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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1074

Filed: 6 June 2017

Montgomery County, Nos. 12 CRS 051235, 12 CRS 051236, 13 CRS 667

STATE OF NORTH CAROLINA

v.

ANTHONY BERNARD BOWDEN, Defendant.

Appeal by Defendant from judgments entered 16 July 2014 by Judge Timothy S. Kincaid in Montgomery County Superior Court. Heard in the Court of Appeals 3 April 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Brian D. Rabinovitz, for the State.*

*Office of the Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Anthony Bernard Bowden (“Defendant”) appeals his convictions of felony fleeing to elude arrest with a motor vehicle, misdemeanor operating a motor vehicle to elude arrest, resisting a public officer, and two counts of driving while license revoked (“DWLR”), and as a habitual felon. Defendant argues the trial court lacked

jurisdiction to sentence him as a habitual felon because the indictment was fatally defective. Defendant also argues the trial court lacked jurisdiction to try Defendant on the two misdemeanor charges of DWLR and the misdemeanor charge of resisting an officer. We hold the trial court had jurisdiction to try Defendant as a habitual felon. However, we hold trial court lacked jurisdiction to try Defendant on the two DWLR charges and the misdemeanor charge of resisting an officer. Accordingly, we vacate the trial court's judgment on the misdemeanor charges and remand Defendant's remaining charges for resentencing.

### **I. Factual and Procedural Background**

On 19 August 2012, the Mount Gilead Police Department arrested and charged Defendant on warrants for driving while license revoked, felony fleeing/eluding arrest with a motor vehicle, and resisting a public officer (12 CRS 051235). On the same day, the Mount Gilead Police Department charged Defendant on warrants for driving while license revoked, felony fleeing/eluding arrest with a motor vehicle, and driving a motor vehicle with no registration (12 CRS 051236).

On 28 January 2013, a Montgomery County Grand Jury indicted Defendant on the two felony charges of fleeing to elude arrest with a motor vehicle. On 16 September 2013, another Montgomery County Grand Jury indicted Defendant for being a habitual felon. On 15 July 2014, the trial court called Defendant's case for trial. The State's evidence tended to show the following.

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The State first called Deputy Roger Roberts of the Montgomery County Sheriff's Office. On 7 August 2012, the Montgomery County Sheriff's Office received an out-of-county order for Defendant's arrest for a felony probation violation<sup>1</sup>. After receiving the order, officers made several attempts to locate and apprehend Defendant.

On 17 August 2012, a confidential informant told Deputy Roberts that Defendant was riding a red four-wheeled all-terrain vehicle ("ATV") in the Highland School Community<sup>2</sup> on Marshall Street. Deputy Roberts decided to investigate. He drove to the Highland School area. This area contained a wooded area and a cornfield located behind a nearby residence. Upon arrival, Deputy Roberts immediately heard an ATV. He proceeded to the edge of the cornfield and noticed where an ATV "mow[ed] down" a trail through it. Because Deputy Roberts hunted this area in the past, he knew the ATV headed toward Williams Street from the cornfield.<sup>3</sup> Deputy Roberts followed the trail on foot.

Deputy Roberts radioed Mount Gilead officers for assistance. Officer James Lewellen of the Mount Gilead Police Department answered and told Deputy Roberts he was on his way to Williams Street. Deputy Roberts told Officer Lewellen that

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<sup>1</sup> The record fails to reveal the county from which this order originated.

<sup>2</sup> This community is located in the town of Mount Gilead.

<sup>3</sup> Williams Street is a dead-end road running to the side of Highland School.

Defendant was on an ATV and he had warrants on Defendant. Deputy Roberts then continued walking through the field on foot.

Officer Lewellen radioed Deputy Roberts. Officer Lewellen told Deputy Roberts he could see Defendant driving toward Airstrip Road. Deputy Roberts replied, on his radio, that someone needed to go to Airstrip Road. Deputy Roberts also directed officers to Hearne Farm Road, where the airstrip ends. Officer Chadley Drye of the Mount Gilead Police Department then picked up Deputy Roberts as he exited the cornfield.

Deputy Roberts arrived at the Airstrip Road area and began to look for Defendant. Deputy Roberts observed “fresh” ATV tracks near Airstrip Road. However, Deputy Roberts did not know where Defendant went from that point. Officers did not apprehend Defendant on 17 August 2012.

On 18 August 2012, a dispatcher notified Deputy Roberts that Defendant was on Haithcock Road, south of Mount Gilead, and headed toward N.C. 109. Deputy Roberts asked Officers Lewellen and Drye to help him find Defendant. Deputy Roberts suggested the officers go down N.C. 109, south of Mount Gilead near Hamer Creek Church, at the Richmond County line. Deputy Roberts told the officers that Defendant would be on an ATV on Haithcock Road headed toward N.C. 109. Deputy Roberts headed toward that location, and met up with the officers at the intersection of McKay Hill Road and Thomasville Church Road.

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The officers told Deputy Roberts that they met Defendant on a blue ATV and Defendant drove “all over the road.” The officers searched for Defendant and drove by a gate to a logging road and wooded area. This area consisted of several hundred acres of heavy woods. The officers helped set up a perimeter around the woods. Deputy Roberts and other law enforcement “kept the roads hot” and set up a perimeter, in case Defendant exited the woods.

The State next called Special Agent Allen Roberts with Alcohol Law Enforcement.<sup>4</sup> Agent Roberts and Deputy Roberts are brothers. On 18 August 2012, Deputy Roberts visited Agent Roberts’s home while Agent Roberts was off duty. Deputy Roberts told him members of the Montgomery County Law Enforcement were attempting to apprehend Defendant, and they needed an ATV. Agent Roberts kept an ATV in his outbuilding. He decided to provide assistance in apprehending Defendant. Agent Roberts dressed in his “duty gear” and brought his ATV to the wooded area, where officers last saw Defendant.

Agent Roberts knew the area from riding his ATV there and from fishing in the Pee Dee River. He heard on his radio that officers arrested Defendant in the woods. Agent Roberts drove his ATV into the woods to assist. He saw Officer Joseph Majors and members of the Candor Police Department in the woods. Officer Majors held Defendant at gunpoint with a shotgun and waited for additional help before he

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<sup>4</sup> The State also called Captain David Little, Jr. and Deputy James Lewellen.

placed handcuffs on Defendant. Agent Roberts saw Defendant's blue ATV flipped on its side, and in a ditch. Agent Roberts got off of his ATV and handcuffed Defendant.

The State called Officer Majors, a K-9 officer for the Candor Police Department. On 18 August 2012, Officer Majors spoke with Deputy Roberts about the search for Defendant. Deputy Roberts asked Officer Majors to help in the search for Defendant, since he had an ATV and was familiar with the area. Officer Majors contacted a relative, Eddie Thompson, who knew the area. Thompson drove the ATV and Officer Majors rode on the back of the ATV with his shotgun. They proceeded to the area where they expected Defendant to be. After they entered the woods, Officer Majors discovered ATV tracks.

As they followed the tracks, they saw a blue ATV. Officer Majors recognized Defendant driving the ATV. After a few minutes, Defendant turned around, saw Officer Majors and Thompson, and "took off at a high rate of speed." Thompson followed Defendant. Officer Majors estimated the ATVs traveled at approximately fifty miles per hour. They drove through some "very rough terrain." Officer Majors nearly fell off the ATV and accidentally discharged his shotgun. Defendant increased his speed. At that point, Defendant turned "on to a power line," hit a ditch, and flipped his ATV. Defendant fell onto the ground. Defendant was still on the ground when Officer Majors got close to him. Officer Majors advised Defendant to stay where he was. Defendant replied, "You've got me. I'm not gonna go anywhere."

The State next called Officer Danny Blake of the Star Police Department. On 18 August 2012, while off duty at home, Officer Blake monitored radio traffic. He heard Deputy Robert's request for help in apprehending Defendant in the Thomasville Church Road area. Officer Blake drove to that area and "parked on the side of 731 'cause [Deputy Roberts] was advising that the subject was on trails and they didn't know exactly where he was headed, but they wanted to keep the area contained." Officer Blake drove his car, which was specifically designed for off-road use.

Officer Blake waited about forty-five minutes. He heard over his radio "they had the subject in custody and they gave a location as to where it was." Because he knew the area, he "drove to where they said that they had went into the woods where [he] found the Mt. Gilead Police Department's Tahoe parked on the side of the road." Officer Blake and Deputy Roberts arrived at the same time.

Deputy Roberts joined Officer Blake in his car. Officer Blake drove around the gate and towards the area where officers had Defendant in custody. Officer Blake described the road as initially a logging road that "turns into just treacherous four-wheeler trails beyond that point." Upon entering the woods, Officer Blake and Deputy Roberts met Officers Lewellen and Drye as they were walking. Officers Drye and Lewellen got in Officer Blake's car, and they all drove to Defendant's location.

Once officers reached Defendant, Deputy Roberts placed Defendant into Officer Blake's car.

Prior to the close of the State's evidence, the State inquired, outside the jury's presence, as to the scope of Defendant's proposed stipulation to the DWLR charges. The trial court informed Defendant, "when you stipulate to something, you are basically relieving the State of the obligation to prove a certain element of an offense." The trial court further stated, "[i]n this case, the tactical reason [to stipulate to DWLR] would be that the jury would not actually see your driving record and what you've been convicted of . . . or what resulted in the revocation of your license." Defendant replied he did not "have a problem" with stipulating that his license was revoked on the dates of the two offenses. The trial court further inquired, "[d]o you understand that the jury will be informed that you stipulated to [DWLR] so the State does not have to prove it?" Defendant assented.

After the close of the State's evidence, Defendant moved for dismissal. The trial court denied Defendant's motion. Defendant did not present any evidence.

During the jury charge, the trial court informed the jury that Defendant stipulated his "license [was] in a state of revocation on [17 and 18 August 2012] and that Defendant had knowledge." The trial court also instructed the jury on the elements of felony operating a motor vehicle to elude arrest, as well on the lesser included offense of misdemeanor operating a motor vehicle to elude arrest. The trial



court explained in order for the jury to find Defendant guilty of the felony charge, the jury must find two aggravating factors:

First, that the Defendant was operating a vehicle in a reckless manner or reckless driving. Reckless driving is operating a vehicle at a speed and in a manner so as to endanger persons or property.

And second, that the Defendant was driving while his license [was] revoked.

The jury found Defendant guilty of felony operating a motor vehicle to elude arrest, misdemeanor operating a motor vehicle to elude arrest, resisting a public officer, and two counts of DWLR. Defendant pled guilty to being a habitual felon. The trial court sentenced Defendant to 76 to 104 months imprisonment. The trial court consolidated Defendant's misdemeanors, and imposed an active sentence of 120 days imprisonment, to be served at the expiration of Defendant's sentence in 12 CRS 051236.

Defendant failed to give timely notice of appeal. On 17 November 2015, Defendant filed a petition for writ of certiorari to review the judgments in 12 CRS 051236 and 13 CRS 667. On 2 December 2015, this Court allowed Defendant's petition for writ of certiorari.

On 15 December 2016, Defendant filed a second petition for writ of certiorari and a petition for writ of supersedeas. In his second petition for writ of certiorari, Defendant requested this Court review case number 12 CRS 051235. In his petition

for writ of supersedeas, Defendant asked this Court to stay the enforcement of the judgments entered against him in 12 CRS 051236 and 13 CRS 667. On 29 December 2016, this Court denied Defendant's petition for writ of supersedeas and referred Defendant's second writ of certiorari to this panel. We allow this petition in the interest of reviewing all of the judgments against Defendant entered by the trial court on 16 July 2014.

## **II. Standard of Review**

In criminal cases, the State has the burden to show "beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citing *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 835 (1993)). "We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation omitted). "When the record shows a lack of jurisdiction in the lower court, the appropriate part of the appellate court is to arrest judgment or vacate any order entered without authority." *Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829 (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

## **III. Analysis**

We review Defendant's contentions in two parts: (A) the trial court's jurisdiction to try Defendant as a habitual felon; and (B) the trial court's jurisdiction to try Defendant on certain misdemeanor charges.

### **A. Habitual Felon Indictment**

Defendant contends the habitual felon indictment contains a fatal defect because it failed to specify the state or sovereign against whom the three prior felonies were committed, in violation of N.C. Gen. Stat. § 14-7.3 (2016). Although the habitual felon indictment omits the statutory language, we conclude the trial court still had jurisdiction to try Defendant as a habitual felon.

“Jurisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). N.C. Gen. Stat. § 14-7.1 (2016) provides “[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal or state court in the United States or combination thereof is declared to be a habitual felon . . . .” N.C. Gen. Stat. § 14-7.1. The indictment charging Defendant as a habitual felon must set forth the following:

[T]he date that prior felony offenses were committed, *the name of the state or other sovereign against whom said felony offenses were committed*, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (emphasis added).

However, even though “a statute requires a particular allegation, the omission of such an allegation from an indictment is not necessarily fatal to jurisdiction[.]” *State v. Taylor*, 203 N.C. App. 448, 453, 691 S.E.2d 755, 761 (2010) (alteration in

original) (quoting *State v. Inman*, 174 N.C. App. 567, 569, 621 S.E.2d 306, 308 (2005)).

Thus:

[w]hile, ordinarily, the word “must” and the word “shall,” in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action, it is not necessarily so and the legislative intent is to be derived from a consideration of the entire statute.

*Id.* at 454, 691 S.E.2d at 761 (quoting *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978)).

The purpose of an habitual felon indictment is to provide a defendant “with sufficient notice that he is being tried as a recidivist to enable him to prepare an adequate defense to that charge,” and not to provide the defendant with an opportunity to defend himself against the underlying felonies . . . . [A]n indictment for habitual felon is sufficient if it provides a defendant with notice of his prior felony convictions.

*State v. Briggs*, 137 N.C. App. 125, 130-31, 526 S.E.2d 678, 681-82 (2000) (quoting *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995)). “Notification is sufficient if the illegal act or omission alleged in the indictment is ‘clearly set forth so that a person of common understanding may know what is intended.’” *State v. Haddock*, 191 N.C. App. 474, 477, 664 S.E.2d 339, 342 (2008) (quoting *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984)). The essential question in the habitual felon indictment is whether another felony was committed. *State v. Locklear*, 117 N.C. App. 255, 260, 450 S.E.2d 516, 519 (1994).

In reviewing the indictment before us, we first consider whether the indictment sufficiently indicates the state against whom the felonies were committed under N.C. Gen. Stat. § 14-7.3. Then, we turn to whether the trial court had jurisdiction to try Defendant as a habitual felon.

i. N.C. Gen. Stat. § 14-7.3

In reviewing the “name of the state or sovereign” statutory requirement for a habitual felon indictment under N.C. Gen. Stat. § 14-7.3, this Court looks to the language of each challenged indictment. *State v. Montford*, 137 N.C. App. 495, 500-01, 529 S.E.2d 247, 251 (2000); *State v. Hodge*, 112 N.C. App. 462, 467, 436 S.E.2d 251, 254-55 (1993); *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990). This Court then determines whether the indictment, in its entirety, sufficiently satisfies the statute. *Montford*, 137 N.C. App. at 500-01, 529 S.E.2d at 251; *Hodge*, 112 N.C. App. at 467, 436 S.E.2d at 254-55; *Williams*, 99 N.C. App. at 335, 393 S.E.2d at 157.

Our Court reviewed habitual felon indictments in *State v. Montford*, *State v. Hodge*, and *State v. Williams*. In those cases, our Court concluded, even though the indictment did not explicitly reference the “name of the state or sovereign,” those indictments sufficiently implied the name of the “state or sovereign” against whom the defendant committed his prior felonies. *Montford*, 137 N.C. App. at 500-01, 529 S.E.2d at 251; *Hodge*, 112 N.C. App. at 467, 436 S.E.2d at 254-55; *Williams*, 99 N.C.

App. at 335, 393 S.E.2d at 157. A review of the indictments' language in those cases is instructive in the case *sub judice*.

In *Montford*, this Court concluded the omission of "North Carolina" in the body of the indictment was not a fatal defect. *Montford*, 137 N.C. App. at 500-01, 529 S.E.2d at 251. The caption at the top of the habitual felon indictment stated "State of North Carolina" and "Carteret County." *Id.* at 500-01, 529 S.E.2d at 251. In the body of the indictment, however, where the indictment set forth the three prior felonies, the indictment only noted the felonies occurred in "Carteret County." *Id.* at 500-01, 529 S.E.2d at 251. The indictment did not further specify a state or sovereign. *Id.* at 500-01, 529 S.E.2d at 251. In upholding the indictment, this Court reasoned "[t]he association of Carteret County with North Carolina at the top of the indictment, coupled with the subsequent listing of Carteret County as the locale of the prior felony convictions, is sufficient to indicate the state against whom the prior felonies were committed." *Id.* at 501, 529 S.E.2d at 251.

In *Hodge*, this Court also concluded the habitual felon indictment at issue was sufficient. *Hodge*, 112 N.C. App. at 467, 436 S.E.2d at 254-55. That indictment stated the first of the three prior felonies occurred in "Wake County, North Carolina[.]" *Id.* at 467, 436 S.E.2d at 254. The indictment then described the other two prior felony convictions as merely occurring in "Wake County[.]" without naming a state. *Id.* at 467, 436 S.E.2d at 254. This "description of defendant's three prior felony convictions

is contained in the same sentence, separated only by semi-colons . . . and the use of ‘Wake County’ to describe the sovereignty against which the felonies were committed, is clearly a reference to Wake County, North Carolina.” *Id.* at 467, 436 S.E.2d at 254.<sup>5</sup>

In *Williams*, the habitual felon indictment set out defendant’s prior felonies. *Williams*, 99 N.C. App. at 335, 393 S.E.2d at 157. The indictment then explicitly stated the defendant acted in violation of an enumerated “North Carolina General Statute” for each felony. *Id.* at 335, 393 S.E.2d at 157. This Court ruled the inclusion of the statutory citation for each prior felony constituted a “sufficient statement of the name of the state or sovereign against whom the felonies were committed to comport with the requirements of [N.C. Gen. Stat.] § 14-7.3.” *Id.* at 335, 393 S.E.2d at 157.<sup>6</sup>

Here, the indictment contains the heading “State of North Carolina[,] Montgomery County[.]” The indictment then states:

On or about SEPTEMBER 8, 2002, ANTHONY BOWDEN did commit the felony of POSSESSION OF COCAINE, and that on or about DECEMBER 11, 2003, ANTHONY BOWDEN was convicted of the felony of POSSESSION OF COCAINE in Stanly County Superior Court; and that on or

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<sup>5</sup> This Court also considered the “state or sovereign” statutory requirement in *State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997). The circumstances surrounding the indictment in *Mason* are substantially similar to those in *Hodge*. In *Mason*, this Court concluded the indictment notified defendant of the state against whom the felonies were committed when the indictment stated the first felony occurred in “Wake County, North Carolina,” and the second felony occurred in “Wake County[.]” but did not list a state. *Id.* at 323, 484 S.E.2d at 821.

<sup>6</sup> See also *State v. Sinclair*, 191 N.C. App. 485, 663 S.E.2d 866 (2008) where the indictment sufficiently named the state against whom the felonies were committed when for each prior felony, the indictment stated that the felonies were committed in violation of a specific North Carolina General Statute. *Id.* at 495, 663 S.E.2d at 873-74.

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about JULY 1, 2004, ANTHONY BOWDEN did commit the felony of POSSESSION OF STOLEN GOODS, and that on or about MAY 5, 2005, ANTHONY BOWDEN was convicted of the felony of POSSESSION OF STOLEN GOODS in Stanly County Superior Court; and that on or about SEPTEMBER 5, 2011, ANTHONY BOWDEN did commit the felony of BREAKING AND ENTERING, and that on or about JULY 9, 2012, ANTHONY BOWDEN was convicted of the felony of BREAKING AND ENTERING in Richmond County Superior Court.

In contrast to the cases where this Court has ruled there is sufficient information in the indictment to link the county where the conviction occurred with the State of North Carolina, here, there is no such relationship between our State and Stanly County or Richmond County. While the indictment's caption sufficiently ties Montgomery County to North Carolina, Defendant's three prior felony convictions did not occur in Montgomery County. Rather, the indictment states the prior felony convictions occurred in "Stanly County Superior Court" and "Richmond County Superior Court." Without more, there is nothing to tie or link these counties to the State of North Carolina. Thus, we must now determine whether, nonetheless, the trial court had jurisdiction to try Defendant as a habitual felon.

ii. Jurisdiction

We must now determine whether, notwithstanding the error under N.C. Gen. Stat. § 14-7.3, the trial court had jurisdiction to try Defendant as a habitual felon. Our decision rests on whether Defendant had notice that "he is being tried as a recidivist[.]" *Briggs*, 137 N.C. App. at 130, 526 S.E.2d at 681 (citation omitted).



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We note that neither the State's brief nor Defendant's brief include any citations to cases in which an indictment completely omitted one of listed criteria under N.C. Gen. Stat. § 14-7.3. Thus, our decision is framed by comparison to other cases where the indictment fell short of N.C. Gen. Stat. § 14-7.3.

This Court held the State gave defendant sufficient notice when it charged him as a habitual felon and the indictment alleged the date on which defendant was sentenced for the prior crime, instead of the date on which defendant pled guilty. *State v. Smith*, 112 N.C. App. 512, 516, 436 S.E.2d 160, 162 (1993). Even though the indictment failed to contain the date on which defendant pled guilty, this Court held the defect was not fatal since the indictment still notified defendant of the prior felony conviction that would be used to convict him as a habitual felon. *Id.* at 516, 436 S.E.2d at 162.

In *Briggs*, the habitual felon indictment alleged defendant had been convicted of three felonies, including "the felony of breaking and entering buildings in violation of N.C.G.S. [§] 14-54." 137 N.C. App. at 130, 526 S.E.2d at 681 (alteration in original). However, under N.C. Gen. Stat. § 14-54, a defendant may be charged with either felony or misdemeanor breaking or entering. *Id.* at 130, 526 S.E.2d at 681. The indictment also failed to allege the particular felony defendant intended to commit pursuant to the breaking and entering. *Id.* at 130, 526 S.E.2d at 681. This Court upheld the indictment, since it clearly notified defendant he was being tried as a

recidivist, and stated defendant had been convicted of *felony* breaking and entering. *Id.* at 130-31, 526 S.E.2d at 681-82.

In *State v. Lewis*, 162 N.C. App. 277, 590 S.E.2d 324 (2004), this Court found no error when the trial court allowed the State to amend a habitual felon indictment when the original indictment incorrectly stated the date and county of the prior conviction. *Id.* at 284, 590 S.E.2d at 323-24. This Court reasoned the indictment gave defendant sufficient notice of the conviction used to support the habitual felon status, since the indictment correctly alleged the type and the date of the offense. *Id.* at 284-85, 590 S.E.2d at 324. Because an amendment to the indictment correcting the date and county of the conviction did not “substantially alter” the charge set forth in the indictment, this Court ruled the amendment was proper. *Id.* at 284-85, 590 S.E.2d at 323-24.

In *Locklear*, this Court ruled the trial court did not err in allowing the State to amend defendant’s habitual felon indictment in order to correct the date on which defendant committed the prior felony.<sup>7</sup> *Locklear*, 117 N.C. App. at 260, 450 S.E.2d at 519. In so holding, this Court noted “[t]he failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does

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<sup>7</sup> In *Taylor*, this Court addressed a similar issue. *Taylor*, 203 N.C. App. at 454-55, 691 S.E.2d at 761. In that case, the trial court correctly allowed the State to amend a habitual felon indictment that incorrectly alleged the dates the prior felonies were committed. *Id.* at 454-55, 691 S.E.2d at 761. This Court held the amendment was proper since defendant still received notice that he was being tried as a habitual felon. *Id.* at 457-58, 691 S.E.2d at 763.

it justify reversal of a conviction obtained thereon.” *Id.* at 260, 450 S.E.2d at 519 (quoting *State v. Cameron*, 83 N.C. App. 69, 72, 349 S.E.2d 327, 329 (1986)). “[I]t [is] the fact that another felony was committed, not its specific date, which [is] the essential question in the habitual felon indictment.” *Id.* at 260, 450 S.E.2d at 519.

Here, as held *supra*, the habitual felon indictment lacks the statutorily mandated language under N.C. Gen. Stat. § 14-7.3, which requires the indictment to allege the name of the “state or sovereign” against whom Defendant committed the prior felonies. However, the indictment does set forth all other required elements, including: the dates Defendant committed the prior felonies; the dates Defendant received convictions in those felony offenses; and the identity of the court where Defendant’s convictions occurred.

Under this indictment, we conclude Defendant, as “a person of common understanding[,]” would have notice he was being tried as a recidivist. *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 342 (citation omitted). Notably, Defendant did not object to or question the habitual felon indictment at trial. In fact, our review of the record shows the trial court asked Defendant if he was guilty of being a habitual felon. Defendant stated he was guilty of being a habitual felon, and admitted the State had enough evidence to support his plea of guilty of being a habitual felon. The State also reviewed each of Defendant’s three prior charges listed in the habitual felon indictment for the trial court and Defendant, and Defendant’s counsel stated he had

nothing “on that issue.”

We conclude the habitual felon indictment sufficiently notified Defendant he was being tried as a habitual felon. Accordingly, we hold, notwithstanding the State’s error in the habitual felon indictment, the trial court had jurisdiction to try Defendant as a habitual felon, and we overrule this assignment of error.

### **B. Misdemeanor Charges**

Defendant next contends, and the State concedes, the trial court lacked jurisdiction to try Defendant for the two misdemeanor charges for DWLR and the misdemeanor charge for resisting an officer. We agree.

The North Carolina Constitution provides, in part, “[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.” N.C. Const. art. I, § 22. “A criminal case may be tried in superior court on a warrant only on an appeal from a conviction at trial in a lower court with jurisdiction over the offense.” *State v. Price*, 170 N.C. App. 57, 61, 611 S.E.2d 891, 894 (2005) (citation omitted).

Unless a misdemeanor is on appeal from district court, a superior court has jurisdiction to try the misdemeanor only in certain instances, which our Legislature statutorily designated in N.C. Gen. Stat. § 7A-271(a) (2016). Under subsection (a)(1) of this statute, a superior court has jurisdiction over a misdemeanor “[w]hich is a lesser included offense of a felony on which an indictment has been returned . . . .”

*Id.* § 7A-271(a)(1). Under subsection (a)(3), the superior court has jurisdiction when the misdemeanor “may be properly consolidated for trial with a felony under G.S. 15A-926[.]” *Id.* § 7A-271(a)(3). It is proper for a court to join offenses under N.C. Gen. Stat. § 15-926(a) (2016) when they “are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.” *Id.* In this circumstance, it is still necessary for the misdemeanor to be charged “upon information or indictment.” N.C. Gen. Stat. § 15A-922(g) (2016).

Here, the State improperly charged Defendant with two counts of DWLR and one count of resisting an officer. Because the State charged Defendant with these three misdemeanors by warrant, instead of by indictment, the trial court did not have jurisdiction to try the misdemeanors or enter judgment. The State concedes this error, and we vacate the trial court’s judgments on these three misdemeanors.

The State also charged Defendant with felony fleeing/eluding arrest with a motor vehicle and misdemeanor driving without registration. Prior to deliberations, the State voluntarily dismissed the charge of driving without registration. Even though the State concedes the trial court did not have jurisdiction over the DWLR misdemeanors, the State contends the trial court properly considered one of the

DWLR charges as an aggravating factor for the felony charge of driving to flee or elude the police.<sup>8</sup>

The jury convicted Defendant of felonious operation of a motor vehicle to elude arrest under N.C. Gen. Stat. § 20-141.5 (2016). That statute provides:

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) Speeding in excess of 15 miles per hour over the legal speed limit.

...

(5) Driving when the person's driver[]s license is revoked.

*Id.* This statutory provision “seeks to punish a single wrong: attempting to flee in a motor vehicle from a law enforcement officer in the lawful performance of his duties.”

*State v. Davis*, 163 N.C. App. 587, 590, 594 S.E.2d 57, 60 (2004) (quoting *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000)). “Although many of the enumerated aggravating factors are in fact separate crimes under various

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<sup>8</sup> Defendant fails to address this contention. This Court, however, must clarify whether the DWLR stipulation, under these circumstances, can still exist as an aggravating factor under N.C. Gen. Stat. § 20-141.5.

provisions of our General Statutes, they are not separate offenses . . . but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.” *Id.* at 590, 594 S.E.2d at 60 (quoting *Funchess*, 141 N.C. App. at 309, 540 S.E.2d at 439).

Here, the jury found the two aggravating factors of reckless driving and driving while license revoked, so as to convict Defendant of felony use of a motor vehicle to elude arrest. Even though the trial court did not have jurisdiction to sentence Defendant for the DWLR misdemeanors, the jury, in this instance, could still consider DWLR as an aggravating factor under N.C. Gen. Stat. § 20-141.5. Defendant stipulated to the charge of DWLR. This stipulation is not sufficient to give the trial court jurisdiction over the DWLR misdemeanor. It is, however, permissive as evidence of an aggravating factor for the jury’s consideration.

#### **IV. Conclusion**

For the foregoing reasons, we hold the trial court had jurisdiction to try Defendant as a habitual felon. We vacate the trial court’s two judgments on misdemeanor DWLR and misdemeanor resisting an officer in 12 CRS 051235 and 12 CRS 051236. We remand Defendant’s remaining convictions for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge MCGEE and Judge Zachary concur.

STATE V. BOWDEN

*Opinion of the Court*

Report per Rule 30(e).