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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-727

No. COA22-148

Filed 1 November 2022

Rowan County, Nos. 18 CRS 1452, 51240

STATE OF NORTH CAROLINA

v.

EUGENE GREEN

Appeal by defendant from judgment entered 10 August 2021 by Judge Richard S. Gottlieb in Rowan County Superior Court. Heard in the Court of Appeals 6 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Laura H. McHenry, for the State.

Caryn Strickland for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Eugene Green appeals from a judgment entered upon a jury's verdicts finding him guilty of felony operating a motor vehicle while fleeing and attempting to elude arrest and attaining the status of habitual felon. After careful review, we affirm the trial court's judgment, but remand for correction of a clerical error.

I. Background

¶ 2 On 14 May 2018, a Rowan County grand jury returned indictments charging Defendant with felony operating a motor vehicle while fleeing and attempting to elude arrest and attaining the status of habitual felon. On 19 April 2021, the matter came on for jury trial in Rowan County Superior Court. Defendant was present in the courtroom when the proceedings began, and the parties discussed trial logistics. The jury was impaneled and the trial court announced that trial would resume at 9:30 the next morning. The court then recessed for the day.

¶ 3 Defendant was not present in court the next day when the trial resumed. The trial court recessed for approximately 30 minutes, during which time the bailiff and defense counsel unsuccessfully sought to locate Defendant. When a bailiff telephoned Defendant at the number that had previously been used to contact Defendant, the bailiff found that the phone was "turned off."

¶ 4 The State requested that the trial proceed *in absentia*. When asked if he wished to be heard in response to this request, defense counsel succinctly stated: "The jury has been impaneled."

¶ 5 The trial court made extensive findings of fact regarding Defendant's absence before concluding:

> At this point it is apparent that . . . Defendant, at least as of now, has no desire to attend his trial. The Court can only conclude that Defendant . . . has voluntarily chosen not to

> be here based on the facts previously laid out and has waived his absolute right to be present at his trial, and this trial will proceed in . . . Defendant's absence.

Defense counsel did not object to the trial court's findings or conclusion.

¶ 6 The trial proceeded *in absentia*, and at the conclusion of the first phase of the trial the jury returned a verdict finding Defendant guilty of the charge of felony operating a motor vehicle while fleeing and attempting to elude arrest. After the jury returned this verdict, the trial moved to the habitual felon phase.

¶ 7 Outside the presence of the jury, the trial court permitted counsel "to be heard with regard to the issue of proceeding with the second phase of the trial, the habitual felon phase[.]" Counsel for both the State and Defendant agreed to proceed *in absentia*. After briefly discussing this Court's opinion in *State v. Davis*, 186 N.C. App. 242, 650 S.E.2d 612, *disc. review dismissed*, 362 N.C. 89, 656 S.E.2d 280 (2007), the court questioned defense counsel concerning Defendant's awareness of the habitual felon portion of these proceedings:

> THE COURT: Okay. And there's nothing about proceeding with the habitual felon phase that would be a surprise to the Defense?
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: In fact, it was always anticipated that these two -- these two items, that being the substantive offense of Fleeing to [E]lude Arrest as well as the habitual felon status would be tried together, and that was the intended offense when this case was called to trial yesterday; is that correct?

> [DEFENSE COUNSEL]: Yes, sir.

¶ 8 The trial court made thorough findings of fact in support of its decision to proceed *in absentia* to the habitual felon phase:

> THE COURT: All right. All right. Well, thank you. In light of the *Davis* case and the things that have occurred in this case, this Court is going to note for the record as far as some findings go that the Defendant . . . was indicted on the underlying offense on May 14, 2018, and -- excuse me, on the habitual felon status on May 14, 2018, which is almost three years ago. The three habitual felon prior conviction allegations in that indictment appear to have remained throughout the three-year period of time from the time of the indictment to this date without being modified or changed or amended in any way.
>
> The Defendant was, in fact, served with notice of the habitual felon indictment on June 11, 2018. These matters have been posted in the Prosecutor's trial priority list just as [Defendant's counsel] indicated they had been and the Defendant was prepared to go forward with both. And nothing has occurred here [that] would be a surprise to the Defendant when the Defendant chose to absent himself from the first trial -- excuse me, the first part of the proceedings, the trial on the substantive offense.
>
> It's this Court's opinion that he's also chosen to absent himself from any subsequent portion of the trial which will be to this point the habitual felon phase. The Court will also indicate that the Defendant . . . has been given a fair opportunity to admit or deny or remain silent about the habitual felon indictment but has chosen not to be here, so, therefore, that can't be done. He has that opportunity to do it. And the Court is relying on the *State v. Davis* case . . . in proceeding with the habitual felon case but also the other cases, but that one seems to be directly on point.

The trial court then issued an order for Defendant's arrest.

¶ 9 At the conclusion of the habitual felon phase, the jury returned its verdict finding Defendant guilty of having attained the status of habitual felon. The trial court announced at the conclusion of the trial that "[a] sentencing hearing will be conducted as soon as . . . practicable upon his arrest" and retained jurisdiction. Defendant was subsequently arrested and the sentencing hearing was held on 10 August 2021. The trial court sentenced Defendant to a term of 80 to 108 months' imprisonment in the custody of the North Carolina Division of Adult Correction.

¶ 10 On 12 August 2021, Defendant filed a *pro se* notice of appeal, stating: "On 8-10-2021 I went to court for Habitual Felon and was given 83 to 105 months. I would like to put in my appeal. I was wrongful sentence and believe I should have got a better deal. Thanks for your time. Foward to the DA and CLERK OF COURT." The next day, Defendant filed another *pro se* notice of appeal, stating: "I would like to put in a direct appeal in regards to case number 18CRS51240. I also would like to put in a motion of insufficient council." Defendant added that he wanted his notice of appeal forwarded to the District Attorney's office and the Clerk of Court and that he wanted an "appeal filed for my sentence 8/10[.]" The record indicates that Defendant's notice was so forwarded.

¶ 11 On 1 September 2021, defense counsel filed a handwritten notice of appeal, identifying the case by name and stating simply: "Defendant hereby enters notice of

appeal." Two days later, defense counsel appeared in open court to ensure that appellate entries were entered and the Appellate Defender's office appointed to represent Defendant on appeal.

II. Appellate Jurisdiction

¶ 12 Simultaneous with his brief on appeal, Defendant filed with this Court a petition for writ of certiorari in case this Court determined that his various notices of appeal were insufficient to invoke our appellate jurisdiction. In his petition, Defendant acknowledges that both of his *pro se* notices "fail to specify the court to which the appeal is taken, and they are not signed by [his] counsel of record." *See* N.C.R. App. P. 4(b). Further, Defendant acknowledges that the handwritten notice of appeal filed by his trial counsel "was not timely filed, does not specify the judgment taken from or the court appealed to, and does not indicate whether it was served on the District Attorney." *See id.* 4(b)–(c).

¶ 13 Nonetheless, "a defect in a notice of appeal should not result in loss of the appeal as long as the intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake." *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) (citation and internal quotation marks omitted). This Court has also specifically held that "a defendant's failure to designate this Court in a notice of appeal does not warrant dismissal of the appeal where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was

misled by the defendant's flawed notice of appeal." *State v. Sitosky*, 238 N.C. App. 558, 560, 767 S.E.2d 623, 624 (2014), *supersedeas and disc. review denied*, 368 N.C. 237, 768 S.E.2d 847 (2015).

¶ 14 Here, Defendant's *pro se* notices of appeal plainly indicate his intent to appeal the habitual felon conviction, and this Court is the only court with jurisdiction to hear Defendant's appeal. *See* N.C. Gen. Stat. § 7A-27(b)(1) (2021). Therefore, Defendant's "intent to appeal can be fairly inferred" from his *pro se* notices of appeal. *Springle*, 244 N.C. App. at 763, 781 S.E.2d at 521 (citation omitted). Moreover, as in *Sitosky*, the State does not assert that it was misled by the notice of appeal or prejudiced by the failure to be properly served with the notice when it was filed. 238 N.C. App. at 561, 767 S.E.2d at 625. Accordingly, these defects do not deprive this Court of appellate jurisdiction and we dismiss Defendant's petition for a writ of certiorari as moot.

III. Discussion

¶ 15 Defendant argues that trial court erred by trying him *in absentia* on the habitual felon charge (1) in violation of his statutory right to notice of the charge and (2) in violation of his constitutional right to be present at trial, which he did not knowingly and intentionally waive. Defendant also argues that his "habitual felon sentence violates separation of powers, his right to equal protection, and his right to be free from cruel and unusual punishment." Lastly, Defendant argues that the

judgment contains a clerical error. We agree that the judgment contains a clerical error, but otherwise disagree with Defendant's arguments.

A. Habitual Felon Arraignment

¶ 16 Defendant argues that "[t]he trial court erred in trying [him] *in absentia* on the habitual felon charge, because it denied him his statutory right to notice of the charge." Defendant alleges that "the trial court violated the plain statutory mandate of" N.C. Gen. Stat. § 15A-928(c), which provides that "[a]fter commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent." N.C. Gen. Stat. § 15A-928(c).

1. Standard of Review

¶ 17 When a criminal defendant alleges that the trial court violated a statutory mandate, the "alleged statutory errors are questions of law" and are reviewed de novo. *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017) (citation omitted). "When conducting de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Guinn*, 281 N.C. App. 446, 2022-NCCOA-36, ¶ 15 (citation and internal quotation marks omitted).

2. Statutory Preservation

¶ 18 As a preliminary matter, we must determine whether Defendant preserved this issue for appellate review. Defendant acknowledges that his "counsel did not object during trial to the court's failure to arraign him," but contends that this failure to object "does not preclude this Court's review" of the trial court's violation of the requirements of § 15A-928(c). As Defendant notes, this Court has recognized that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial." *State v. Edgerton*, 266 N.C. App. 521, 531, 832 S.E.2d 249, 256–57 (2019) (citation omitted), *disc. review denied*, 375 N.C. 496, 847 S.E.2d 886 (2020). "A statutory mandate automatically preserves an issue for appellate review when it (1) requires a specific act by the trial judge or (2) requires specific proceedings the trial judge has authority to direct." *Id.* at 531, 832 S.E.2d at 257.

¶ 19 On the other hand, the State contends that Defendant's appeal is not automatically preserved because § 15A-928(c) "is inapplicable" to this case. The State cites *State v. Marshburn*, in which this Court held that § 15A-928(c) "does not apply to habitual felon indictments." 173 N.C. App. 749, 751, 620 S.E.2d 282, 284 (2005). While we agree that § 15A-928(c) does not apply to habitual felon cases such as this, the State is incorrect in its assertion that this precludes automatic preservation of this issue, as Defendant remained statutorily entitled to an arraignment on his

habitual felon charge.

¶ 20 First, we address the proper statutory framework for analyzing the habitual felon charge in the case at bar. "The criminal law of this State contains two distinct types of 'habitual' classifications. The first type includes habitual felon under Article 2A of Chapter 14 and violent habitual felon under Article 2B of Chapter 14." *State v. Burch*, 160 N.C. App. 394, 396, 585 S.E.2d 461, 462 (2003). "This category classifies the transgression as a status, not a substantive offense. The habitual felon status must be charged in an indictment separate from the principal felony." *Id.* (citation omitted). "The second type of habitual offenses include[s] habitual misdemeanor assaults and habitual impaired driving. Trials for these offenses are required to follow the procedures set forth in Chapters 15A and 20, *which are different from those set forth for habitual felons and violent habitual felons in Chapter 14*." *Id.* at 396, 585 S.E.2d at 462–63 (emphasis added) (citation omitted). Section 15A-928 applies to this second category, offenses in which "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter[.]" N.C. Gen. Stat. § 15A-928(a). "These habitual offenses are substantive offenses; the 'habitual' aspect is not merely a status. The prior convictions of a defendant are an element of the habitual offense." *Burch*, 160 N.C. App. at 396, 585 S.E.2d at 463 (citation omitted).

¶ 21 This case falls into the first category, and as such § 15A-928(c) does not apply.

However, Defendant points out that this Court has applied § 15A-928(c) to a habitual felon status case governed by Chapter 14. *See Davis*, 186 N.C. App. at 248–49, 650 S.E.2d at 617. And even before *Marshburn* this Court rejected the argument advanced by the State "that a defendant need not be arraigned on a habitual felon charge." *State v. Lane*, 163 N.C. App. 495, 502–03 n.1, 594 S.E.2d 107, 112 n.1 (2004) (citing *State v. Brunson*, 120 N.C. App. 571, 578, 463 S.E.2d 417, 421 (1995), *cert. denied*, 346 N.C. 181, 486 S.E.2d 211 (1997)).

¶ 22 Here, we need not resolve the extant uncertainty between the statutory analyses of *Davis*, *Marshburn*, *Lane*, *Brunson*, and other of this Court's cases regarding the source of the statutory guarantee of an arraignment on a habitual felon status charge, because there is one constant irrespective of which line of precedent we follow: in order to prevail on appeal, Defendant must demonstrate that he has been prejudiced by the trial court's failure to arraign him in person on the habitual felon charge. *See Davis*, 186 N.C. App. at 249, 650 S.E.2d at 618 (finding no error where the defendant "failed to show any prejudicial effect resulting from his absence"); *Marshburn*, 173 N.C. App. at 752–53, 620 S.E.2d at 285 ("The failure to conduct a formal arraignment itself is not reversible error . . . and the failure to [arraign] is not prejudicial error unless [the] defendant objects and states that he is not properly informed of the charges." (first and second alterations in original) (quoting *Brunson*, 120 N.C. App. at 578, 463 S.E.2d at 421)). Thus, assuming,

arguendo, that Defendant's argument is automatically preserved for the purposes of reviewing the merits of his appeal, Defendant must nevertheless show that he was prejudiced by the trial court's failure to arraign him in person. We conclude that he has not.

3. Prejudice

¶ 23 "One basic purpose behind our Habitual Felons Act is to provide notice to [a] defendant that he is being prosecuted for some substantive felony *as a recidivist*." *State v. Allen*, 292 N.C. 431, 436, 233 S.E.2d 585, 588 (1977). "The notice of the allegation of habitual felon status is the critical issue" in a determination of whether a failure to conduct a formal arraignment on a habitual felon charge constitutes prejudicial error. *Marshburn*, 173 N.C. App. at 753, 620 S.E.2d at 285 (citation and internal quotation marks omitted).

¶ 24 Defendant's prejudice argument is primarily based upon comments that he made after he was arrested and brought before the trial court for sentencing. Defendant contends on appeal that "there is no record evidence that the trial court discussed the habitual felon charge or its consequences with him, and [Defendant] explicitly stated at sentencing that he did *not* understand the charge."

¶ 25 In *Edgerton*, which applied Defendant's preferred § 15A-928(c) to a failure to conduct a formal arraignment on a charge of habitual felony larceny, this Court found no prejudice where, *inter alia*, "the prior convictions being used to elevate [the

d]efendant's charge were identified with specificity in a valid indictment, providing him with notice[,]" and where "through counsel, [the d]efendant stipulated to the prior larcenies." 266 N.C. App. at 532, 832 S.E.2d at 257. Accordingly, this Court concluded that "[t]he two purposes of the statute, informing [the d]efendant of the prior convictions that would be used against him and allowing him an opportunity to admit or deny those convictions, were fulfilled[.]" *Id.*

¶ 26 Here, the trial court found that "Defendant was, in fact, served with notice of the habitual felon indictment on June 11, 2018"; that "[t]hese matters have been posted in the Prosecutor's trial priority list just as [defense counsel] indicated they had been and the Defendant was prepared to go forward with both"; and that "nothing has occurred here [that] would be a surprise to the Defendant when the Defendant chose to absent himself" after the first day of trial. Lastly, as in *Edgerton*, "Defendant did not before the trial court and does not on appeal deny the convictions." *Id.* We therefore conclude that "[t]he two purposes of the statute, informing Defendant of the prior convictions that would be used against him and allowing him an opportunity to admit or deny those convictions, were fulfilled" and Defendant has not shown that he was prejudiced by the trial court's decision to proceed to the habitual felon phase of trial *in absentia*. *Id.*

B. Constitutional Arguments

¶ 27 Defendant raises two constitutional arguments on appeal. First, Defendant

argues that the trial court erred by proceeding to the habitual felon phase of trial *in absentia* "because [Defendant] did not knowingly and intentionally waive his right [to] be present." And second, Defendant argues that his "habitual felon sentence violates separation of powers, his right to equal protection, and his right to be free from cruel and unusual punishment." We disagree.

1. Standard of Review

¶ 28 This Court reviews de novo alleged violations of a defendant's constitutional rights. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012).

2. Waiver of Right to Be Present

¶ 29 "It is well[ ]established that under both the federal and North Carolina constitutions a criminal defendant has the right to be confronted by the witnesses against him and to be present in person at every stage of the trial." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985).

> In noncapital cases, however, a defendant's constitutional right to be present at all stages of the trial is a purely personal right that can be waived expressly or by his failure to assert it. Additionally, in a non-capital case counsel may waive [a] defendant's right to be present through failure to assert it just as he may waive [a] defendant's right to exclude inadmissible evidence by failing to object.

State v. Christian, 150 N.C. App. 77, 81, 562 S.E.2d 568, 571 (citations and internal quotation marks omitted), *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). "Once trial has commenced, the burden is on the defendant to explain his or her

absence; if this burden is not met, waiver is to be inferred." *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991).

¶ 30 "Whether such a burden has been satisfied has been the subject of numerous appellate decisions." *Id.* These include many cases in which the trial court concluded that a defendant "voluntarily absented himself" where the defendant "was present during the first day of his trial but failed to appear when the trial recommenced on the second day" although the defendant "had due notice of the time his trial was to recommence[.]" *Id.* (describing *State v. Stockton*, 13 N.C. App. 287, 185 S.E.2d 459 (1971)); *see also State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887); *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985); *State v. Potts*, 42 N.C. App. 357, 256 S.E.2d 497 (1979); *State v. Montgomery*, 33 N.C. App. 693, 236 S.E.2d 390, *disc. rev. denied and appeal dismissed*, 293 N.C. 256, 237 S.E.2d 258 (1977); *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976). Upon listing each of these cases, our Supreme Court observed that "[f]indings of no error under similar circumstances have repeatedly been reached by" our appellate courts. *Richardson*, 330 N.C. at 179, 410 S.E.2d at 63.

¶ 31 This Court's subsequent opinion in *Davis*, upon which the trial court relied here, falls within this line of cases as well. In *Davis*, the defendant was present when his trial began and the jury was selected. 186 N.C. App. at 243, 650 S.E.2d at 614. The defendant "was not present when his trial resumed" and, after hearing an explanation from defense counsel that the defendant had received medical treatment,

the trial court continued the case for over a week "to give [the d]efendant an opportunity for further treatment and recovery." *Id.* at 246, 650 S.E.2d at 616. "Nevertheless, . . . [the d]efendant was not present at the time his trial was scheduled to resume." *Id.* After "the trial court ascertained that [the d]efendant was aware of the date and time that his trial was scheduled to resume, and that he had failed to provide any reason or notice to defense counsel or the clerk's office as to his failure to appear[,]" the trial court concluded that it "ha[d] a right to go forward with the trial of this case having been shown no good reason as to why the defendant ha[d] not appeared[.]" *Id.*

¶ 32 This case falls neatly into this line of precedent, notwithstanding Defendant's arguments to the contrary. Here, Defendant was present on the first day of his trial, during which the jury was selected. The next day of trial, although Defendant had been informed in open court of the time at which his trial would resume, he was absent without explanation and unable to be contacted. Finally, defense counsel did not object to proceeding *in absentia* at either the beginning of the second day of trial or at the beginning of the habitual felon phase of the trial, thus waiving Defendant's right to be present by his failure to assert that right. *See Christian*, 150 N.C. App. at 81, 562 S.E.2d at 571. Accordingly, this argument is overruled.

3. Habitual Felon Statute

¶ 33 Defendant also argues that "the habitual felon statute violates the North

Carolina and United States Constitutions in myriad respects[,]" including the separation of powers between the legislative and judicial branches, the right to equal protection, and the right to be free of cruel and unusual punishment. Although Defendant "recognizes that the habitual felon statute has been upheld against constitutional challenges, . . . he raises these arguments for preservation purposes and to urge the courts to reconsider these precedents." *See, e.g.*, *State v. Wilson*, 139 N.C. App. 544, 550, 533 S.E.2d 865, 870 ("Our courts have held the procedures set forth in the Habitual Felon Act comport with a criminal defendant's federal and state constitutional guarantees."), *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000).

¶ 34 "When a panel of this Court has decided the same issue in a different case, subsequent panels are bound to the decision until it is overturned by a higher court." *State v. Carpenter*, 155 N.C. App. 35, 46, 573 S.E.2d 668, 676 (2002) (citation omitted), *supersedeas and disc. review denied*, 356 N.C. 681, 577 S.E.2d 896 (2003).

¶ 35 Moreover, it does not appear from the transcript that Defendant raised any of these constitutional arguments before the trial court. "It has long been the rule that we will not decide at the appellate level a constitutional issue or question which was not raised or considered in the trial court." *Wilson*, 139 N.C. App. at 546, 533 S.E.2d at 867 (citation omitted). For each of these reasons, we are bound to reject Defendant's remaining constitutional arguments.

C. Clerical Error

¶ 36 Lastly, Defendant argues that this matter "should be remanded to correct a clerical error in the judgment upon conviction." Specifically, Defendant notes that "the trial court's judgment found that there were three or more aggravating factors on the eluding arrest offense, even though the jury was only instructed on two possible aggravating factors." We agree.

¶ 37 "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and internal quotation marks omitted). "A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (citation and internal quotation marks omitted), *disc. review denied*, 368 N.C. 353, 777 S.E.2d 62 (2015), *cert. denied*, 372 N.C. 704, 829 S.E.2d 207 (2019).

¶ 38 Defendant was indicted for felony operating a motor vehicle while fleeing and attempting to elude arrest. "The crime does not become a felony unless two or more of the aggravating factors listed in the statute are present at the time of the violation." *State v. Woodard*, 146 N.C. App. 75, 80, 552 S.E.2d 650, 654 (2001), *disc. review improvidently allowed*, 355 N.C. 489, 562 S.E.2d 420 (2002); *see also* N.C. Gen.

Stat. § 20-141.5(b)(1)–(8).

¶ 39 The indictment in this case alleges that "Defendant was speeding in excess of 15 miles per hour over the legal speed limit, driving recklessly in violation of [N.C. Gen. Stat. § 20-140] and . . . Defendant was driving while Defendant's license was revoked[,]" properly alleging three of the statutory aggravating factors. *See* N.C. Gen. Stat. § 20-141.5(b)(1), (3), (5). However, the State conceded at trial that it did not present evidence that Defendant's license was revoked, and the trial court only instructed the jury on the other two aggravating factors. Accordingly, Defendant could only be convicted of the charge of felony operating a motor vehicle while fleeing and attempting to elude arrest on the basis of two aggravating factors rather than three. *See State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 524 (2009) ("It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury." (citation and internal quotation marks omitted)).

¶ 40 Nonetheless, the judgment erroneously states that Defendant was convicted of felony operating a motor vehicle while fleeing and attempting to elude arrest based on ">=3 AGRV FCTRS." "This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing." *Gillespie*, 240 N.C. App. at 245, 771 S.E.2d at 790. This error does not affect Defendant's sentence, but Defendant notes that "if

left uncorrected, it could affect [his] driving privileges." *See* N.C. Gen. Stat. § 20-141.5(d) (providing that the period of license revocation for a conviction with three or more aggravating factors is three years, but up to two years on a first conviction of the offense if there are only two aggravating factors). "Accordingly, we hold that [Defendant] is not entitled to resentencing, but we remand the judgment to the trial court to correct the clerical error . . . ." *Gillespie*, 240 N.C. App. at 246, 771 S.E.2d at 790.

IV. Conclusion

¶ 41 For the foregoing reasons, we affirm the judgment, and remand for the limited purpose of correcting the clerical error in the judgment.

AFFIRMED IN PART; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges GORE and JACKSON concur.

Report per Rule 30(e).