 799.

As the indictment for injury to personal property in this case was fatally defective, the trial court did not acquire jurisdiction to accept Mr. Taylor’s plea and enter judgment against him for that charge. Accordingly, the judgment must be vacated and the case remanded for new proceedings in which Mr. Taylor could “withdraw his guilty plea and proceed to trial on the criminal charges or attempt to negotiate another plea agreement.” *State v. Flint*, 199 N.C. App. 709, 727, 682 S.E.2d 443, 453 (2009) (cleaned up). Further, as Mr. Taylor’s guilty plea was premised in part on his plea to injury to personal property, the plea agreement must be set aside. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev’d for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam).

## The trial court erred in accepting Mr. Taylor’s guilty plea when there was not a sufficient factual basis to support guilty pleas to larceny, safecracking, or injury to personal property.

Before accepting a guilty plea, a trial court must determine there is a sufficient factual basis for the plea. The State’s proffered factual basis failed to describe essential elements of three of the crimes Mr. Taylor pled guilty to. Mr. Taylor’s pleas to those charges must be set aside.

### Applicable Legal Principles

 “A [trial court] may not accept a defendant’s guilty plea without first determining that there is a factual basis for the plea.” *State v. Weathers*, 339 N.C. 441, 453, 451 S.E.2d 266, 272 (1994) (citing N.C.G.S. § 15A-1022(c)). N.C.G.S. § 15A-1022(c) provides that a factual basis may be based on a statement of the facts by the prosecutor, a written statement of the defendant, an examination of the presentence report, sworn testimony, which may include reliable hearsay, or a statement of facts by defense counsel. N.C.G.S. § 15A-1022(c). Regardless of the source of information presented to the trial court, the information must provide some “substantive material” beyond the plea itself that tends to show that the defendant is guilty. *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421-22 (1980).

However, a defendant’s guilty plea pursuant to *Alford*, a transcript of plea, or a defense attorney’s stipulation to the existence of a factual basis are insufficient to support a guilty plea because they do not provide the trial court any additional substantive information about a case. *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007). A judgment based on a guilty plea unsupported by a factual basis must be vacated. *Weathers*, 339 N.C. at 453, 451 S.E.2d at 273; *see also* *State v. Keller*, 198 N.C. App. 639, 646, 680 S.E.2d 212, 216 (2009).

### There was an insufficient factual basis for three of the charges.

This Court should vacate Mr. Taylor’s pleas and the related judgments in this matter because the factual bases presented by the State failed to support Mr. Taylor’s guilty plea to three of the charged crimes: larceny, safecracking, and injury to personal property. The factual basis the State provided at the plea hearing, which was relied upon by the trial court, did not “establish the essential elements of the charged offense[s]” and therefore did not meet the requirements of N.C.G.S. § 15A-1022(c). *Compare State v. Poore*, 172 N.C. App. 839, 842, 616 S.E.2d 639, 641 (2005).

#### There was no factual basis to support the plea to larceny.

The essential elements of larceny are: “(1) taking the property of another; (2) carrying it away; (3) without the owner’s consent; and (4) with intent to deprive the owner of the property permanently.” *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002). “A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away.” *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (cleaned up).

In this case, the property subject to the larceny charge was “a black in color Sentry safe[.]” (Rp 12). The State’s factual basis for the larceny charge was the following:

And, at that point, the -- it appeared that the garage door leading into the kitchen, leading into the house, had been unlocked and so that informant was with this defendant as well and they sort of fake arrested the informant and, at the same time, caught this defendant inside the house with gloves on, and that *he had been trying to access the safe*. And I know that there were some – there was a search warrant done for the vehicle. And at some point there were some toolbars, *some sort of instruments that we believe that he would have used to get into that safe*, but he was caught red-handed literally as he went into that residence. That would be a factual basis, Your Honor, of the second breaking and entering. *And, again, at that time, he was in the process of stealing that safe*.

(Tpp 13-14, emphasis added).

Thus, the State’s factual basis only shows that Mr. Taylor was “trying to access the safe” and had instruments in a vehicle “that we believe he would have used to get into that safe.” (Tpp 13-14). The State provided no facts to support its conclusory statement that Mr. Taylor was “in the process of stealing that safe.” (Tp 14). There was no factual basis for the essential elements that Mr. Taylor had either taken the safe or carried it away. Indeed, the State’s factual basis shows that only Mr. Taylor was “caught red-handed literally as he went into that residence.” (Tp 14). The State’s factual basis failed to establish Mr. Taylor got anywhere near the safe, let alone that he had accomplished even “[a] bare removal from the place in which he found the goods,” as is required to show larceny. *Carswell*, 296 N.C. at 103, 249 S.E.2d at 428 (cleaned up).

The trial court found there was a sufficient basis for the plea, and it accepted Mr. Taylor’s plea, based solely on the foregoing information. (Tp 14). While the owner of the property did later provide a victim impact statement in which he asserted the police had “clued [him] in” that Mr. Taylor had a “dolly loaded up with [his] safe on it,” (Tpp 20-21), he was not present when this occurred and his statement was not “sworn testimony” as contemplated by N.C.G.S. § 15A-1022(c). Further, our Supreme Court has held that facts provided *after* the acceptance of a plea “could not serve as a factual basis . . . [because] N.C.G.S. § 15A-1022(c) requires that the trial court make the determination of a factual basis *when accepting the plea*.” *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584 (emphasis added); *accord State v. Lewis*, 2013 N.C. App. LEXIS 362, \*17-18 (N.C. Ct. App. 2013)(unpublished) (“In the same vein, the evidence at defendant’s trial relating to the misdemeanor hit and run and misdemeanor possession of marijuana charges to which he pled guilty cannot form the factual basis for his pleas *because that evidence was admitted after his guilty pleas to those charges had already been accepted by the trial court*.”) (emphasis added). Thus, because there was no description of any taking or carrying away of the safe, there was an insufficient factual basis for the charge of larceny and the trial court erred in accepting Mr. Taylor’s plea to that charge.

#### There was no factual basis to support the charge of safecracking.

As charged in the present case, the pertinent elements of safecracking are that a defendant “unlawfully opens, enters, or attempts to open or enter a safe . . . by the use of explosives, drills, or tools[.]” N.C.G.S. § 14-89.1(a)(1). The means by which a defendant opens a safe is an essential element of the offense of safecracking. *State v. Ross*, 249 N.C. App. 672, 676, 792 S.E.2d 155, 158 (2016).

The State’s factual basis for the safecracking charge was substantially the same as its factual basis for the charge of larceny:

And, at that point, the -- it appeared that the garage door leading into the kitchen, leading into the house, had been unlocked and so that informant was with this defendant as well and they sort of fake arrested the informant and, at the same time, caught this defendant inside the house with gloves on, and that *he had been trying to access the safe*. *And I know that there were some – there was a search warrant done for the vehicle. And at some point there were some toolbars, some sort of instruments that we believe that he would have used to get into that safe*, but he was caught red-handed literally as he went into that residence. That would be a factual basis, Your Honor, of the second breaking and entering. *And, again, at that time, he was in the process of stealing that safe*.

(Tpp 13-14, emphasis added).

Thus, the State’s factual basis only shows that Mr. Taylor was “trying to access the safe” and had instruments *which were found in a vehicle* “that we believe he *would have* used to get into that safe.” (Tpp 13-14, emphasis added). The State described no facts showing that Mr. Taylor ever attempted to open the safe using tools, nor that he ever did in fact open the safe using tools. Again, the State’s factual basis shows that only Mr. Taylor was “caught red-handed literally as he went into that residence.” (Tp 14). The State’s factual basis for safecracking completely fails to show any use or attempted use of tools to enter the safe, as Mr. Taylor was charged with doing.

At best, the State’s factually unsupported conclusory statement that Mr. Taylor was “in the process of stealing that safe” might suggest a basis for concluding that Mr. Taylor was guilty of safecracking under N.C.G.S. § 14-89.1(b) for “unlawfully remov[ing the safe] from its premises . . . for the purpose of stealing, tampering with, or ascertaining its contents.” N.C.G.S. § 14-89.1(b). However, Mr. Taylor was not charged with unlawfully removing the safe from its premises, and “a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.” *Williams*, 318 N.C. at 628, 350 S.E.2d at 356. Further, as discussed above, there was no factual basis showing that Mr. Taylor ever actually removed the safe from its premises. Moreover, even if Mr. Taylor were attempting to remove the safe from its premises, N.C.G.S. § 14-89.1(b) does not provide equal punishment for *attempted* *removal* of a safe in the same way that subsection (a) punishes attempted and completed entry of a safe by various means. Therefore, assuming Mr. Taylor had been charged with attempted safecracking by removal under N.C.G.S. § 14-89.1(b), it would only have been punishable as a Class 1 misdemeanor under N.C.G.S. § 14-2.5, and it would not have been subject to habitual felon punishment enhancement.

Regardless of what Mr. Taylor *could have been* charged with, he was actually charged with safecracking by the use of tools. The State’s factual basis was insufficient to show any attempt to enter the safe through the use of tools, let alone the completion of that act. Therefore, there was an insufficient factual basis to support Mr. Taylor’s guilty plea to safecracking.

#### There was no factual basis to support the charge of injury to personal property.

For the reasons described above in Argument I, there was also an insufficient factual basis to support Mr. Taylor’s guilty plea to injury to personal property. In the event this Court concludes the indictments were somehow sufficient to charge Mr. Taylor with injury to personal property, the State’s factual basis establishes clearly that the property damaged was *real property* and not personal property. The State described no injury to any personal property whatsoever, and therefore provided no factual basis sufficient to support Mr. Taylor’s plea to injury to personal property.

The State’s factual basis regarding injury to personal property was the following:

And it appears the break-in occurred upstairs, pursuant to either throwing something through or somehow damaging the window -- the French doors to the residence which, at the time, we believed it was used to gain entry. That would be the basis for the injury to personal property was breaking that -- that window.

(Tp 12).

 While the State’s factual basis appears somewhat confused as to whether the property injured was a window or a door, the factual basis makes clear that the property was attached to the house – it was a door or window which was broken in order to gain entry to the residence. The indictment makes clear that the damaged property was a door. As described above, “[a] door attached to a building and the door’s component parts are *real property*.” *In re A.D.S.*, 2020 N.C. App. LEXIS 21, \*5 (unpublished) (emphasis added); *see also Zigler*, 42 N.C. App. at 152, 256 S.E.2d at 482 (holding that “the defendant wilfully and wantonly fired the shotgun and shattered the glass door of the police station, causing damage to real property.”).

 The factual basis clearly established that the property alleged to have been injured was real property, and not personal property. The State described no injury to any property whatsoever, whether personal or real, other than the French doors described above. There was simply no factual basis to support a plea to injury to personal property. Therefore, the trial court erred by accepting Mr. Taylor’s guilty plea to injury to personal property.

### A guilty plea which is not supported by a factual basis must be set aside.

Our Supreme Court has clearly held that “[a] defendant’s bare admission of guilt, or plea of no contest, always contained in such transcripts, does not provide the ‘factual basis’ contemplated by G.S. 15A-1022(c).” *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421. Moreover, our Supreme Court has stated that “[i]f the plea itself constituted its own factual basis, the statute requiring a factual basis to support the plea would be meaningless.” *Id.* Instead, as described above, there must be “some substantive material independent of the plea itself appear[ing] of record which tends to show that [a] defendant is, in fact, guilty” when the trial court accepts a guilty plea. *Id.* at 199, 270 S.E.2d at 421-22.

N.C.G.S. § 15A-1022(c) contains a statutory mandate which “requires an independent judicial determination that a sufficient factual basis exists *before* a trial court accepts a guilty plea.” *Agnew*, 361 N.C. at 333-34, 643 S.E.2d at 582 (emphasis added). The language of § 15A-1022 is plain and mandatory - a trial court “may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea.” N.C.G.S. § 15A-1022(c). A mandatory provision of a statute is one that must be followed. *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002). Our Supreme Court has long held that “[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court’s actions is preserved, notwithstanding the failure of the appealing party to object at trial.” *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994).

Further, under N.C.G.S. § 15A-1446(d)(16), errors occurring during the entry of a plea are reviewable on appeal “even though no objection, exception or motion has been made in the trial division.” N.C.G.S. § 15A-1446(d)(16); *see, e.g., State v. Szucs*, 207 N.C. App. 694, 701, 701 S.E.2d 362, 367 (2010). Accordingly, this Court and the Supreme Court have both reviewed factual basis arguments, and granted relief, despite the lack of any objection to the factual basis at the trial level. *See, e.g., Flint*, 199 N.C. App. at 724-27, 682 S.E.2d at 451-53 (vacating guilty plea based on insufficient factual basis without requiring defendant to have raised the issue below); *accord* *Keller*, 198 N.C. App. at 642-46, 680 S.E.2d at 214-16; and *Weathers*, 339 N.C. at 453, 451 S.E.2d at 272-73; *see also* *Poore*, 172 N.C. App. at 841-42, 616 S.E.2d at 640-41 (reviewing factual basis argument without requiring defendant to have raised the issue below); *accord* *State v. Heatwole*, 333 N.C. 156, 160, 423 S.E.2d 735, 737 (1992).

However, some decisions of this Court appear to conflict with the greater weight of cases cited above as well as N.C.G.S. § 15A-1446(d)(16), and hold that in order to preserve a factual basis argument for review, a defendant must simultaneously enter a guilty plea while also arguing the plea should not be accepted due to an insufficient factual basis. *See*, *e.g. State v. Monroe*, 256 N.C. App. 565, 569, 822 S.E.2d 872, 875 (2017) (“Assuming *arguendo* that we granted defendant’s petition [to review sufficiency of factual basis], the issue would not be properly before us due to his failure to raise this argument to the trial court.”).

To the extent this Court holds the reasoning in such cases is sound and controlling, Mr. Taylor requests this Court to invoke Rule 2 to suspend the requirements of the Rules of Appellate Procedure and review his challenge to the factual basis to prevent a manifest injustice. Both our Supreme Court and this Court have invoked Rule 2 to address unpreserved sufficiency claims because “when this Court firmly concludes . . . that the evidence is insufficient . . . it will not hesitate to reverse the conviction *sua sponte*, in order to prevent manifest injustice to a party.” *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1992) (cleaned up); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134-35, 676 S.E.2d 586, 590 (2009). Therefore, Mr. Taylor’s conviction of three crimes for which the factual bases were insufficient is a manifest injustice warranting the invocation of Rule 2.

Because there was nothing aside from the plea itself tending to show that Mr. Taylor was, in fact, guilty of larceny, safecracking, or injury to personal property, his guilty pleas thereto were unsupported by a factual basis. *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584*.* The judgments must be vacated and the case remanded for new proceedings in which defendant could “withdraw his guilty plea and proceed to trial on the criminal charges or attempt to negotiate another plea agreement.” *Flint*, 199 N.C. App. at 727, 682 S.E.2d at 453 (cleaned up). Further, as Mr. Taylor’s guilty plea was premised in part on his pleas to the foregoing charges, the plea agreement must be set aside. *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting), *rev’d for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam).

## The trial court erred by failing to follow the procedures established in N.C.G.S. § 15A-1024 when sentencing Mr. Taylor.

In the event this Court concludes the indictment was sufficient to confer jurisdiction on the trial court as to the charge of injury to personal property, and it concludes there was a sufficient factual basis to support Mr. Taylor’s guilty pleas, this case must nevertheless be remanded because the trial court failed to follow the procedures set forth in N.C.G.S. § 15A-1024 when sentencing Mr. Taylor.

N.C.G.S. § 15A-1024 mandates that a trial judge who determines that they will not sentence a defendant in accordance with the plea arrangement must first inform the defendant of that fact and inform the defendant that he may withdraw his plea. Here, the trial court did not sentence Mr. Taylor in accordance with the terms of the plea arrangement. However, the trial court failed to first inform Mr. Taylor of his right to withdraw the plea. Thus, the trial court failed to follow the procedures required by § 15A-1024. This error is preserved as a matter of law for appellate review even absent an objection by defense counsel and requires the sentence imposed by the trial court to be vacated, and the case to be remanded to the trial court for a sentencing in accordance with the mandates of N.C.G.S. § 15A-1024.

### Mr. Taylor and the State entered into a plea arrangement calling for a specific sentence and the trial court imposed a sentence deviating from that plea arrangement.

Mr. Taylor and the State entered into a plea arrangement whereby Mr. Taylor agreed to plead guilty to several charges as described above. (Rpp 21-24). In exchange for Mr. Taylor’s plea, the State agreed to Mr. Taylor receiving one consolidated sentence in the presumptive range, authorizing a minimum term of 89 months to 111 months in the court’s discretion. *See* N.C.G.S. § 15A-1340.17(c). The terms of the plea arrangement are set out below:



(Rp 23).

During the guilty plea hearing, after asking Mr. Taylor the questions required by N.C.G.S. § 15A-1022(a) and hearing the factual basis proffered by the State, the trial court found there was a factual basis for the plea and that Mr. Taylor’s plea was freely, voluntarily and understandingly made. (Tpp 2-14). The trial court stated that “[t]he defendant’s plea is hereby accepted by the Court and is ordered recorded.” (Tp 14). However, although the trial court accepted the plea arrangement which provided *only* for a single consolidated sentence, with the minimum term subject to the court’s discretion, it instead imposed two consecutive sentences. (Tpp 22-24; Rpp 28-33).

### Pursuant to N.C.G.S. § 15A-1024, if a judge elects to sentence a defendant in a manner other than that provided for in the plea arrangement, the judge must inform the defendant of that fact and inform the defendant of his right to withdraw the plea. If the defendant withdraws his plea, he is entitled to a continuance to the next session of court.

N.C.G.S. § 15A-1024 “applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed.” *State v. Williams*, 291 N.C. 442, 446, 230 S.E.2d 515, 517-18 (1976). “Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.” *Id*. at 446-47, 230 S.E.2d at 518.

Thus, it is well-settled law that once the trial court decides to impose a sentence different from the one provided in the plea agreement, “the court must: (1) inform the defendant of its decision; (2) inform the defendant that he or she may withdraw his or her plea; and (3) if the defendant chooses to withdraw his or her plea, grant a continuance until the next session of court.” *Blount*, 209 N.C. App. at 346, 703 S.E.2d at 925.

Here, the parties agreed that Mr. Taylor would receive one consolidated sentence with a minimum in the presumptive range between 89 and 111 months. In contradiction to the terms of the agreement, the trial court imposed two consecutive sentences. (Rp 23). The trial court, however, determined that the sentence provided for by the parties in the plea arrangement was insufficient, and imposed two consecutive sentences effectively doubling the amount of time Mr. Taylor agreed to in his plea arrangement. (Tpp 22-24; Rpp 28-33).

Our courts have made clear that “*any* change by the trial judge in the sentence that was agreed upon by the defendant and the State, even a change benefitting the defendant, requires the judge to give the defendant an opportunity to withdraw his guilty plea.” *State v. Marsh*, 265 N.C. App. 652, 655, 829 S.E.2d 245, 247 (2019) (emphasis in the original). To be clear, the trial court’s decision to impose a sentence other than the one provided for in the plea arrangement was authorized because North Carolina law does not bind a judge to the terms of the plea arrangement made by the parties. As the plea arrangement here itself contemplates, the law affords judges the discretion to alter the terms of the sentence for any reason. However, if the judge chooses to do so, the judge must “follow the procedure required by N.C. Gen. Stat. § 15A-1024” and “inform [the] defendant of [his] right to withdraw [his] plea[.]” *State v. Carriker*, 180 N.C. App. 470, 471, 637 S.E.2d 557, 558 (2006).

Here, the trial court failed to do so. And, when a judge fails to inform the defendant of his right to withdraw his plea as mandated by N.C.G.S. § 15A-1024, the sentence imposed must be vacated and the matter remanded to the trial court for a new sentencing hearing during which either the agreed-upon sentence is imposed or the procedures of N.C.G.S. § 15A-1024 are followed. *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004) (“Because the trial judge failed to follow the procedure mandated in N.C. Gen. Stat. § 15A-1024, we vacate defendant’s sentence and remand the matter to the trial court for proceedings consistent with those prescribed by N.C. Gen. Stat. § 15A-1024.”); s*ee also Carriker*, 180 N.C. App. at 471, 637 S.E.2d at 558 (“[W]e vacate defendant’s sentence on this ground[.]”).

### The trial court’s failure to advise Mr. Taylor of his right to withdraw his plea is preserved as a matter of law and is reversible error.

The trial court’s failure to advise Mr. Taylor of his right to withdraw his plea upon its imposition of a sentence different from that provided for in the plea arrangement is preserved as a matter of law, notwithstanding trial counsel’s failure to object. Moreover, it constitutes reversible error.

It is well-settled law that both sentencing errors and violations of statutory mandates are preserved without objection. Here, both rules are implicated. While a party must normally object to preserve an issue for appellate review, a defendant need not voice a contemporaneous objection to preserve a non-constitutional sentencing issue for appellate review. *State v. Meadows*, 371 N.C. 742, 747-48, 821 S.E.2d 402, 406 (2018). This exception exists because trial courts know or should know that a defendant is seeking the minimum or least punitive sentence possible. *Id*. Thus, there is no need to object to a sentencing issue to preserve the question for appellate review. *Id*. 371 N.C. at 746, 821 S.E.2d at 405. Therefore, although Mr. Taylor did not object to the trial court’s imposition of a different sentence than that which the parties agreed upon in the plea arrangement, the issue is preserved.

Moreover, N.C.G.S. § 15A-1024 creates a statutory mandate for judges. When the parties have entered into a plea arrangement and the judge, for any reason, determines to impose a sentence other than that provided for in the arrangement, “the procedure mandated in N.C. Gen. Stat. § 15A-1024” requires the judge to inform the defendant of his right to withdraw his plea. *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733. When a trial court acts contrary to a statutory mandate, the right to appeal the court’s action is preserved, notwithstanding the failure of the appealing party to object at trial. *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000). Therefore, although trial counsel did not object to the trial court’s imposition of a different sentence than that which the parties agreed upon in the plea arrangement, the issue is preserved.

In addition to being preserved as a matter of law, Mr. Taylor is not required to prove prejudice. This Court recently addressed the question whether a harmless or prejudicial error analysis is applicable to a violation of N.C.G.S. § 15A-1024. *Marsh*, 265 N.C. App. at 656, 829 S.E.2d at 248. This Court held that neither harmless error analysis nor proof of prejudicial error are required in cases involving N.C.G.S. § 15A-1024, “as plea arrangements are contractual in nature.” *Id*. Therefore, if there is “any change at all concerning the substance of the sentence imposed” the trial court is “required to inform Defendant of his right to withdraw his guilty plea pursuant to Section 15A-1024.” *Id*. (cleaned up). The failure of a trial court to do so requires vacatur of the sentence imposed, without proof of “a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.” *Id*. (cleaned up).

Finally, although not required to prove prejudice, Mr. Taylor unquestionably was prejudiced. The sentence imposed by the trial court is more punitive than the sentence agreed to by the parties, as it effectively doubled the amount of prison time Mr. Taylor, a then-72-year-old man, agreed to face when negotiating his plea. (Tp 4). Mr. Taylor gave notice of appeal as well as filing a motion for appropriate relief soon after his judgments were entered, claiming the trial court erred by failing to comply with N.C.G.S. § 15A-1024 and evidencing the prejudice he suffered as a result. (Rpp 34-57).

### Mr. Roberts is entitled to a new sentencing hearing.

When the trial court fails to inform the defendant of his right to withdraw his guilty plea, as required by N.C.G.S. § 15A-1024, the sentence imposed must be vacated and the matter remanded to the trial court. *Rhodes*, 163 N.C. App. at 195, 592 S.E.2d at 733. N.C.G.S. § 15A-1024 entitles the defendant to withdraw his plea if the judge deviates from the plea arrangement entered into by the parties. This Court should vacate the trial court’s sentence and remand for a new sentencing hearing during which the trial court can choose to either impose the agreed-upon sentence, or to persist in imposing a different sentence but comply with the terms of N.C.G.S. § 15A-1024.

Mr. Taylor and the State entered into a plea arrangement that provided for a specific sentence disposition. When the trial court chose to impose a different sentence than the one agreed upon by the parties, North Carolina law required it to inform Mr. Taylor of his right to withdraw his plea and continue the case to the next session of court. The trial court’s failure to do so constitutes reversible error.

# CONCLUSION

For the foregoing reasons and authorities, Mr. Taylor respectfully requests this Court to vacate his judgments and commitments in this matter and remand for any further necessary proceedings.

Respectfully submitted this, the 17th day of June, 2021.

 Electronically Submitted

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# CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2)

I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This, the 17th day of June 2021.

 Electronically Submitted

 Sterling Rozear

 Assistant Appellate Defender

# CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant’s Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon Kayla D. Britt, Assistant Attorney General, by sending it electronically to the following current email address, kbritt@ncdoj.gov.

This, the 17th day of June, 2021.

 Electronically Submitted

 Sterling Rozear

 Assistant Appellate Defender

No. COA21-277 FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

v. ) From Duplin County

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WILLIAM TAYLOR )

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**APPENDIX TO DEFENDANT-APPELLANT’S BRIEF**

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*In re A.D.S.*,

 2020 N.C. App. LEXIS 21

 (N.C. Ct. App. 2020) (unpublished) App. 1-5

*State v. Lewis*,

 2013 N.C. App. LEXIS 362

 (N.C. Ct. App. 2013)(unpublished) App. 6-14

1. Mr. Fennell’s first name is not provided in the transcript. [↑](#footnote-ref-1)