No. 119PA21 DISTRICT TWENTY-TWO (a)

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

)

v. ) From Iredell County

)

Maderkis Deyawn Rollinson )

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**DEFENDANT-APPELLANT’S NEW BRIEF**

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**DEFENDANT-APPELLANT’S NEW BRIEF**

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**ISSUES PRESENTED**

1. Did the Court of Appeals err by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1) where the trial court did not personally engage with Mr. Rollinson to determine whether (i) he wanted to have a bench trial on habitual felon status and (ii) he understood the consequences of waiving his right to a jury trial?
2. Did the Court of Appeals err by requiring Mr. Rollinson to establish that he was prejudiced by the trial court’s failure to address him personally to determine whether he knew the consequences of waiving his constitutional right to a jury trial as mandated by N.C.G.S. § 15A-1201(d)(1) and N.C. Const. art. I, § 24?

**STATEMENT OF THE CASE**

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

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

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

**GROUNDS FOR APPELLATE REVIEW**

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

**STATEMENT OF THE FACTS**

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

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

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

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

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

**Mr. Rollinson’s Trial**

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

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

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

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

[MR. ROLLINSON]: Yes, sir.

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

[MR. ROLLINSON]: Yes, sir.

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

[MR. ROLLINSON]: Yes, sir.

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

(T pp 4-5).

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

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

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

󠄀 1. The court consents to the defendant’s waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed in accordance with that waiver, and as otherwise required by law.

󠄀 2. The court does not consent to the defendant’s waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed as required by law.

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

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

**Habitual Felon Phase**

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

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

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

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

[*Brief pause*]

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

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

[COURT]: Go ahead.

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

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

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

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

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

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

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

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

(T pp 143-44). The court sentenced Mr. Rollinson to 101-134 months in prison. (T p 144). After the court pronounced judgment, the prosecutor noted, “The only thing is he … didn’t admit the habitual felon.” (T p 144). The court responded, “He pled guilty to that.” (T p 144).

**The Court of Appeals’ Opinion**

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

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

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

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

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

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

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

**STANDARD OF REVIEW**

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

**ARGUMENT**

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

The Court of Appeals erred by concluding that Mr. Rollinson knowingly and voluntarily waived his right to a jury trial on habitual felon status. N.C.G.S. § 15A-1201(d)(1) expressly requires that the trial judge (1) address the defendant personally and (2) determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury. In this case, the trial judge did *not* personally address Mr. Rollinson in open court about his decision to waive his constitutional right to a jury trial or take any measures to ensure he understood and appreciated the consequences of his decision to waive the right to trial by jury before it proceeded to a bench trial on habitual felon status. The Court of Appeals’ conclusion is legally erroneous because it ignores the plain language of N.C.G.S. § 15A-1201(d)(1) and directly conflicts with the precedent established by this Court and the U.S. Supreme Court.

1. **Applicable Legal Principles**

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

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

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

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

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

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

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

N.C.G.S. § 15A-1201(b).

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

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

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

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

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

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

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

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

[COURT]: … At this point in the trial it’s a separate trial. The jurors are coming back to hear the habitual felon matter, or *you can waive your right to a jury trial* and we can proceed.[[3]](#footnote-3)

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

[*Brief pause*]

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

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

[COURT]: Go ahead.

(T p 136) (emphasis added).

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

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

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

The Court of Appeals concluded “[t]he transcript shows the trial court complied with N.C. Gen. Stat. § 15A-1201(d)(1).” *Rollinson*, 2021-NCCOA-58, ¶ 23 (quoting N.C.G.S. § 15A-1201(d)(1)). In support, the Court of Appeals found that “the trial court addressed [Mr. Rollinson] personally” when it stated, “[Y]ou can waive your right to a jury trial.” *Id*. at ¶ 24 (quoting T p 136). The Court of Appeals acknowledged that the trial court did not communicate directly with Mr. Rollinson about the waiver of his right to a jury trial and noted that “defense counsel answered for [Mr. Rollinson] after speaking to him.” *Id*.

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

The Court of Appeals’ conclusion that the trial court complied with N.C.G.S. § 15A-1201(d)(1) is legally erroneous and contrary to the plain language of the statute for two reasons. First, the trial court did *not* personally address Mr. Rollinson in open court about his decision to waive his right to a jury trial on the habitual felon charge. The trial judge only communicated with defense counsel about Mr. Rollinson’s decision. Second, the trial judge’s failure to personally address Mr. Rollinson precluded the court from determining that Mr. Rollinson understood and appreciated the consequences of his decision to waive the right to trial by jury as required by N.C.G.S. § 15A-1201(d)(1) before it proceeded to a bench trial. Accordingly, the trial court made no findings that Mr. Rollinson had such an appreciation or understanding. Indeed, defense counsel’s statement—that Mr. Rollinson was “not requesting” rather than *waiving* *his* *right* to a jury trial—indicates confusion on this crucial point. (T p 136). For both of these reasons, the Court of Appeals’ conclusion that the trial court complied with N.C.G.S. § 15A-1201(d)(1) is erroneous and ignores the plain language of the statute.

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

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

N.C.G.S. § 15A-1201(d)(1) expressly requires that the *trial judge* (1) address the defendant personally and (2) determine whether the defendant fully understands and appreciates the consequences of the defendant’s decision to waive the right to trial by jury. Because N.C.G.S. § 15A-1201(d)(1) requires the trial judge to address the defendant personally, defense counsel’s communication with the court cannot be a satisfactory substitute for communication between the court and the defendant. Similarly, defense counsel’s communication with Mr. Rollinson cannot satisfy the trial court’s responsibility of ensuring that Mr. Rollinson’s desire to waive his constitutional right to a jury trial is the product of an informed choice.

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

A trial court cannot assume that the defendant knows his rights. A trial court must conduct the mandated inquiry. *State v. Bullock*, 316 N.C. 180, 186 (1986) (trial court must conduct statutorily mandated inquiry to affirmatively demonstrate the defendant knowingly and voluntarily waived a constitutional right). Because the trial court failed to address Mr. Rollinson personally and ensure that he knew the consequences of his decision to waive his right to a jury trial, the Court of Appeals erred by concluding that the trial court complied with N.C.G.S. § 15A-1201(d)(1). *See generally* *State v. Williamson*, 227 N.C. App. 204, 220-21 (2020) (reversing habitual felon conviction where the trial judge communicated with defendant’s attorney but failed to address the defendant personally and failed to assess whether the defendant’s plea was an informed choice as required by N.C.G.S. § 15A-1022(c)); *State v. Wilkins*, 225 N.C. App. 492, 497-98 (2013) (vacating habitual felon conviction where the trial court sentenced the defendant as an habitual felon where the issue was not submitted to the jury and the trial court accepted the defendant’s stipulation without first addressing the defendant personally and making inquiries of the defendant as required by N.C.G.S. § 15A-1022); *State v. Gilmore*, 142 N.C. App. 465, 471 (2001) (holding that a defendant’s stipulation to habitual felon status “in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.”)

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

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

The Court of Appeals erroneously assumed that even though the trial judge failed to conduct the inquiry mandated by section 15A-1201(d)(1), Mr. Rollinson nevertheless knowingly and voluntarily waived his right to a jury trial because he failed to make an affirmative showing to the contrary. The Court of Appeals’ analysis and conclusion directly conflicts with the precedent established by this Court in *Bullock* and by the U.S. Supreme Court in *Boykin v. Ala. Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Bullock*, 316 N.C. at 186.

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

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

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

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

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

At the beginning of the trial in *Hamer*, defense counsel informed the court that the defendant waived his right to a jury trial and that the State consented to a bench trial. *Hamer*, 2021-NCSC-67, ¶ 5. The trial court accepted the waiver through counsel of defendant’s right to a jury trial and proceeded to a bench trial. *Id*. The trial court subsequently announced that N.C.G.S. § 15A-1201 required him to personally address the defendant “and ask if he waives a jury trial and understands the consequences of that.” *Id*. at ¶ 6. The following colloquy occurred, in relevant part:

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

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

*Hamer*, 2021-NCSC-67, ¶ 6.

On appeal, the defendant argued he did not knowingly and voluntarily waive his right to a jury trial. *Hamer*, 2021-NCSC-67, ¶ 9. This Court concluded that “the pretrial exchange between the trial court, defense counsel, and the State, coupled with defendant’s subsequent clear and unequivocal answers to questions posed by the trial court demonstrated that he understood he was waiving his right to a trial by jury and the consequences of that decision.” *Id*. at ¶ 23.

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

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

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

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

DEFENDANT: No, sir.

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

DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

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

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

In *State v. Swink*, the trial court engaged in a colloquy with the defendant prior to trial and asked the defendant about his age, education, mental faculties, representation by counsel, and his request to waive his right to a jury trial. *State v. Swink*, 252 N.C. App. 218, 219-20 (2017). During the colloquy the defendant affirmed to the trial court that he wished “to have a judge decide [his] case as opposed to a jury of 12 individuals[.]” *Id.* The trial court concluded that the defendant “knowingly and with advice from counsel ... made his individual decision to waive his right to a jury trial and will be allowed to go forward with a bench trial.” *Id.* at 224. The defendant signed a written waiver of jury trial form and reaffirmed – through counsel – his desire to waive his right to a jury trial on the date of trial. *Id.*

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

Similar to the Court of Appeals’ holdings in *Rutledge* and *Swink*, the Court of Appeals also concluded the defendant’s waiver of the right to a jury trial was knowing and voluntary in an unpublished decision where the trial court personally addressed the defendant and questioned her about her decision to waive the constitutional right to a jury trial. *See* *State v. French*,2021-NCCOA-606 (unpublished) (trial court’s colloquy established the defendant fully understood and appreciated her decision to waive a jury trial where the court personally addressed the defendant, the court explained to the defendant the differences between bench trials and jury trials, and personally asked the defendant if she wished to waive her right to a jury trial);[[4]](#footnote-4) *see also State v. Cranford*,2021-NCCOA-511, ¶¶ 12-17 (unpublished) (where the trial court asked the defendant one question regarding the waiver of his right to a jury trial and the record failed to disclose the substance of defense counsel’s statements or describe on the record the defendant’s request to waive his right to a jury trial, the court held that “[e]ven if we were to presume error in the violation of the statutory mandate, N.C. Gen. Stat. § 15A-1201(d)(1), Defendant cannot establish prejudice to warrant a new trial”).[[5]](#footnote-5)

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

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

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

Although Mr. Rollinson, defense counsel, and the court signed the Waiver of Jury Trial form (AOC-CR-405) (R pp 61-62), the execution of a written waiver is no substitute for compliance by the trial court with N.C.G.S. § 15A-1201(d)(1). *See State v. Sinclair*, 301 N.C. 193, 199 (1980) (a completed Transcript of Plea from is inadequate to satisfy the mandate of N.C.G.S. § 15A-1022(c), which ensures a knowing and voluntary plea); *State v. Evans*, 153 N.C. App. 313, 315 (2002) (“The execution of a written waiver is no substitute for compliance by the trial court with the statute” governing waiver of a constitutional right).Bottom of Form When the court signs a certification indicating the statutory waiver procedure has been followed, but the record belies that fact, the waiver is invalid. *State v. Warren*, 82 N.C. App. 84, 87 (1986).

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

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

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

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

1. **Applicable Legal Principles**

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

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

In the context of a defendant’s right to a jury trial, the United States Supreme Court has stated that, in light of “the Sixth Amendment’s clear command to afford jury trials in serious criminal cases[, w]here th[e] right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant’s guilt,” given that “the error in such a case is that the wrong entity judged the defendant guilty.” *Rose*, 478 U.S. at 578 (citations omitted); *see also Sullivan*, 508 U.S. at 281-82 (stating that, since “‘[t]he right to trial by jury reflects ... a profound judgment about the way in which law should be enforced and justice administered,’” “[t]he deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as ‘structural error.’” (citations omitted) (quoting *Duncan v. Louisiana*, 391 U.S. at 155)).

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

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

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

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

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

DEFENDANT: Yes, sir.

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

DEFENDANT: Yes, sir.

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

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

*Hamer*, 2021-NCSC-67, ¶ 6.

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

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

This Court relied on *State v. Garcia* to explain that while a substantial violation of N.C.G.S. § 15A-1201(d)(1) amounts to structural error or reversible error per se, a mere technical violation does not. *Hamer,* 2021-NCSC-67, ¶ 17 (citing *State v. Garcia*, 358 N.C. 382, 410 (2004)). In *Garcia*, the defendant argued that the trial court committed structural error by deviating from the jury selection procedure of N.C.G.S. § 15A-1214. *Id.* (citing *Garcia*, 358 N.C. at 410). The Court explained that for structural error to apply, the defendant must show the violation of a constitutional right that “*necessarily* rendered the criminal trial fundamentally unfair or unreliable.” *Garcia*, 358 N.C. at 410. The *Garcia* Court found the defendant failed to show that he was denied a trial by a fair and impartial jury or that any other constitutional error resulted from the jury selection procedure employed at his trial. *Id.* The Court concluded that the defendant showed “only a technical violation” of the jury selection statute; and, “*[w]ithout more,* this statutory violation is insufficient to support a claim of constitutional structural error.” *Id.* (emphasis added). *See State v. Thompson*, 359 N.C. 77, 87 (2004) (alleged violation of jury selection statute amounts to structural error where the violation is “so serious as to render [defendant’s] trial unreliable;” however, “a mere technical violation of N.C.G.S. § 15A-1214 is insufficient to support a claim of structural error”).

In *Hamer*, this Court reasoned that the trial court merely committed a technical violation of N.C.G.S. § 15A-1201(d)(1) by belatedly obtaining the defendant’s waiver. *Hamer*, 2021-NCSC-67, ¶ 18. In this Court’s view, such a technicality was “simply an error in the trial process itself that did not affect the framework within which the trial proceeded.” *Id*. (internal quotation and citation omitted). In other words, structural error did not apply in *Hamer* because the defendant had shown only a technical violation of N.C.G.S. § 15A-1201(d)(1). Because the error in *Hamer* involved a technical violation of N.C.G.S. § 15A-1201(d)(1), the defendant had to show that he was prejudiced by the error. *Hamer*, 2021-NCSC-67, ¶ 21.

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

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

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

The circumstances in *Hamer* are vastly different than the circumstances in this case. In *Hamer*, a technical statutory violation occurred because the trial court’s colloquy pursuant to N.C.G.S. § 15A-1201(d)(1) was *untimely*. Mr. Rollinson’s case is not about the timeliness of the trial court’s colloquy; it is about the complete failure of the trial court to conduct *any* colloquy with Mr. Rollinson before proceeding to a habitual felon bench trial. In *Hamer*, the trial court personally addressed the defendant, conducted a colloquy pursuant to N.C.G.S. § 15A-1201(d)(1), and the defendant personally affirmed his desire to waive his right to a jury trial. Unlike the facts in *Hamer*, the trial court failed to address Mr. Rollinson personally and failed to take any steps to ensure the waiver of his right to a jury trial on habitual felon status was a knowing and voluntary decision. Because the errors in Mr. Rollinson’s case were not mere technical statutory violations, structural error applies in this case.

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

The Court of Appeals did not address Mr. Rollinson’s contention that the trial court’s failure to comply with N.C.G.S. § 15A-1201(d)(1) is reviewed on appeal as structural error or prejudice per se. Instead, to obtain relief, the Court of Appeals required Mr. Rollinson to show (1) the trial court violated the waiver requirements set forth in N.C.G.S. § 15A-1201 and (2) that he was prejudiced by the error. *Rollinson*, 2021-NCCOA-58, ¶ 9. The court imposed its prejudice requirement without regard to the long-standing precedent holding that such fundamental violations of the right to a jury trial are deemed prejudicial per se. *Sullivan*, 508 U.S. at 281-82; *Rose*, 478 U.S. at 578; *Duncan*, 391 U.S. at 148-62; *Poindexter*, 353 N.C. at 444; *Bunning*, 346 N.C. at 257; *Bindyke*, 288 N.C. at 621-22; *Hudson*, 280 N.C. at 80. Unlike in *Hamer*, the violation was not a mere technicality. It went to the heart of the waiver statute: ascertaining whether Mr. Rollinson was knowingly and intelligently waiving his constitutional right to a jury trial. In *Hamer*, this Court held that a similar violation of the waiver statute would have given Hamer the right to compel a mistrial, regardless of prejudice. *Hamer*, 2021-NCSC-67, ¶ 24. The Court of Appeals’ requirement that Mr. Rollinson show prejudice cannot be reconciled with this Court’s reasoning in *Hamer*.

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

A defendant is not required to make an affirmative showing that he “did not understand or appreciate the consequences of the waiver” or that his decision to waive his right to a jury trial “was made unknowingly or without an understanding of the consequences of doing so.” *Rollinson*, 2021-NCCOA-58, ¶¶ 24, 29. Instead, a knowing and voluntary wavier must be shown on the record. *State v. Pruitt*, 322 N.C. 600, 604 (1988) (holding that the defendant was entitled to a new trial when there was “nothing in the record which show[ed]” a knowing and voluntary waiver of his right to counsel as required by N.C.G.S. § 15A-1242).

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

The Court of Appeals has likewise found per se reversible error where the trial court wholly failed to address the defendant personally and conduct the colloquy required by N.C.G.S. § 15A-1022. *See, e.g*., *State v. Williamson*, 227 N.C. App. 204, 220-21 (2020) (reversing habitual felon conviction where the trial judge communicated with defendant’s attorney but failed to address the defendant personally and failed to assess whether the defendant’s plea was an informed choice as required by N.C.G.S. § 15A-1022(c)); *State v. Wilkins*, 225 N.C. App. 492, 497-98 (2013) (vacating habitual felon conviction where the trial court sentenced the defendant as an habitual felon where the issue was not submitted to the jury and the trial court accepted the defendant’s stipulation without first addressing the defendant personally and making inquiries of the defendant as required by N.C.G.S. § 15A-1022); *State v. Gilmore*, 142 N.C. App. 465, 471 (2001) (holding that a defendant’s stipulation to habitual felon status “in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea.”)

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

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

Even if the Court of Appeals correctly required Mr. Rollinson to demonstrate prejudice, the totality of the circumstances below demonstrate the prejudice required. Here, the trial court’s failure to conduct a proper colloquy with Mr. Rollinson led to confusion that ultimately deprived Mr. Rollinson of a lawful adjudication of his habitual felon status. After hearing evidence at the habitual felon proceeding, the trial court said that it was finding Mr. Rollinson attained habitual felon status based on Mr. Rollinson’s guilty plea. The prosecutor alerted the court that Mr. Rollinson had not pled guilty. The trial court disagreed and reiterated that it was accepting Mr. Rollinson’s guilty plea. The Court of Appeals erred in discounting the trial court’s express and emphatic words declaring that it was accepting Mr. Rollinson’s guilty plea to habitual felon status. Because the confusion engendered by the inadequate waiver deprived Mr. Rollinson of a lawful conviction, prejudice is manifest.

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

The Court of Appeals held that “the statement by the trial court that [Mr. Rollinson] pleaded guilty to attaining habitual felon status when he did not so plead was error, though not prejudicial error.” *Rollinson*, 2021-NCCOA-58, ¶ 26. The Court of Appeals found that prejudicial error did not occur because (1) the trial judge “simply misspoke” when he said Mr. Rollinson pleaded guilty to habitual felon status and (2) the issue was rectified because the written judgment indicated Mr. Rollinson received a bench trial and indicated the court “adjudge[d] defendant to be a habitual felon to be sentenced.” *Id*. The Court of Appeals erred on both counts.

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

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

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

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

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

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

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

The trial court stated – five times – that Mr. Rollinson pleaded guilty to habitual felon status and even reaffirmed its belief when the prosecutor attempted to correct the court. Contrary to Court of Appeals’ decision, the transcript does *not* show the court’s oral statements that Mr. Rollinson pled guilty to habitual felon status were merely an inadvertent slip of the tongue. Thus, the Court of Appeals’ conclusion that the “transcript shows the trial court judge intended to state [Mr. Rollinson] was found guilty, not that he pleaded guilty” is not supported by the record. *Rollinson*, 2021-NCCOA-58, ¶ 26.

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

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

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

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

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

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

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

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

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

Mr. Rollinson asks this Court to take judicial notice of the documents contained in the Record on Appeal in other cases that have come before this Court where the defendant *pleaded guilty* to habitual felon status and habitual felon status is listed on the judgment and commitment along with the other offenses for which the defendant was found guilty pursuant to a jury trial. N.C.G.S. § 8C-1, Rule 201; N.C. R. App. P. 37; *State* *v. Thompson,* 349 N.C. 483, 497 (1998) (“This Court may take judicial notice of the public records … within the state judicial system.”); *State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶ 24 (taking judicial notice of trial court’s findings of fact in a different action); *State v. Ward*, 338 N.C. 64, 127 (1994) (taking judicial notice of record and appellate opinion in different action); *Swain v. Creasman*, 260 N.C. 163, 164 (1963) (taking judicial notice of record in different action).

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

A screenshot of a computer

Description automatically generated with low confidenceSimilarly, in *State v. Austin*, the defendant was convicted of assault on a female and habitual misdemeanor assault following a jury trial. *State v. Austin*, 378 N.C. 272, 2021-NCSC-87, ¶ 1. The defendant pleaded guilty A screenshot of a computer

Description automatically generated with low confidenceto having attained habitual felon status. *Id*. As in *Tucker*, the trial court in *Austin* checked the box indicating that the defendant was found guilty pursuant to a trial by jury. Habitual felon status was listed next to the defendant’s convictions of assault on a female and habitual misdemeanor assault even though it was undisputed that the defendant pleaded guilty to having attained habitual felon status. *State v. Austin*, COA19-1110, R p 66; (App. 3).[[7]](#footnote-7)

A screenshot of a computer

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

As shown by the judgment and commitment orders in *Tucker*, *Austin*, and *Robinson*, the fact that habitual felon status is listed with the substantive offenses of conviction does not mean that habitual felon status was attained by the same means of conviction as the substantive offense(s) on the judgment. Therefore, the Court of Appeals’ assertion that the judgment shows Mr. Rollinson received a habitual felon bench trial because “habitual felon” was listed on the judgment and commitment order along with the substantive offenses for which Mr. Rollinson was found guilty pursuant a bench trial is without merit.

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

Text, letter

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

(R p 66).

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

1. Mr. Rollinson was prejudiced.

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

The absence of a valid adjudication of habitual felon status cannot be harmless error. Mr. Rollinson was prejudiced because he was erroneously sentenced as an habitual felon in the absence of a knowing and voluntary guilty plea, a verdict of guilt by twelve peers, or a verdict of guilt by a judge after a knowing and voluntary waiver of the right to a jury trial. Therefore, the judgment sentencing Mr. Rollinson as an habitual felon should be vacated.

**CONCLUSION**

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

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

Electronic Submission

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**CERTIFICATE OF FILING AND SERVICE**

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

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

This the 30th day of March, 2022.

Electronic Submission

Hannah Hall Love

Assistant Appellate Defender

No. 119PA21 DISTRICT TWENTY-TWO (a)

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA )

)

v. ) From Iredell County

)

Maderkis Deyawn Rollinson )

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**APPENDIX**

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1. The 13-14 May 2019 trial transcript is cited as (T p x). [↑](#footnote-ref-1)
2. The decision in *State v. Rollinson*, 2021-NCCOA-58 (unpublished) is appended to this New brief. [↑](#footnote-ref-2)
3. The italicized language above is the language quoted by the Court of Appeals in support of its conclusion that the trial court personally addressed Mr. Rollinson as required by N.C.G.S. § 15A-1201(d)(1). *Rollinson*, 2021-NCCOA-58, ¶ 24. [↑](#footnote-ref-3)
4. The decision in *State v. French*,2021-NCCOA-606 (unpublished) is appended to this New Brief. [↑](#footnote-ref-4)
5. The decision in *State v. Cranford*,2021-NCCOA-511 (unpublished) is appended to this New Brief. [↑](#footnote-ref-5)
6. The relevant pages of the filed Record on Appeal in *State v. Tucker*, COA19-715 are appended to this New Brief. (App. 45-48). [↑](#footnote-ref-6)
7. The relevant pages of the filed Record on Appeal in *State v. Austin*, COA19-1110 are appended to this New Brief. (App. 1-4). [↑](#footnote-ref-7)
8. The relevant pages of the filed Record on Appeal in *State v. Robinson*, COA14-224 are appended to this New Brief. (App. 25-28). [↑](#footnote-ref-8)