NO. COA 14-50 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wake
	)	
JASON KEITH WILLIFORD	)	

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BRIEF FOR THE STATE

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BRIEF FOR THE STATE

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ISSUES PRESENTED

I. WHETHER THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS DNA EVIDENCE OBTAINED FROM A CIGARETTE BUTT DEFENDANT DISCARDED IN A COMMUNAL APARTMENT PARKING LOT.

II. WHETHER THE JUDGMENT AND COMMITMENT IS CLEAR WITHOUT REMAND FOR THE TRIAL COURT TO CHECK A REDUNDANT BOX ON THE FACE OF THE DOCUMENT.

STATEMENT OF THE CASE

At the 16 May 2012 Criminal Session of Wake County Superior Court before the Honorable Paul G. Gessner, Superior Court Judge presiding, and a jury, defendant came to be capitally tried on charges of first-degree murder, first-degree rape, and first-degree burglary. (R pp. 1-5).

With defendant's permission, after a Harbison inquiry, defense counsel's opening statement described defendant's background, his past, and his version of the events surrounding defendant's murder of Kathy Taft.(T31[1] pp. 6736-40, 6766-6808). By and through his attorney's opening statement, defendant admitted to raping and killing Ms. Taft, whom he had never met, after breaking into a dwelling located near his own apartment, and discovering her there. (T31 pp. 6766-6808).

After hearing all the evidence in the case, the jury convicted defendant of first-degree murder, first-degree rape, and non-felonious breaking and entering as a lesser-included offense of the charge of first-degree burglary. (R pp. 153-155). The jury recommended a sentence of life imprisonment on the first-degree murder conviction. (R pp. 156-64). The trial court accordingly sentenced defendant to life imprisonment on the first-degree murder conviction, to begin at the expiration of a 276 to 341 month term

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[1] Some of the page numbers were duplicated when the court reporters transcribed their portions of trial transcript. The State therefore has indicated the volume number in which the pages appear, for example, as "T31," meaning Volume 31 of the trial transcript. The transcript of the 20 February 2012 hearing on defendant's motion to suppress is designated herein as "MT" (motion transcript).

of imprisonment on the first-degree rape. (R pp. 165-170). The rape conviction was ordered to begin at the expiration of a 45-day sentence on the non-felonious breaking and entering conviction. (R pp. 165-170).

Defendant gave notice of appeal to this Court.

STATEMENT OF THE FACTS

Kathy Taft lived in Greenville. (T36 pp. 7296-97). At the time of her death at age 62, she was the longest serving member of the North Carolina State Board of Education. (T36 pp. 7296-97).

On Friday, 5 March 2010, Ms. Taft was scheduled for minor outpatient surgery with Dr. Ronald Riefkohl, a Durham plastic surgeon. (T32 pp. 6892-93, T36 pp. 7169-70). Ms. Taft had arranged for her sister, Dina Holton, to accompany her to the surgery and stay with her following the procedure. (T32 p. 6896, T36 p. 7169). Ms. Taft and her sister were staying at the Raleigh home of a friend, John Geil, who was out of town at the time. (T36 pp. 7298-99, T37 p. 7365). The home was located at 2710 Cartier Drive. (T36 p. 7171).

The night before the surgery, the two women attended a Women in Politics function in Chapel Hill, and met Ms. Taft's son for dinner at an Italian restaurant. (T36 p. 7169). The following morning, 5 March 2010, Ms. Taft underwent the outpatient surgery, which was revision surgery of earlier procedures on Ms. Taft's face, neck, and breasts. (T32 pp. 6892-93, 6898). The facial procedure involved incisions in front of and behind the ear, so Dr. Riefkohl applied a bandage to Ms. Taft's head that was fashioned sort of like a helmet, and went around under her chin. (T32 pp.

6894-95). This bandage was not so much to prevent bleeding as for the little bit of seepage that occurs after the procedure. (T32 pp. 6895-96).

The procedures were completed in less than three hours and went perfectly, with no issues. (T32 pp. 6893, 6898, T36 p. 7170). Ms. Taft was scheduled for a follow-up appointment three days after the procedure, on the following Monday, to remove the stitches. (T32 p. 6896).

After the surgery, Ms. Taft and her sister went back to the house at 2710 Cartier Drive in Raleigh. (T36 p. 7170). Ms. Taft wanted some Diet Coke, so Ms. Holton went to a nearby Harris Teeter to get the Diet Coke and other groceries. (T36 p. 7171). Receipts from Harris Teeter reflected that groceries were purchased at 1:12 p.m. on 5 March 2010, and that an 8-pack of Diet Coke was purchased at 1:13 p.m. (T36 pp. 7333-36). At Harris Teeter, Ms. Holton accidentally locked the keys in the car, and ended up walking the short walk back to 2710 Cartier Drive through a path in the woods. (T36 p. 7171).

The rest of the afternoon and evening, the sisters sat around watching movies and eating ice cream together. (T36 p. 7172). Ms. Holton recalled getting up and locking the door at about 8:40 that evening. (T36 p. 7172). Ms. Taft took her prescribed dose of pain medicine at around 9:00 p.m., and then Ms. Holton assisted her sister into her pajamas and into bed. (T36 p. 7172).

Ms. Holton stayed up a while longer, and turned on the fan above the stove to provide a constant noise, so she wouldn't disturb her sister. (T36 pp. 7172-73). At around 11 p.m., Ms.

Holton got on the couch right outside the bedroom where Ms. Taft was asleep. (T36 p. 7173).

During the night of 5 March 2010, Ms. Holton heard noises. (T36 p. 7173). She did not recall exactly what the noises were, but she did recall that at one point she actually leaned up on the couch and said, "Who is in this house?" (T36 pp. 7173-74). She kept hearing noises, at one point hearing what she thought was someone running down the stairs. (T36 p. 7174). At some point, she got up off the couch, looked around, then went to the back door and opened it. (T36 p. 7174). When she opened up the back door, she realized the door was unlocked. (T36 p. 7174). She turned on the floodlights to the back porch, and looked out and yelled. (T36 p. 7174). It was a wooded area, and she didn't hear anything, not even a leaf rustle. (T36 p. 7174). When she came back in, she closed and locked the door, and noticed on the clock above the television that it was 3 a.m. (T36 pp. 7174-75).

Ms. Holton was unfamiliar with the house because she had never been there before the previous night. (T36 p. 7173). The house was extremely dark, and the only lights on in the house were the light in the upstairs bedroom where Ms. Holton had slept the previous night, and the light above the stove. (T36 p. 7175). Ms. Holton walked to the back bedroom where Ms. Taft was asleep, opened the door just a crack so she didn't disturb her sister, and looked in to see if she could see or hear if she was okay and asleep. (T36 p. 7175). She could not see her sister, but could hear her breathing and actually snoring a little bit. (T36 p. 7175). Ms. Holton thought Kathy was okay, so she went upstairs and went to bed. (T36

p. 7175).

On the morning of 6 March 2010, Ms. Holton woke up around 8:30. (T36 p. 7175). She walked to the top of the staircase to see if she could hear her sister stirring, and didn't hear anything. (T36 p. 7176). Ms. Holton washed her face, brushed her teeth, got dressed, and went downstairs. (T36 p. 7176).

Ms. Holton went in to check on her sister. (T36 p. 7176). The covers were off of the bed, Ms. Taft was completely nude, her shirt was pushed up, her pajama shirt was pushed up around underneath her chin, and there was a large amount of blood on the bed, especially around her head. (T36 p. 7176). Ms. Holton went to her sister and wrapped her hand around the back of her sister's head. (T36 p. 7177). Kathy was still making the breathing sound she was making the previous night, but now Ms. Holton knew something was wrong. (T36 p. 7177).

Ms. Holton called 911. (T36 p. 7177). The 911 call went in at 9:31:41 a.m. on March the 6th, 2010. (T36 p. 7177). Emergency Technicians (EMTs) with the Raleigh Fire Department responded to the scene. (T31 pp. 6809-13). They noted a lot of blood, particularly around Ms. Taft's bandaged head. (T31 pp. 6813, 6817). Ms. Holton informed them that Ms. Taft had undergone surgery the day before, that she had found Ms. Taft like this that morning, and that she was concerned it was some kind of complication with the surgery. (T31 pp. 6812-13, 6817, 6821).

EMT worked to establish a good airway and make sure Ms. Taft was breathing. (T31 pp. 6809-13). As they were working on Ms. Taft, they realized that she was disrobed with no clothing on her body,

but then discovered a shirt pulled up tight under her arms and neck, above the chest. (T31 p. 6813). They cut the shirt away with a pair of trauma scissors, suctioned out Ms. Taft's mouth, and placed an oxygen mask over her nose and mouth to assist her ventilation. (T31 pp. 6813-15).

Paramedics arrived on the scene and took over the advanced care, with EMT assisting. (T31 pp. 6815-16). Responders put Ms. Taft on a stretcher to carry her up the steep stairs. (T31 p. 6817). Halfway up the stairs, Ms. Taft stopped breathing, and paramedics had to get her breathing again. (T31 p. 6818). They then put her into the ambulance to transport her to the hospital. (T31 p. 6818).

During the time EMT was on the scene, Dr. Riefkohl called to check on Ms. Taft, which he always does with his patients the day after surgery. (T32 pp. 6898-99). When Kathy didn’t answer her cell phone, he called Dina Holton’s cell phone. (T32 p. 6899). Ms. Holton was hysterical when she answered, and all Dr. Riefkohl could gather from her was that Kathy was unresponsive, that there was blood everywhere, that she had called EMT, and that EMT was there. (T32 p. 6899). Dina was so distraught that Dr. Riefkohl asked to speak to one of the EMTs. (T32 p. 6899). The emergency technician told Dr. Riefkohl they were taking Kathy to Wake Med. (T32 p. 6899).

Dr. Riefkohl thought the problem was related to the surgery or Ms. Taft had fallen, so he Googled WakeMed and got the address. (T32 pp. 6899-6900). Dr. Riefkohl does not have operating privileges at WakeMed, but wanted to assist in whatever way he

could. (T32 pp. 6899-6900). When he arrived at WakeMed, Dr. Riefkohl explained the situation, and they let him go back to the ER. (T32 p. 6900).

Kathy Taft was on a gurney, comatose, and had been intubated with an intra tracheal tube because she was unable to breathe on her own. (T32 pp. 6900, 6915, T36 pp. 7160-61). She also had I.V.'s, and was unclothed. (T32 p. 6900). In the process of examining Ms. Taft and preparing to insert a urinary catheter, ER nurse Karla Mills noted blood around Ms. Taft's anus. (T36 pp. 7161-62). She also observed that Ms. Taft's labia were very swollen, there was a laceration to her right labia, which was very bruised, and that she was bleeding from the vagina. (T36 p. 7162).

Dr. Riefkohl's bandages were still in place, but they were very bloody. (T32 p. 6901, T36 pp. 7162-63). Dr. Riefkohl asked to remove them, because Ms. Taft's face looked fine, with no swelling. (T32 p. 6901). This ruled out a hematoma, which is a large amount of bleeding after an operation. (T32 p. 6901). Hospital personnel allowed Dr. Riefkohl to remove the bandage. (T32 p. 6901). When he did, Dr. Riefkohl saw a huge defect, a gaping laceration on the left side of Kathy's scalp with bone edges protruding, so he knew her skull had been fractured. (T32 pp. 6901, 6903). It was impossible that this gaping injury was related to the surgery. (T32 p. 6905).

Ms. Taft was also doing what is called "posturing," which is an involuntary reflexive type of movement that occurs as a result of an injury to the brain or abnormality of the brain. (T32 pp. 6901, 6916). She was doing the type of posturing called

[decerebrate] posturing, which is the worst kind, and reflects that the brain injury is extraordinarily severe and extends down to the brain stem. (T32 p. 6916). With this type of posturing, the arms rotate externally with the fists clenched in a spontaneous fashion and the legs stiffen and extend as well. (T32 p. 6916).

Because of the posturing, WakeMed neurosurgeon Dr. Koeleveld had already been called in for neurosurgery. (T32 pp. 6901, 6914-15, T36 p. 7163). Dr. Koeleveld could tell just from looking at the very large gaping scalp wound and exposed, fragmented skull on the left side of Ms. Taft's head that skull fragments had been driven deep into Ms. Taft's brain. (T32 p. 6915). Ms. Taft was sent for CT scan, which confirmed a brain injury. (T32 p. 6915, T36 pp. 7160-61, 7163).

As they were examining Ms. Taft's injuries, Dr. Koeleveld asked Dr. Riefkohl if Ms. Taft had been catherized during the surgery, and Dr. Riefkohl said no. (T32 p. 6901). Dr. Koelveld wondered why Ms. Taft had bruising and bleeding from the vaginal area. (T32 p. 6901).

Dr. Koeleveld performed an emergency craniotomy on Ms. Taft, which is opening the skull to relieve pressure on the brain. (T32 p. 6917). She had bruising of the brain and blood that needed to be evacuated. (T32 pp. 6917, 6920). The dura, which is the membrane that covers the brain, had been lacerated by the injury and needed to be repaired, if possible. (T32 p. 6917). Part of the scalp was missing and there was a large part of the skull that was exposed, probably about 4 x 4 centimeters. (T32 p. 6918). The skull fragments were jagged and depressed in multiple places in an area

about the size and diameter of an orange. (T32 p. 6918). There was a laceration to the brain itself, with a blood clot extruding through that brain laceration. (T32 p. 6920).

Dr. Koeleveld removed the blood clot, grafted on a collagen patch to Ms. Taft's brain membrane to accommodate the swelling, and made a decision not to replace the skull because of the swelling. (T32 pp. 6921-22). He then had an unusual situation where the scalp could not be closed, so he had to fashion a vaseline gauze bandage to cover this opening, over which he put more gauze. (T32 p. 6922). At the end of the surgery, the prognosis was that Ms. Taft would not survive. (T32 pp. 6922-23).

After the surgery, Christie Malcolm, a trained sexual assault nurse examiner ("SANE") reported to the recovery room to perform a rape kit on Ms. Taft. (T31 pp. 6824-26). Ms. Taft was not conscious at any time during which Nurse Malcolm dealt with her. (T31 p. 6826). As she collected the samples, Nurse Malcolm noticed a lot of bruising and swelling on the perineal area, so she examined that area more closely. (T31 pp. 6827-29). The bruising and swelling increased over the time that they were taking care of Ms. Taft and doing the pelvic exam. (T31 pp. 6828-29). The purpose of the rape kit is to isolate any unknown DNA there and to get a qualifying sample of the victim's DNA. (T31 p. 6826). Since Ms. Taft was never conscious and could not give a history, they collected samples from every area. (T31 pp. 6827-28). Nurse Malcolm, who had worked at Wake Med since 1975 and been a SANE nurse since 1998, regarded Ms. Taft's injuries as more severe than those of most of the other sexual assault victims she had ever taken care of. (T31 p. 6839).

Ms. Taft was taken to the intensive care unit. (T32 p. 6923). Ms. Taft died three days later. (T32 p. 6923).

Dr. John Butts, then chief medical examiner for North Carolina, did the autopsy on Ms. Taft. (T32 pp. 6932-37). In addition to the extensive damage to Ms. Taft's brain beneath the large defect in her scalp and skull, Dr. Butts noted two other areas of bruising and laceration on the left side of the head where there was no injury to the skull or the brain. (T32 pp. 6940-41). These blows had torn the skin and scalp but had not damaged the skull or underlying brain. (T32 pp. 6940-41). The head injuries were blunt force injuries, which had to have been made by a heavy, blunt object that impacted her head with a great deal of force. (T32 p. 6951). There were three areas of definite impact: one to the forehead, one above the ear, and the large area of extensive damage back behind the ear. (T32 p. 6954). In Dr. Butts' opinion, it was virtually impossible that all three of the injuries were the result of a single blow. (T32 p. 6954).

Twenty-two separate pieces of bone had been extracted from the skull defect where the bone was extensively fragmented. (T32 pp. 6951-53). Dr. Butts was able to reconstruct the injury from the fragments, and concluded that it was unlikely that this much damage came from a single blow to that area. (T32 pp. 6951-52, 6954-55). Dr. Butts therefore concluded that there were at least three blows and likely more to Ms. Taft's head. (T32 p. 6955).

In the groin area, Dr. Butts noted an extensive bruise that encompassed the whole right side of the groin from the top all the way back down to labia and on down to the anus or rectal area. (T32

pp. 6948-51). This was a blunt force injury, caused either by tearing of the tissues internally as a result of stretching or twisting, or possibly even a blow. (T32 pp. 6948-51).

Dr. Butts determined that the cause of Ms. Taft's death was blunt force trauma to the head, and the manner of death was homicide. (T32 pp. 6953-54).

The Raleigh Police Department's homicide unit was already assigned to investigate the case, even before Ms. Taft died, because homicide responds in cases of very serious assault where the victim's survival is in grave danger. (T36 p.7166). Detectives interviewed Dina Holton several times, and Ms. Holton later did a walk-through of the crime scene with them. (T31 pp. 6865, 6868, 6904,7168-69, 7178-80, 7188). The crime scene had been secured on 6 March 2010, and samples were taken from the sheets and other items for DNA testing. (T31 pp. 6842-45, T33 p. 7200).

The Police Department had already begun canvassing the neighborhood to see if anyone had seen or heard anything. (T31 pp. 6845-46, T36 p. 7189). They made a point to go to every house in the neighborhood, starting first on Cartier Drive. (T36 p. 7305). They would go to the home, meet with the homeowner, ask them about the neighborhood, ask them about their neighbors, and inquire what they might have seen or might have heard that night and leading up to the crime. (T36 p. 7305). People in the neighborhood were very cooperative, but no one had seen or heard anything out of the ordinary. (T31 p. 6846, T36 p. 7306).

Raleigh PD brought in a trained, certified police dog to search for evidence. (T31 pp. 6853-58). The dog did not alert to

anything during the search of the area. (T31 p. 6858).

Detectives quickly became aware that male DNA was present at the crime scene and in the rape kit. (T31 p. 6868). The four vaginal swabs from Ms. Taft indicated the presence of blood, spermatazoa, and human saliva. (T33 pp. 7203-04). The rectal swabs indicated the presence of blood and spermatozoa. (T33 p. 7206). Blood, semen, and spermatazoa were detected on the bed sheet, and spermatazoa were detected on the bed skirt. (T33 pp. 7206-08, 7215-16).

When detectives learned of the male DNA, they started canvassing to collect buccal swabs, or cheek swabs, from friends, associates, and neighbors. (T31 pp. 6869-70, T32 pp. 7020-21, T36 pp. 7306-07, 7189). Officers believed the perpetrator was possibly someone who lived close by. (T32 pp. 7020-21). Police asked neighbors around Cartier Drive for information about who was new in the neighborhood, and information of that nature. (T31 p. 6870). They were told about a man who would come through the neighborhood with another man on a moped, and do a little hustle with a mop and bucket, trying to make money. (T31 pp. 6871-72). Raleigh Police Department's fugitive unit covertly followed these men, and got samples from a toothpick one of the men flicked onto the sidewalk, and from McDonald's trash and a cigarette butt the other man discarded. (T31 p. 6873, T32 pp. 6961-68, 6986).

In doing the canvassing for the buccal swabs, lead detective Zeke Morse found his interaction with defendant to be very different from what he experienced with the other neighbors. (T36 pp. 7314-15). Every other neighbor had invited detectives inside,

and the detectives had talked with them for no less than an hour because the neighborhood residents had as many questions for police as police did for them. (T36 p. 7314). Out of the many people police had canvassed, defendant was the only person who had come outside and shut the door without inviting detectives in. (T36 pp. 7315, 7191-93). Defendant had no questions about the crime and expressed no concerns about his or his wife's safety. (T36 pp. 7315, 7191-93). This struck detectives as odd, and raised their suspicion. (T36 pp. 7314-15, 7190-91).

Detective Morse did not ask defendant for a DNA sample when he first spoke with him because their conversation was so brief. (T36 p. 7309). In Detective Morse's experience, people are protective of their DNA, so it requires a certain comfort level and answering questions about what police are going to do with it. (T36 p. 7309). Detective Morse did not think he had gotten to the point with defendant where defendant would give him a sample, so he didn't ask the first time he spoke with defendant. (T36 p. 7309).

Detective Morse tried again later to get a sample from defendant, but defendant refused. (T36 pp. 7310-13, 7192-93). Defendant said that his parents had told him not to give his DNA, and cited his Fourth Amendment right not to give his DNA. (T36 pp. 7312-13, 7192-93). The officers could not convince him to do it. (T36 pp. 7313-14, 7192-93).

After defendant refused to give a sample, the fugitive unit was assigned to follow him to try to obtain a sample. (MT pp. 119-21, T31 p. 6969, T36 pp. 7315-16). On 15 April 2010, members of the fugitive unit went to the area around defendant's residence at 2812

Wayland Drive and spread out strategically throughout the neighborhood. (MT pp. 120-21, T32 p. 6990). There are eight members in the unit, and each did surveillance in a separate vehicle, keeping in contact with each other by radio. (MT pp. 121-22).

Defendant's residence looked like a small apartment building with three units and a parking lot with six or eight spaces. (MT p. 123, T32 pp. 6991, 6996). There was no cover over the lot, no fence around it, no gate, and no "no trespassing signs" or other signs posted. (MT pp. 129-34, R pp. 91, 114). There was a lot of vegetation at the roadside at the curb line. (T32 pp. 6991-92).

Officers observed defendant leave his apartment, get in his vehicle, and go to the Harris Teeter at Cameron Village. (MT pp. 123-24, T32 pp. 6992-94). While defendant was at Harris Teeter, one of the officers, Gerry Davis, pulled into the parking lot of defendant's apartment building and parked there. (MT p. 122, T32 pp. 6994-95). Officer Davis was driving a Pathfinder with dark tinted windows. (MT p. 125, T32 p. 6996). While Officer Davis was sitting there in his car, another person, a female, pulled up and parked in the lot. (MT p. 126, T32 pp. 6996-97). The woman went into an apartment, and came back out, leaned over, as if looking suspiciously into Officer Davis's vehicle, and then left. (MT p. 126, T32 pp. 6996-97).

After the woman left, Officer Davis's vehicle was the only vehicle in the lot. (T32 p. 6997). After a short while, Officer Davis heard on radio traffic that defendant was on his way back, and that he was smoking a cigarette. (MT p. 124, T32 p. 6997). Defendant pulled into the apartment parking lot, still smoking the

cigarette. (MT p. 124, T32 p. 6997). Defendant parked in the second space from the left, which was almost directly in front of his apartment unit. (MT p. 125, T32 pp. 6997-98). He got out of the car smoking, took at least one more puff, then dropped the cigarette to the ground. (MT p. 125, T32 p. 6998). Defendant made about three trips to the car to get the groceries and take them back to the apartment. (MT pp. 125-26, T32 p. 6998). After the last trip, defendant went into the apartment and stayed there. (MT p. 126, T32 p. 6998).

After twenty minutes, give or take 10 minutes either way, Davis and another officer on the team, Officer Dorsey, coordinated on a plan to get closer to the cigarette butt. (MT p. 127, T32 p. 6998). They had decided to pretend to be looking for a certain address they got off Craigslist. (MT p. 128, T32 p. 7000). Officer Dorsey pulled into the parking lot in a pickup truck, careful to stay away from the area where defendant had left the cigarette butt. (MT p. 128, T32 p. 6999). Officer Davis got out of his car to meet up with him. (MT p. 128).

Defendant was inside his apartment, looking out of the window facing the lot. (MT p. 128, T32 p. 7000). Officer Dorsey went and spoke to defendant while Officer Davis picked up the cigarette butt with a rubber glove and put it in a ziploc bag. (MT p. 128, T32 pp. 7000-01). Officer Davis immediately delivered the evidence to Detective Faulk in the detective division on Atlantic Avenue. (MT p. 134, T32 pp. 7000-01, 7022-23).

Michelle Hannon, an expert in field of DNA analysis with the NC State Crime Lab developed DNA profiles from the samples she

received in the case, including the known standards, vaginal and rectal swabs, bedding, bed skirt, cups, and cigarette butts. (T33 pp. 7241, 7244-48). DNA obtained from defendant's cigarette butt matched the male fraction of DNA obtained from the vaginal and rectal swabs, and the bed sheet. (T33 pp. 7259-7266). She later confirmed this with DNA obtained from a buccal swab from defendant. (T33 pp. 7266-67, 7269). The federal government requires testing for 13 markers; North Carolina tests for 16 markers. (T33 p. 7275). Here, not just the 13, but all 16 markers matched. (T33 p. 7275).

Shawn Weiss, an expert in DNA analysis with Laboratory Corporation of America ("LabCorp"), testified that LabCorp also analyzed the DNA evidence in this case. (T33 pp. 7318-7324). LabCorp determined that Jason Williford could not be excluded as a source of the DNA from the cigarette butt or the sperm fractions of the vaginal swab and the fitted sheet. (T33 p. 7325). The random match probability in this case, which is the probability of randomly selecting an unrelated individual with a DNA profile consistent with these items, was greater than one in 6.8 billion. (T33 p. 7325).

On 16 April 2010, police learned they had probable cause to arrest defendant. (T36 p. 7134). They also got a search warrant, and searched defendant's residence. (T36 p. 7134). Defendant was arrested the same day. (T36 p. 7318).

Among the things found in the search of defendant's residence were a handwritten list of things to ask forgiveness for, and two letters, one to defendant's wife, Jessica, and one to his mom and dad. (T36 pp. 7137, 7139, 7141-44). The list and the letters were

read into evidence. (T36 pp. 7144-47).

Defendant's wife, Jessica, later told police that on the Friday night of 4 March 2010, defendant had gone out partying with a friend. (T36 p. 7220). Defendant and his friend came back to defendant's house after midnight, making a lot of noise and playing the drums. (T36 p. 7221). Jessica had to be up at 6 a.m. to go to her job as a vet tech in Durham the next morning. (T36 pp. 7218, 7220-21). Jessica got mad and told them to be quiet or for defendant to take his friend home. (T36 p. 7221). They left, and defendant took his friend home. (T36 p. 7221). Defendant got back at around 2:30 or 2:45 a.m., and Jessica confronted him about his blatant disrespect for the fact that she had to work. (T36 p. 7222). They got into a fight, which escalated until defendant left to go out on the porch to smoke. (T36 pp. 7222-23). Defendant stayed gone for a long time. (T36 p. 7223). Defendant came back at around 5 a.m., and was dressed only in his boxer shorts when he came in the bedroom. (T36 p. 7225). He didn’t say anything to Jessica, he just rolled over and appeared to go to sleep. (T36 p. 7226). Jessica was furious and tried to provoke conversation, but defendant wouldn't respond. (T36 pp. 7226-27).

Five days before defendant was arrested for the murder of Kathy Taft, he pinned Jessica down and attempted to rape her. (T36 pp. 7277, 7283-85). When defendant let her up, Jessica pressed 911, but did not complete the call. (T36 p. 7284).

Jessica had not been aware until after defendant's arrest that during their marriage, defendant had been using Craigslist to find men and have sex with or that he was hiring prostitutes. (T36 p.

7262). Police found emails on defendant's computer from gay men in response to ads for gay sex, searches of Craigslist for women seeking men, men seeking men, and transsexuals, and searches of several escort sites. (T37 pp. 7384-85, 7388-90).

Defendant did not know Ms. Taft prior to his assault on her, and there was no evidence that he had specifically targeted her. (T37 p. 7391).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS DNA EVIDENCE OBTAINED FROM A CIGARETTE BUTT DEFENDANT DISCARDED IN A COMMUNAL APARTMENT PARKING LOT.

On the basis of uncontested findings of fact, the trial court concluded that defendant's Fourth Amendment rights were not violated by DNA testing of a cigarette butt defendant voluntarily discarded in the communal parking lot of his apartment building. (R p. 116). The trial court's conclusions were supported by precedent from this State and from other jurisdictions across the country, and should be affirmed.

On appeal from denial of a motion to suppress, the trial court's findings of fact are binding when supported by competent evidence, while conclusions of law are "fully reviewable" by the appellate court. State v. Icard, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009)(quoting State v. Brooks, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994)). Here, the trial court's findings of fact included:

> 2812 Wayland Drive is a four-unit apartment building with a common parking lot located at the front of the building. Unit D and Unit A are end units; unit D is on the left and Unit A is on the right side of the building. Unit B and Unit C are located in the middle of the building. Unit A and Unit D each have their own walkway

> from the parking lot to their front door. Unit B and Unit C share a walkway from the parking lot to the front door, as their front doors are immediately adjacent to each other. The address of each unit is identified with numbering and unit letter on the face of the building near the front door to each unit. (2812A, 2812B, 2812C, 2812D). Each unit has its own mailbox located on the walkway railing at the end of the railing closest to the parking lot.
>
> The front of the building is located 92 feet from the curb of Wayland Drive. The parking lot in front of the building is approximately 63 feet wide and 33 feet deep. The parking lot is paved with asphalt. The parking lot has a driveway ingress and egress that is 15 feet wide and 43 feet long. With the exception of the driveway, the area between the curb of Wayland Drive and the parking lot is heavily wooded. The parking lot has room for 5 to 7 cars to park. There are lined spaces for parking and painted areas adjacent to the walkways that indicate parking is not permitted. There are no signs indicating "Private Property", "No Trespassing", "Parking for Residents Only" or anything else. The parking spaces have no visible markings indicating the building address other than what is posted on the face of the building. The parking area is not covered. There is no gate restricting access to the parking lot. The perimeter of the property is not fenced. There is a wooden fence between the parking lot and the apartment building which attaches to the walkway railings at the end of the walkways closest to the parking lot.

(R p. 114). These findings of fact were supported by the evidence (MT pp. 116-134), and are not in contention. The findings of fact, in turn, support the trial court's conclusions of law:

> 1. The area that the cigarette was recovered is not within the curtilage 2812-D Wayland Drive, it was outside and beyond the individual walkway and mailbox for that unit and out side the wooden fence in front of the apartments.
>
> 2. The Defendant did not have a reasonable expectation of privacy in the area that he discarded the cigarette butt. The cigarette butt was discovered in an area were the defendant knew, or reasonably should have known, was an area frequented by members of the public as they came to 2812 Wayland Drive.
>
> 3. The defendant did not have a reasonable expectation of privacy in the cigarette butt

> once he discarded it. He voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it.

(R p. 116). The trial court correctly concluded that the physical features and use of the communal parking lot placed it outside the curtilage of defendant's individual unit, and that defendant had no expectation of privacy in the cigarette butt he abandoned in this common area.

A. The Trial Court Correctly Concluded That Defendant Discarded The Cigarette Butt Outside the Curtilage of His Residence in an Area in Which He Had No Reasonable Expectation of Privacy.

The analysis of whether a space is within the curtilage of a person's residence hinges upon whether the area harbors "intimate activity associated with the sanctity of a man's home and the privacies of life." Oliver v. United States, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984)(quoting Boyd v. United States, 116 U.S. 616, 630, 29 L. Ed. 746 (1886)). The United State Supreme Court established a four-factor test to help guide this inquiry: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; (4) the steps taken by the resident to protect the area from observation by people passing by. United States v. Dunn, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35 (1987). The Court noted, however:

> We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a "correct" answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they

> bear upon the centrally relevant consideration -- whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.

Id. at 301, 94 L. Ed. 2d at 335. Thus, even where a shared space is directly contiguous to a resident's own living space, the balance of the Dunn test tips against a conclusion that such a space is so "intimately tied" to the home as to be within the curtilage of a single resident's dwelling. For example, in a case with facts substantially similar to the facts of this case, the Fourth Circuit rejected defendant's argument that he had an expectation of privacy in a cigarette butt he dropped in the shared parking lot of his mobile home park. See United States v. Stanley, 597 F.2d 866 (4th Cir. 1979).

In Stanley, the Fourth Circuit held that the communal parking lot in which defendant's automobile was parked was not within the curtilage of his mobile home. The court noted:

> The parking lot was used by three other tenants of the mobile home park. It contained parking spaces for six or seven cars. No particular space was assigned to any tenant. Although on the day of the search the Cadillac was parked in a space close to Stanley's home, that space was not annexed to his home or within the general enclosure surrounding his home.

Id. at 870. The pertinent facts considered in Stanley are directly analogous to those of this case. Here, as in Stanley, the parking lot was used by other tenants of the apartment building and members of the public; the lot contained spaces for six or seven cars with no particular space assigned to any tenant; although, on the particular day of the search, defendant's car was parked closest to his unit, that space was not annexed to his home or within the general enclosure surrounding the apartment. (R pp. 116-17). These

factors support the trial court's conclusion that this area was not within the curtilage of defendant's dwelling, and defendant had no reasonable expectation of privacy there. See id.

The Ninth Circuit similarly rejected a defendant's claim that he had an expectation of privacy in the parking area of an apartment that was shared by residents and guests. United States v. Soliz, 129 F.3d 499, 503 (9th Cir. 1997), overruled on other grounds, 256 F.3d 895 (9th Cir. 2001). In Soliz, the Ninth Circuit applied the four-factor test noting that, although the parking area was adjacent to the residence and there was a fence surrounding the property, the fence did nothing to prevent outside observation of the lot, and there was no evidence that the area was used for anything other than the "mundane, open and notorious activity of parking." Id. at 502-04. Here, even stronger than Soliz, there was no fence surrounding the lot or the property (R p. 114), and here, like Soliz, there was no evidence that the area was used for anything other than the "mundane, open and notorious activity of parking." See id.

In the present case, the trial court also noted that there were no "No Trespassing" or other signs on the lot. (R. p. 114). Even if such signs had been present, the trial court's conclusion of law that the lot was outside the curtilage would still have been supported by the other factors present in this case. See United States v. Sparks, 750 F. Supp. 2d 384, 389 (D. Mass. 2010). In Sparks, the court noted:

> Although the parking lot sat in close proximity to his apartment building, the remaining three factors weigh against a ruling of curtilage. The parking area was in no way bounded or enclosed, and it has not been alleged that

> the lot was used for anything other than parking. Further, the only attempts to keep the area protected were two "Private Property No Trespass" signs, one affixed to a fence beyond Sparks's apartment building and the other posted on the facade of the neighboring apartment building. Gov't Sept. 16 Aff. ¶ 4. As there is no indication that the lot was used for private activities, nor did it provide any actual privacy, the Fourth Amendment will not be extended to protect its contents.

Id. at 389. In the present case, the trial court considered similar factors, and correctly determined that the Fourth Amendment should not be extended to protect the contents of the shared parking lot of defendant's apartment building. (R pp. 113-17).

Defendant cannot establish that the trial court's conclusion of law was in error in light of the rationale of the foregoing cases and numerous other cases from across the country holding that there is no legitimate expectation of privacy in various common areas of apartment buildings or other dwellings. See, eg., State v. Washington, 134 N.C. App. 479, 484, 518 S.E.2d 14, 16-17 (1999)(communal dumpster of apartment complex was not within the curtilage of defendant's unit and he therefore retained no legitimate expectation of privacy in his garbage once he placed it in the dumpster); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976) (underground parking garage of condominium did not form part of the curtilage of defendant's apartment); United States v. Miguel, 340 F.2d 812, 814 (2d Cir. 1965)(lobby of multi-tenanted apartment house not within curtilage of defendant's apartment), cert. denied, 382 U.S. 859, 15 L. Ed. 2d 97 (1965); United States v. Holland, 755 F.2d 253, 255 (2d Cir. 1985) (individual tenants in multi-tenant buildings have no legitimate privacy expectations in common areas, even when guarded by locked doors); United States v.

Acosta, 965 F.2d 1248, 1257 (3d Cir. 1992) (apartment backyard shared with others not part of apartment curtilage); United States v. Dunkel, 900 F.2d 105, 107-08 (7th Cir. 1990) (dumpster located in parking lot of a multi-tenant office building was technically within the curtilage of the office but defendant's expectation of privacy was unreasonable since the dumpster was accessible to all persons and its contents were knowingly exposed to the public); United States v. Shanks, 97 F.3d 977, 979 (7th Cir. 1996) (no reasonable expectation of privacy in garbage cans placed next to a detached garage and only twenty feet from the residence but also close to the alley), cert. denied, 519 U.S. 1135, 136 L. Ed. 2d 881 (1997); United States v. Magana, 512 F.2d 1169, 1170-71 (9th Cir. 1975) (stating that driveway is only a semi-private area); People v. Rooney, 175 Cal. App. 3d 634, 221 Cal. Rptr. 49, 56 (1985) (communal trash bin in subterranean garage of 28-unit apartment building not within curtilage); People v. Becker, 188 Colo. 160, 533 P.2d 494, 495 (1975) (common area in front of apartments contiguous to all apartments and not fenced in is not part of curtilage of particular apartment); Mahar v. State, 137 Ga. App. 116, 223 S.E.2d 204, 207 (1975) (truck in parking lot 150 feet away from defendant's apartment not within curtilage), cert. denied, 429 U.S. 923, 50 L. Ed. 2d 291 (1976); Commonwealth v. Thomas, 358 Mass. 771, 267 N.E.2d 489, 491 (1971) (cellar not within curtilage of particular apartment); Commonwealth v. Pacheco, 21 Mass. App. 565, 488 N.E.2d 42 (1986) (cellar not part of curtilage of first-floor apartment); State v. Coburne, 10 Wash. App. 298, 518 P.2d 747, 757 (1973) (vehicle parked in alley parking lot available

to all users of apartment not within curtilage).

Defendant cites several cases for the proposition that the curtilage of a dwelling extends to the vehicle parked outside of the dwelling or a storage shed on the property. See Def.'s Br. p. 14. The cases cited, however, do not relate to the concept of what constitutes the curtilage of a communal residence, but simply hold that a search warrant describing an owner's property with sufficient particularity is sufficient to include a search of the owner's vehicle parked nearby, or to storage sheds on the property. See, eg., State v. Reid, 286 N.C. 323, 210 S.E.2d 422 (1974) (in a case involving illegal possession of intoxicating liquor, evidence seized from defendant's car, which was parked on the lot of his service station, was properly admitted where the officers searched the premise under a valid warrant which described them with particularity but did not specifically refer to the vehicle parked thereon); State v. Trapper, 48 N.C. App. 481, 269 S.E.2d 680 (1980)(search warrant for house trailer sufficient to cover search of tin storage shed in back), appeal dismissed, 301 N.C. 405, 273 S.E.2d 450 (1980), cert. denied, 451 U.S. 997, 68 L. Ed. 2d 856(1981); State v. Cartwright, 60 N.C. App. 247, 298 S.E.2d 740 (1983)(search warrant describing defendant's single family dwelling sufficient to cover search of car parked on premises); State v. Logan, 27 N.C. App. 150, 218 S.E.2d 213(1975) (search warrant describing house sufficient to support search for controlled substances of defendant's vehicle parked in the driveway).

This case does not involve the question of whether a search warrant covers the search of defendant's car or some other building

within the curtilage of a privately owned or occupied building. This case involves the cigarette butt discarded outside of defendant's car in the communal area of a shared dwelling, while in the direct view of a police officer openly parked in the same communal space.

The weight of authority both in this State and across the country supports the trial court's conclusion that the parking lot of defendant's apartment building was not within the curtilage of defendant's private space. Defendant has failed to establish that the trial court erred in this conclusion of law.

B. The Trial Court Correctly Concluded That Defendant Had No Reasonable Expectation of Privacy in Property He Had Abandoned.

Defendant dropped his cigarette to the ground of a shared parking lot and abandoned it. A person has no privacy interest in abandoned property. Defendant's Fourth Amendment rights therefore were not violated when police officers picked up the abandoned cigarette butt and submitted it for DNA testing.

"The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" California v. Ciraolo, 476 U.S. 207, 211, 90 L. Ed. 2d 210, 215 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). The two-part inquiry is: first, whether the individual has manifested a subjective expectation of privacy in the object of the challenged search second, whether society is willing to recognize that expectation as reasonable. See id. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."

Id. (citing Katz, 389 U.S. at 351, 19 L. Ed. 2d at 582).

It is well-settled that the warrantless search of abandoned property is not unreasonable and therefore does not violate the Fourth Amendment. See, e.g., Abel v. United States, 362 U.S. 217, 241, 4 L. Ed. 2d 668, 687 (1960) (holding there can be nothing unlawful in the government's appropriation of abandoned property); State v. Cromartie, 55 N.C. App. 221, 225, 284 S.E.2d 728, 730 (1981) ("The protection of the Fourth Amendment does not extend to abandoned property"); California v. Greenwood, 486 U.S. 35, 100 L. Ed. 2d 30 (1988)(defendant had no reasonable expectation of privacy in bagged garbage for municipal collection placed on curb outside curtilage of home).

Here, defendant demonstrated his intent to abandon the cigarette butt by his actions of tossing the cigarette butt to the ground, walking past it multiple times while unloading his groceries, and leaving it on the ground, unretrieved, when he returned to his apartment to stay. By all indications, defendant left his trash to remain on the ground of the shared parking lot to disintegrate or be picked up by some more fastidious third party. Leaving the cigarette butt in a communal place relinquished defendant's privacy and possessory interest in it. See State v. Washington, 134 N.C. App. 479, 484, 518 S.E.2d 14, 16-17 (1999).

In Washington, this Court held that defendant had no legitimate expectation of privacy in garbage he put in a communal dumpster in his apartment complex. Id. at 484, 518 S.E.2d at 16-17. This Court noted that, although the dumpster was for the use of certain apartment residents and may not have been in public view,

it was accessible to other apartment visitors and passers-by, and defendant had presented no evidence that public access to it was restricted. Id. This Court concluded that the warrantless search of the dumpster therefore did not violate defendant's rights under the North Carolina or United States Constitutions, and that the trial court had properly denied defendant's motion to suppress. Id. at 484, 518 S.E.2d at 17.

The present case presents an even stronger case for abandonment of defendant's privacy interest than did Washington. Here, defendant did not even place his trash out of sight in a communal receptacle, he abandoned it out in the open in a communal space frequented by other residents and guests.

As noted in Subsection A, above, other jurisdictions across the country have held, similarly to Washington, that residents of places with shared common areas do not have a privacy interest in the shared area. Leaving a cigarette butt in a non-private communal area demonstrates defendant's subjective intent to abandon it. See id.; see also Cromartie, 55 N.C. App. at 224, 284 S.E.2d at 730 (where police are lawfully present and the discard occurs in a public place where defendant cannot reasonably have any continued expectancy of privacy, the property will be deemed abandoned for purposes of search and seizure).

Defendant maintains that most reasonable people do not expect that throwing something away permits the government to collect and analyze their DNA. Def.'s Br. pp. 22, 25. Contrary to defendant's assertion, people today live in the information age in which forensic shows such as CSI are prevalent and popular. See State v.

Reed, 182 N.C. App. 109, 110, 641 S.E.2d 320, 321 (defendant shredded and pocketed his first cigarette butt, mentioning to police that he watched CSI), appeal dismissed and disc. rev. denied, 361 N.C. 701, 653 S.E.2d 155 (2007). The legal trend across the country further indicates that DNA testing of such abandoned property is constitutionally permissible. See, eg., People v. Gallego, 190 Cal. App. 4th 388, 395-96, 117 Cal. Rptr. 3d 907, 912 (2010) (a suspect had no reasonable expectation of privacy in a cigarette butt he discarded onto a public sidewalk, and subsequent DNA testing of the item was constitutional); Piro v. State, 146 Idaho 86; 190 P.3d 905 (2008) (no reasonable expectation of privacy in water bottle left in interrogation room and later DNA tested), disc. rev. denied, 2008 Ida. LEXIS 159 (Idaho, Aug. 14, 2008); Commonwealth v. Perkins, 450 Mass. 834, 883 N.E.2d 230, 239 (2008) (defendant abandoned any privacy interest in cigarette butts and soda can he left behind after interview with police and that were later DNA tested); Commonwealth v. Bly, 448 Mass. 473, 862 N.E.2d 341, 356-357(2007) (inmate demonstrated no subjective privacy expectation where he made no attempt to retrieve cigarette butts or water bottle left in interrogation room); Commonwealth v. Cabral, 69 Mass. App. Ct. 68, 72, 866 N.E.2d 429, 433 (2007) (Fourth Amendment did not protect suspect who spat onto a public street and did not retrieve the fluid; the suspect assumed the risk of the public witnessing his action and thereafter taking possession of his bodily fluids); People v. LaGuerre, 815 N.Y.S.2d 211, 213 29 A.D.3d 820, 822 (2006) (police constitutionally obtained DNA sample from piece of chewing gum the defendant voluntarily discarded

during contrived soda tasting test); Hudson v. State, 205 S.W.3d 600, 604-05 (2006) (warrantless seizure of a defendant's DNA from a Dr. Pepper can that was voluntarily thrown in the trash did not violate the Fourth Amendment because the defendant's actions indicated an intent to abandon the can), disc. rev. denied, 2007 Tex. Crim. App. LEXIS 148 (2007); Pollard v. State, 392 S.W.3d 785 (2012) (defendant had no privacy interest in cup and spoon he discarded in a "detox cell"), reh'g denied, 2012 Tex. App. LEXIS 10902 (Tex. App. Waco, Oct. 11, 2012), disc rev. denied, 2013 Tex. Crim. App. LEXIS 461 (Tex. Crim. App., Mar. 6, 2013); State v. Athan, 160 Wn.2d 354, 158 P.3d 27, 33-34 (2007) (defendant had no reasonable expectation of privacy in DNA obtained from saliva he used to seal an envelope mailed to detectives in response to a police ruse).

Defendant relies upon this Court's decision in Reed, 182 N.C. App. 109, 641 S.E.2d 320 (holding that defendant's Fourth Amendment rights were violated when a detective kicked the defendant's second cigarette butt off his patio to a common area, where it was retrieved by another detective). Reed is readily distinguishable from this case. Here, defendant did not attempt to throw the cigarette butt into a trash pile within the curtilage of his own property, he abandoned it in a communal area. Here, there was no police intercession in moving the cigarette butt to a place outside the curtilage of defendant's own unit; police picked up the cigarette from exactly where defendant had abandoned it.

Defendant's reliance on cases analyzing whether defendant's garbage can or trash bag was not left in a place indicating his

intention to convey the property to a third party is likewise misplaced. See Def.'s Br. pp. 19-21. This case is wholly inapposite a situation in which a garbage can was being used as a drop box for exchange of money and drugs, had not been put out for collection in the usual manner, was still situated close to defendant's private home, and thus was considered to still be within the curtilage and not discarded. See State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266 (2002). Unlike Rhodes, here, defendant discarded a single piece of trash in a communal area with no indication of any subjective intent to protect a privacy interest in it. The trial court correctly concluded that defendant had abandoned the cigarette butt. (R p. 116).

This Court should affirm the decision of the trial court determining that defendant had no subjective or objective expectation of privacy in a cigarette butt he discarded in a common area open to other residents, passers-by, and guests.

II. THE JUDGMENT AND COMMITMENT IS CLEAR WITHOUT REMAND FOR THE TRIAL COURT TO CHECK A REDUNDANT BOX ON THE FACE OF THE DOCUMENT.

Defendant maintains that remand of this case is required to correct a clerical error on the judgment and commitment. Defendant notes that the trial court did not check the box indicating that defendant was being sentenced to life without parole for a Class A felony at the bottom of Form AOC-CR-601. (R p. 165).

It is within this Court's discretion to remand for correction of a clerical error on the face of a judgment. See State v. McIlwaine, 169 N.C. App. 397, 402, 610 S.E.2d 399, 402 (2005) (remanded for correction of clerical error where verbatim

transcript and written judgment indicated defendant's prior record level to be VI, while sentence given was within the presumptive range for level IV); State v. Brooks, 148 N.C. App. 191, 195, 557 S.E.2d 195, 197-98 (2001) (remand for correction of clerical error proper where judgment incorrectly indicated that the mitigating factors outweighed the aggravating factors but the verbatim transcript reflected that the trial court found an aggravating factor, that the aggravating factor outweighed the mitigating factors, and where the sentence actually imposed was in the aggravated range for defendant's class and level of offense).

While it is within this Court's discretion to remand for correction, in this particular case it would appear to be an unnecessary expenditure of judicial resources where, unlike the cases cited by defendant, there is no conflict on the face of the judgment, no room for confusion about the terms of the judgment, and no potential ramification to defendant that a redundant box on the face of the judgment was not checked.

Here, defendant's only complaint is omission of a check mark in the box at the bottom of From AOC-CR-601, indicating that defendant was being sentenced to life without parole for a Class A felony. (R p. 165). Near the beginning of the document, however, in the block for "Offense Description," the trial court has indicated "FIRST DEGREE MURDER" and, under the column for class of offense, the trial court has indicated class "A." (R p. 165). In the next block below that, the trial court has indicated that it "makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses." In

the next block below that, at 1(b), the trial court has indicated that it makes no written findings because the prison term is for a Class A felony.

There is no conflict in the mere omission of a check mark beside the box for "Class A Felony" where the judgment again relates that the trial court imposes a sentence of "Life Imprisonment Without Parole." The other choices in this space are "Class B1 Felony," "Violent Habitual Felon," "G.S. 14-27.2A or G.S. 14-27.4A with egregious aggravation." None of these other choices are reflected as fulfilled anywhere else on the document.

There can be no confusion in this case that the trial court sentenced defendant to life imprisonment without parole because he was convicted of a Class A felony. The omission of which defendant complains has no conceivable prejudice to defendant.

CONCLUSION

For the reasons stated herein, this Court should affirm the trial court's conclusion of law that defendant's Fourth Amendment rights were not violated and should find no prejudicial error that a superfluous box on the judgment was not checked.

Electronically submitted this the 21st day of May, 2014.

ROY COOPER
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

John R. Mills
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Durham, North Carolina 27701

This the 21st day of May, 2014.

Electronically Submitted
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