No. COA-19-487 SIXTEEN-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

 )

 v. ) From Robeson

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BOBBY ALAN LOCKLEAR )

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DEFENDANT-APPELLANT’S BRIEF

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

I. SHOULD THE JUDGMENT BE VACATED BECAUSE THE TRIAL COURT LACKED JURISDICTION TO ACCEPT THE PLEA AND ENTER JUDGMENT AGAINST MR. LOCKLEAR BECAUSE THE INDICTMENT WAS FATALLY DEFECTIVE?

II. SHOULD THE JUDGMENT BE VACATED BECAUSE MR. LOCKLEAR’S PLEA WAS UNSUPPORTED BY A FACTUAL BASIS?

**STATEMENT OF THE CASE**

 On December 4, 2017, Bobby Alan Locklear was indicted for discharging a weapon into an occupied dwelling, felony conspiracy, and injury to personal property. (Rp. 2) On December 11, 2018, he entered a plea of guilty to one count of misdemeanor injury to personal property. He received a sentence of 120 days incarceration, suspended for a period of 12 months supervised probation. (Rpp. 26-27) On December 20, 2018, Mr. Locklear gave written notice of appeal. (Rp. 28) On January 8, 2019, the Office of the Appellate Defender was appointed to represent him on appeal. (Rpp. 29-30) On March 11, 2019, the matter was assigned to undersigned counsel. (Rp. 31)

**STATEMENT OF THE FACTS**

 On May 1, 2017, Billie Carol Hammonds was in her house in Lumberton, North Carolina. (Rp. 12) Inside the home with Ms. Hammonds were four other individuals – Sequoia, DJ, Destiny, and Destiny’s unidentified child. (Rp. 12) DJ looked out the living room window of Ms. Hammonds’ home and saw Chance Lowery and two other individuals standing in the yard with guns. (Rp. 13) The individuals fired at the home. (Rp. 13) When the authorities arrived, they found four bullet holes on the front of the home, two bullet holes inside the master bedroom, and one bullet hole in a door frame. (Rp. 13) There were no projectiles located inside the home and no casings located outside the home. (Rp. 13)

 Sequoia Hammonds provided a statement and identified the men who shot at the home as Chance Lowery, Bobby Alan Locklear and Evone Thompson. (Rpp. 13-14)

 Chance Lowery gave a statement in which he admitted he was in the area of Ms. Hammonds’ home with Diamond Lowery and Mr. Locklear while the shooting occurred, but claimed that some unknown assailants in a black Impala shot Ms. Hammonds’ home. (Rp. 14)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Mr. Locklear appeals pursuant to N.C. R. App. P. 21 and N.C. Gen. Stat. § 15A-1444(e). Contemporaneously with this brief, Mr. Locklear filed a petition seeking review of the following by writ of certiorari: (i) the indictment is fatally defective, (ii) the factual basis was insufficient to support his plea, (iii) it is possible the notice of appeal was defective for failing to comply with the technical requirements of N.C. R. App. P. 4. The issues argued in the petition and fully contained in this brief are reviewable by writ of certiorari.

**ARGUMENT**

1. **THE JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT LACKED JURISDICTION TO ACCEPT MR. LOCKLEAR’S PLEA AND ENTER JUDGMENT AND COMMITMENT AGAINST HIM DUE TO A FATALLY DEFECTIVE INDICTMENT.**

***A. Introduction***

Mr. Locklear was indicted for, and convicted of, the crime of injuring personal property. However, the indictment alleged that the personal property Mr. Locklear injured was Ms. Hammonds’ residence. As a house is real property, not personal property, the indictment was fatally defective. Accordingly, the trial court was without jurisdiction to accept Mr. Locklear’s plea and his plea must be vacated and the matter remanded to Superior Court for further proceedings.

***B. Standard of review***

The question whether an indictment adequately contains facts supporting every element of the criminal charge is a question of law which this Court reviews *de novo*. *State v. Miller*, 159 N.C. App. 608, 583 S.E.2d 620 (2003), *aff’d*, 358 N.C. 133, 591 S.E.2d 520 (2004). Under a *de novo* review, this Court considers the matter anew. *N.C. Dep’t of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

###  *C. The indictment*

 The indictment returned against Mr. Locklear reads as follows:

 **File No. 17CRS52801**

**STATE VERSUS ) INDICTMENT**

 **)**

 **)**

**BOBBY ALAN LOCKLEAR ) III. Injury to Personal Property**

Date of offense 5/1/17 offense in violation of 14-160

III. And, the jurors for the state upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully and willfully did wantonly injure personal property, four bullet holes to the exterior and interior walls to the residence of 187 McKinnon Rollin Road, Lumberton, NC the property of Billie Carol Hammonds. The damage caused was in excess of $200.00, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Rp. 2)

###  *D.* A *valid indictment is necessary for the trial court to acquire jurisdiction. A fatally defective indictment can be challenged at any time because such an indictment, and any conviction that results from it, is a nullity.*

For well over one hundred years our appellate courts have held that Article I, Sections 22 and 23 of the North Carolina Constitution requires the return of a valid indictment to give a trial court jurisdiction to try and enter judgment against a defendant. *State v. Synder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996); *State v. Gallimore*, 24 N.C. 372, 377 (1842). Moreover, the due process clause of the Fourteenth Amendment guarantees a defendant the right to a state court pleading which alleges every element of the offense. *Hodgson v. Vermont*, 168 U.S. 262, 42 L.Ed. 461 (1897). Without a formal and sufficient accusation, the trial court acquires no jurisdiction whatsoever and the ensuing proceedings and conviction are a nullity. *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003).

 It is well-settled law that an indictment must allege all of the essential elements of the charged offense. *State v. Claudis*, 164 N.C. 521, 80 S.E.2d 261 (1913). Specifically, an indictment must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant’s commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. §15A-924(a)(5) (2018); *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

Because a valid indictment is necessary for a trial court to acquire jurisdiction in a matter, a facially invalid indictment can be challenged at any time because it, as well as any conviction that results from it, is a nullity. *State v. Call*, 353 N.C. 400, 428-429, 545 S.E.2d 190, 208 (2001); *State v. Wallace*, 352 N.C. 481, 528 S.E.2d 326 (2000); N.C. Gen. Stat. §15A-952(d)(2018).

###  *E. The indictment was fatally defective. Therefore, the trial court had no jurisdiction to accept Mr. Locklear’s plea and to enter judgment against him.*

The trial court had no jurisdiction to enter judgment and commitment against Mr. Locklear for injury to personal property for two reasons. First, the indictment failed to charge injury to personal property because it alleged the personal property Mr. Locklear injured was real property. Second, a defendant can be convicted only of the offense charged in the indictment and the body of this indictment charged injury to real property, not injury to personal property

North Carolina law criminalizes injury to real property and injury to personal property as separate offenses. *State v. Hardy*, 242 N.C. App. 146, 155, 774 S.E.2d 410, 416 (2015); N.C. Gen. Stat. § 14-127; N.C. Gen. Stat. § 14-160. As “there is a fundamental difference between personal property and real property” there are different charging requirements for each offense. *State v. Spivey*, 368 N.C. 739, 743, 782 S.E.2d 872, 875 (2016). But regardless of whether the charge is injury to real property or injury to personal property, the appropriate classification of the type of property the defendant is charged with injuring is required. *Hardy*, 242 N.C. App. at 155, 774 S.E.2d at 416.

While neither § 14-127 nor § 14-160 define real or personal property, N.C. Gen. Stat. § 12-3(6) provides that “real property shall be coextensive with lands, tenements and hereditaments[,]” while “personal property shall include moneys, goods, chattels, choses in action and evidences of debt . . . .”

Real property is inherently unique, it cannot be duplicated, and no two parcels of real estate are the same. *Spivey*, 368 N.C. at 744, 782 S.E.2d at 875. Accordingly, our Supreme Court held that an indictment for injury to real property must describe the property in sufficient detail to identify the parcel of real property injured. *Id*., 368 N.C. at 740, 782 S.E.2d at 872. That can be accomplished by including the street address or other clear designation identifying the parcel of real estate. *Id*., 368 N.C. at 743-44, 782 S.E.2d at 874-75.

Personal property is different from real property. Personal property is not inherently unique and it can be duplicated such that two pieces of personal property can be the same. Our Supreme Court recognized that personal property “is often fungible, such that two items can essentially be indistinguishable.” *Id*., 368 N.C. at 743, 782 S.E.2d at 875. Therefore, a description of the personal property is required as it is “nearly impossible” to “[d]ifferentiat[e] between two jugs of malt liquor, two sacks of tobacco seed, or two baggies of cocaine.” *Id*., 368 N.C. at 744, 782 S.E.2d at 875 (quoting *State v. Jones*, 367 N.C. 299, 311, 758 S.E.2d 345, 354 (2014)(Martin, J., concurring in part and dissenting in part)).

Although there can be questions regarding how and when personal property becomes so attached to real property as to become part of the real property, it is well-settled law that a house, once affixed to the land underneath it, becomes part of the realty to which it is affixed. *State v. Graves*, 74 N.C. 396, 396 (1876); *Wade v. Wade*, 72 N.C. App. 372, 377, 325 S.E.2d 260, 267 (1985)(citing *Ingold v. Assurance Co*., 230 N.C. 142, 52 S.E.2d 366 (1949)). Accordingly, 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). And, shooting a gun into a house, thereby damaging a window frame and door frame of the house, constitutes injury to real property. *State v. Lilly*, 195 N.C. App. 697, 700, 673 S.E.2d 718, 720 (2009).

The state purported to charge Mr. Locklear with injury to personal property and, in fact, convicted him of that offense. However, the indictment failed to charge injury to personal property because the property it alleged Mr. Locklear injured was real property. Because real property is not personal property, a defendant cannot commit injury to personal property if the injured property is real property. Therefore, the indictment was fatally defective and failed to confer jurisdiction on the trial court, rendering the proceedings and conviction a nullity. *Partridge*, 157 N.C. App. at 570, 579 S.E.2d at 399.

While the state purported to charge Mr. Locklear with injury to personal property, the body of the indictment, in fact, charged injury to real property. However, judgment and commitment was entered against Mr. Locklear 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); *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420-21 (1986); *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979); *State v. Cooper*, 275 N.C. 283, 286, 167 S.E.2d 266, 268 (1969); *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). As Mr. Locklear was not indicted for the offense for which he was convicted, the trial court did not have jurisdiction to enter judgment and commitment against him for that offense.

***F. A plea of guilty waives all defenses other than the sufficiency of the indictment.***

“A plea of guilty waives all defenses other than the sufficiency of the indictment.” *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). 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.” *State v. McGee*, 175 N.C. App. 586, 623 S.E.2d 782 (2006). Accordingly, this Court has addressed in direct review the sufficiency of an indictment when the defendant pleaded guilty. *State v. Frink*, 177 N.C. App. 144, 627 S.E.2d 472 (2006); *McGee*, 175 N.C. App. at 587, 623 S.E.2d at 784; *State v. Jones*, 161 N.C. App. 60, 588 S.E.2d 5 (2003), *overruled in part on other grounds*, 358 N.C. 473, 598 S.E.2d 125 (2004). Therefore, this Court can review this claim in Mr. Locklear’s direct appeal.

However, if this Court disagrees and concludes that this issue is not cognizable on direct review, counsel has submitted a petition for writ of certiorari contemporaneously with this brief raising the challenge to the indictment.

Alternatively, the Appellant requests that this Court invoke Rule 2 to suspend the requirements of the Rules of Appellate Procedure and review Mr. Locklear’s challenge to the defective indictment. 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. Bolinger*, 320 N.C. 596, 601-02, 359 S.E.2d 459, 462 (1987) and *State v. Jones*, 161 N.C. App. 60, 65, n.3, 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, “If 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.” *Jones*, 161 N.C. App. at 65, n.3 588 S.E.2d at 9, n.3. 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.

***G. 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, 88-89, 202 S.E.2d 798, 799 (1974). A judgment entered by a court that lacks jurisdiction is void. *Stroupe v. Stroupe*, 301 N.C. 656, 661, 273 S.E.2d 434, 438 (1981). “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 or vacate any order entered without authority.” *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted).

As the indictment in this case was fatally defective, the trial court did not acquire jurisdiction to accept Mr. Locklear’s plea and enter judgment against him. Accordingly, the judgment must be vacated and the case remanded for new proceedings in which Mr. Locklear 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).

**II. THE JUDGMENT MUST BE VACATED BECAUSE MR. LOCKLEAR’S PLEA WAS UNSUPPORTED BY A SUFFICIENT FACTUAL BASIS.**

***A. Introduction***

The state’s factual basis for the crime of injury to personal property alleged that Mr. Locklear injured the door and walls of Ms. Hammonds’ home. Because Ms. Hammonds’ home, including its walls and doors, is real property, not personal property, the state failed to offer a sufficient factual basis for the offense. Accordingly, the trial court erred in accepting his plea. The plea must be vacated and the matter remanded to Superior Court for further proceedings.

***B. Standard of review***

 Whether the State’s factual basis was sufficient to support the defendant’s plea is a question of law reviewed *de novo* on appeal. *See State v. Agnew,* 361 N.C. 333, 643 S.E.2d 581 (2007); *State v. Weathers*, 339 N.C. 441, 451 S.E.2d 266 (1994). Under a *de novo* review, this Court considers the matter anew. *N.C. Dep’t of Envtl. & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

***C. The factual basis did not allege that Mr. Locklear injured personal property.***

 The entirety of the state’s factual basis is reproduced verbatim herein:

 MS. HEAVNER: Judge, had this matter gone to trial, the State’s evidence would have shown that on or about May 1st of 2017, Deputy Brent Chavis responded to 187 McKinnon Rowland Road in Robeson – in Lumberton, in reference to a weapons violations.

 When he got there he spoke with a Billie Hammonds who said she was in the master bedroom of that residence talking to a Sequoia Hammonds and Sequoia’s boyfriend, DJ.

 She said that a person by the name of Destiny and Destiny’s child were in the living room at the time. She said that the man that was known as DJ looked out the window that is located in the master bedroom and saw Chance Lowery standing in the yard, and he stated they have guns.

 She said that the people with guns including, this Chance Lowery person, started shooting at the house. She yelled at them to stop shooting. They started shooting again. They had to run to the wash room and take cover by the wash room dryer.

 Sequoia Hammonds also gave a statement that she had broken up with Chance Lowery and started dating DJ and that Chance Lowery was staying at her address with her when they were together. She had kicked him out because of a drug problem. And when she started dating DJ, Chance – that’s when Chance Lowery came to the front yard with two other males armed with firearms. She saw them as well.

 When officers responded, they saw four bullet holes on the left front of the residence. Inside the residence there were two bullet holes on the master bedroom side and one in the door from what appeared to have come – that appeared to have come from the window and came into the house that way why the window was open. There were no projectiles located inside the residence and they did not find any casings around the outside of the residence.

 On May 1st of 2017, after this happened, Sequoia Hammonds gave a statement and to officers when she said that Chance Milicai Lowery (phonetic) had a long gun and was shooting. And then in July 17th of 2017 she made contact with officers about what had happened on May 1st and advised that Chance Lowery did not have a firearm but that he was with Bobby Alan Locklear, this defendant, and an Evon Jamal Thompson (phonetic) when they shot into her mother’s residence.

 Change Lowery was detained. Transported to Robeson County Sheriff’s Office, was read his rights. He offered a statement. His statement placed him with Diamond Lowery and Bobby Locklear, this defendant, in the area of 187 McKinnon Rowland Road.

 During the time of the shooting, Lowery said that he saw the person known as DJ, who was later identified as Michael Elvis being his real name. Lowery said that he saw Michael Elvis pull into Sequoia Hammond’s residence. And as Elvis went into the residence, a black Impala drove by slowly and began shooting at the Hammonds’ residence. He said that him and Diamond Lowery then got into Bobby Locklear’s red Charger and left. And then Diamond Lowery and Bobby Alan Locklear were arrested in reference to this incident. They refused to give statements. That would be the State’s evidence in this case.

(Rp. 12-14)

***D. Without an adequate factual basis, the trial court erred in accepting Mr. Locklear’s plea of guilty.***

“A plea of guilty or no contest is improperly accepted unless the trial judge has first determined that there is a factual basis for the plea.” *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1979). This determination may be made in one of several ways, including:

1. A statement of facts by the prosecutor.

2. A written statement of the defendant.

3. An examination of the presentence report.

4. Sworn testimony, which may include reliable hearsay.

5. A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c).

 The requirements of this statute are mandatory. “A defendant's bare admission of guilt contained in the transcript of a plea does not provide the factual basis for the plea.” *State v. Ross,* 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005), *aff’d*, 360 N.C. 355, 625 S.E.2d 779 (2006). Nor does a fully executed plea transcript satisfy the statute, even if accompanied by the indictment and a factual basis stipulation from defense counsel. *Agnew,* 361 N.C. at 337, 643 S.E.2d at 584. The trial court must be provided with substantive facts allowing for an independent judicial determination of defendant's actual guilt.

*Id.* And in this case there were no substantive facts offered by the prosecutor to establish that Mr. Locklear injured personal property belonging to Ms. Hammonds.

 The elements of injury to personal property are: willfully and wantonly; injuring; the personal property of another. N.C. Gen. Stat. § 14-160. Personal property is defined as “[g]enerally, all property other than real estate; as goods, chattels, money, notes, bonds, stocks, and choses in action generally, including intangible property.” Black’s Law Dictionary 1217 (6th ed. 1990). The property the state identified in its factual basis cannot be the subject of injury to personal property because the property is real property. (Rp. 2) As our Legislature has chosen to criminalize injury to real property and injury to personal property as separate offenses, one cannot commit injury to personal property if the property injured is real property.

If our Legislature intended for injury to personal property to be committed by injuring real property, “it would have been a simple matter to include the explicit phrase” in the statute. *In re Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994). But the absence of such language in the injury to personal property statute, and the criminalization of injury to personal property and injury to real property as separate and distinct offenses, evidences a legislative intent that injury to personal property cannot be accomplished by injuring real property. *See* *Fabrikant v. Currituck County*, 174 N.C. App. 30, 42, 621 S.E.2d 19, 28 (2005) (legislature knows how to draft statute, so its language must control). And, a court is “without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain.” *Board of Architecture v. Lee*, 264 N.C. 602, 611, 142 S.E.2d 643, 649 (1965).

Before accepting Mr. Locklear’s plea, the trial court was required to ensure a sufficient factual basis existed to support the plea pursuant to § 15A-1022(c). Such information “must appear in the record, so that an appellate court can determine whether the plea has been properly accepted.” *State v. Flint*, 199 N.C. App. 709, 724, 682 S.E.2d 443, 452 (2009)(*quoting State v. Sinclair*, 301 N.C. 193, 198, 270 S.E.2d 418, 421 (1980)). This requires a review of the record to determine what evidence was before the trial court and whether or not it was sufficient to demonstrate that each guilty plea had a proper factual basis. *Flint*, 199 N.C. App. at 725, 682 S.E.2d at 452. However, the only evidence before the trial court upon which it could rely was the prosecutor’s verbal recitation. And nothing in that verbal recitation established that Mr. Locklear injured Ms. Hammonds’ personal property.

Therefore, Mr. Locklear’s plea was unsupported by a sufficient factual basis and the trial court erred by finding a sufficient factual basis, accepting the plea, and entering judgment. *See Agnew*, 361 N.C. at 335-36, 643 S.E.2d at 583.

**E. The only evidence offered to support the factual basis was the prosecutor’s statement of facts.**

North Carolina law provides that a trial court may find the existence of a factual basis by relying on forms of evidence other than the prosecutor’s statement of facts. In this case, no other forms of evidence existed from which the trial court could determine the factual basis. Accordingly, the only evidence offered to support the factual basis in this case was the prosecutor’s statement of facts which was insufficient to establish that Mr. Locklear injured personal property.

On the Transcript of Plea form Mr. Locklear wrote “yes” in response to the question “[d]o you agree that there are facts to support your plea and do you consent to the Court hearing a summary of the evidence?” (Rp. 22) At the hearing, the trial court asked Mr. Locklear, “Do you agree there are facts to support your plea and consent to me hearing a summary of the evidence?” (Rp. 12) Mr. Locklear replied, “Yes, sir.” (Rp. 12) After the state provided its factual summary the trial court then asked defense counsel if he stipulated that there “is a factual basis for the conviction of this offense?” (Rp. 15) Defense counsel replied, “Yes, Your Honor, I do.” (Rp. 15)

None of those answers constituted evidence from which the trial court could determine the factual basis. Each of the answers was nothing more than a stipulation that facts exist to support the plea and that the trial court could hear a summary of the state’s evidence. Our Supreme Court addressed the effect of these sort of stipulations on the question of the sufficiency of a factual basis and held that a “stipulation to the existence of a factual basis [is] insufficient because the stipulation [gives] the trial court no additional substantive information about the case as required by statute.” *Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. The answers provided by Mr. Locklear and his attorney were nothing more than that – a stipulation to the existence of facts to support the plea. As such, they provided the trial court with no additional substantive information about the case as required by § 15A-1022.

Additionally, the record contains the indictment charging Mr. Locklear with injury to personal property and other charges which were dismissed against him. The state may argue that those items provided the trial court with sufficient evidence from which it could determine that a factual basis existed. Such an argument is erroneous. Neither the indictment for the crime of injury to personal property nor the dismissed charges can be said to support the trial court’s determination of a factual basis in this case for two reasons.

First, nothing in the indictment for injury to personal property nor in the dismissed charges provides any evidence to support the charge that Mr. Locklear injured Ms. Hammonds’ personal property. Nothing in any of the charging language identifies any personal property belonging to Ms. Hammonds which was injured by Mr. Locklear. (Rp. 2)

Second, this Court has held that if indictments are to be relied upon to support the factual basis, the record must establish that the trial court, in fact, relied upon them in determining the factual basis. *Flint*, 199 N.C. App. 726, 682 S.E.2d at 453. Inclusion of the indictments in the record on appeal is not sufficient to establish that. *Id*. It must be established that the indictments were before the trial court during the plea. *Id*. That is established by the trial court stating, on the record, that it relied upon the indictments when making its factual basis determination. *Id*. In Mr. Locklear’s case, the trial court never indicated that it was relying on the indictment when making its factual basis determination. Accordingly, the record does not support that the trial court relied on the indictment when making its factual basis determination.

None of these forms of evidence constituted “substantive material” establishing Mr. Locklear’s guilt. Therefore, none was sufficient to support Mr. Locklear’s plea. *Agnew,* at 337, 643 S.E.2d at 584.

***F. This issue is preserved for, and reviewable on, direct appeal.***

N.C. Gen. Stat. § 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. 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.” 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); *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988); *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985). Therefore, this Court can, and should, review Mr. Locklear’s factual basis claim on direct review.

However, if this Court finds the factual basis issue is not properly considered on direct appeal, this Court can still review this issue on the basis of Mr. Locklear’s petition for writ of certiorari filed contemporaneously with this brief. And, as discussed in that petition, this Court has specifically reviewed such claims in petitions for writ of certiorari in other cases. In *Flint*, 199 N.C. App. at 724, 682 S.E.2d at 451, the defendant filed a direct appeal brief challenging the lack of factual basis to support 21 of the 68 charges to which he pleaded guilty. The defendant requested, in the event this Court determined that he did not have an appeal of right, that this Court construe the brief as a petition for writ of certiorari. *Id*. This Court concluded that the defendant did not have an “appeal of right as to this issue,” considered the brief as a petition for writ of certiorari, allowed the petition, and addressed the merits of the claim to find an insufficient factual basis for 21 of the 68 convictions. *Id*.

Recently, in the case of *State v. Joe*, 247 N.C. App. 479, 787 S.E.2d 464, 2016 N.C. App. LEXIS 518 \*8-11 (2016) (unpublished)[[1]](#footnote-1), this Court reviewed the sufficiency of the factual basis for a guilty plea pursuant to petition for writ of certiorari. Therein, this Court allowed defendant’s petition for writ of certiorari to find an insufficient factual basis for the guilty plea to one of defendant’s convictions. *Id*.

Alternatively, the Appellant requests that this Court invoke Rule 2 to suspend the requirements of the Rules of Appellate Procedure and review Mr. Locklear’s 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 “[w]hen this Court 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); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134-35, 676 S.E.2d 586, 590 (2009). Therefore, Mr. Locklear’s conviction for a crime for which no court has found a factual basis exists is a manifest injustice warranting the invocation of Rule 2.

***G. Conclusion***

As Mr. Locklear’s plea was unsupported by any factual basis, the trial court erred by finding there was a sufficient factual basis, accepting the plea, and entering judgment against him. *See Agnew*, 361 N.C. at 335-36, 643 S.E.2d at 583. The judgment 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

# Conclusion

For the foregoing reasons and authorities, Mr. Locklear respectfully requests that this Court issue its writ of certiorari to review issues argued in this brief and fully contained in the petition filed contemporaneously with this brief, on the merits, and that plea and judgment be vacated and new proceedings ordered.

 Respectfully submitted, this the 24th day of June, 2019.

(Electronically Filed)

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# CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the above and foregoing Brief has been duly served upon Robert C. Ennis, Assistant Attorney General, North Carolina Department of Justice, via email to rennis@ncdoj.gov.

 This the 24th day of June, 2019.

(Electronically Filed)

Katherine Jane Allen

Assistant Appellate Defender

No. COA-19-487 SIXTEEN-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

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 v. ) From Robeson

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BOBBY ALAN LOCKLEAR )

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APPENDIX

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Appendix Pages

App. 1-8 *State v. Joe*, 247 N.C. App. 479, 787 S.E.2d 464, 2016 N.C. App. LEXIS 518 (2016) (unpublished)

1. A copy of the unpublished opinion is attached. [↑](#footnote-ref-1)