NO. COA17-516 **THIRTIETH DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	**)**	
	)	
v.	**)**	**From Jackson**
	)	
GEORGE LEE NOBLES	**)**	

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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 CORRECTLY DENIED DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION.**

II. **WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUBMIT THE ISSUE OF SUBJECT MATTER JURISDICTION TO THE JURY.**

III. **WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS.**

IV. **WHETHER THE MATTER SHOULD BE REMANDED FOR CORRECTION OF A CLERICAL ERROR.**

STATEMENT OF THE FACTS

A. The robbery and murder at the Fairfield.

On 30 September 2012, 76-year-old Barbara Preidt and her husband, John Preidt, were traveling from their home in Indiana to Florida. That day, they stopped in Cherokee and checked into the Fairfield Inn located at 568 Paint Town Road. They went to a casino across the street and returned to the Fairfield shortly before 10:00 p.m. When Mrs. Preidt exited the passenger side of their van, defendant ambushed her and grabbed her purse. She did not let go of her purse, so defendant hit her with his gun. During the ensuing struggle over the purse, defendant fatally shot Mrs. Preidt. Defendant grabbed her purse and ran away. (3Tpp. 829-36; 4Tpp. 958, 984-91, 1003-04, 1012-16, 1037; 6Tpp. 1271-72, 1393-97; 10Tpp. 2228-29, 2243-44, 2246; 11Tpp. 2403-06, 2441-46; 12Tpp. 2528-33; State's Ex. 204A)

The first Cherokee Indian Police Department ("CIPD") officer arrived at the scene at 10:04 p.m. Mr. Preidt, who was visibly upset, informed law enforcement that when his wife exited their van, she was ambushed by a man dressed in all black and wearing a black mask. Mr. Preidt said the man was about 5'9" to 6' tall and grabbed his wife's purse but she tried to hold onto it. Mr. Preidt tried to help his wife, but he fell down. The man then grabbed his wife's purse, shot her, and ran behind the Fairfield. Mr. Preidt also told law

enforcement that his wife had a tube of eye medication in her purse. (3Tpp 837; 4Tpp. 984-991, 1003-04, 1012-16; 11Tpp. 2413-14; 12Tpp. 2585-86, 2590-91; 13T pp. 2683-85)

Tourist Glen Gronseth left the casino across the street from the Fairfield close to 10:00 p.m. He heard several loud "bangs" and saw a person in dark-colored clothing running in front of a building. After losing sight of the person, Gronseth saw a dark-colored pickup truck, which was facing the casino, pull out from a building and turn right onto Highway 19. Gronseth went to the Fairfield and told law enforcement what he observed. (4Tpp. 957-71, 1009; 11Tpp. 2413-14, 2420-21; Rule 9(d)(2) Documentary Exhibits ("Supp.") 77-79)

Law enforcement found one Hornady .40-caliber shell casing underneath Mrs. Preidt's body. (4Tpp. 1060-62, 1066-68; 5Tpp. 1093-95; 8Tpp. 1886-87; 11Tp. 2425) They later recovered video surveillance footage from the Fairfield and the casino across the street. Beginning at about 9:40 p.m.[1] on 30 September 2012, the surveillance video shows a person dressed in dark clothing walking across the Fairfield's parking lot, ducking behind cars, and heading in the direction of where the Preidts had parked their van earlier that day. Video surveillance also showed headlights from the Preidts' van as it entered the

[1]The video surveillance showed the time as 21:31 (9:31 p.m.), but CIPD Detective Sergeant Daniel Iadonisi testified the time shown on the Fairfield's surveillance video was nine minutes slow. (11T pp. 2435, 2440; 12Tp. 2581)

parking lot, a person lurking in the shadows of the bushes, and the Preidts' van parking in the same place it had parked earlier that day. Video surveillance footage from the casino shows a pickup truck leaving the area of the Fairfield shortly thereafter and turning onto the highway heading north. (11Tpp. 2363-64, 2380-83, 2426-51, 2455-56; 12Tpp. 2581, 2663)

Dr. John Samuel Davis performed the autopsy of Mrs. Preidt on 1 October 2012, and opined the cause of death was a single gunshot wound to the organs of the chest. Mrs. Preidt also had a fresh, shallow laceration and abrasion on the right lateral temporal scalp. (6Tpp. 1225, 1228, 1234-38, 1240-41, 1246-74, 1289-90)

B. Defendant's actions before and after the robbery and murder.

In September 2012, Dwayne Edward Swayney ("Swayney") lived at 76 Enoch Oocumma Road in Cherokee with his mother, Catherine Gentry, and 15-year-old Alexis McCoy. Ashlyn Carothers ("Carothers") was at Swayney's house on 30 September 2012 with defendant, who was her boyfriend. Defendant and Carothers told Swayney they did not have any money and indicated they were going to rob someone. (6Tpp. 1363-67, 1377-80; 7Tpp. 1577-79)

That night, Swayney heard on his scanner that shots were fired at the Fairfield, a woman was unresponsive, and a pickup truck took off from behind a store. Shortly thereafter, defendant and Carothers arrived at his house in a

Ford pickup truck that belonged to Carothers's step-father, John Wolfe. (6Tpp. 1376-77, 1381-85, 1388; 7Tpp. 1581-85, 1687-88; 8Tpp. 1759-60; 10Tpp. 2217-33)

Defendant was carrying a black gun when he entered Swayney's house. All three went to Swayney's bedroom to talk. Swayney told Carothers and defendant what he had heard on his scanner. Defendant then told Swayney that he hid in the bushes at the Fairfield and saw "that woman and that man[;]" he grabbed the woman's purse; she would not let go of her purse so he hit her; and when she still did not let go, he hit her again and the gun discharged. The woman said "oh," and defendant grabbed her purse and ran to the truck where Carothers was waiting behind a nearby store. Carothers brought the purse that defendant had taken from Mrs. Preidt into the bedroom. Swayney saw pill bottles in the purse, and defendant told Swayney that he had taken about $5,000.00 from the purse. (6Tpp. 1385-1401; 7Tpp. 1559, 1585, 1598, 1602-03; 10Tpp. 2233-37, 2240)

Defendant was wearing black pants, a black shirt, a stocking cap, and a pair of gloves. He asked Swayney if he could borrow some clothes and Swayney gave defendant a pair of black camouflage cargo shorts and a t-shirt. Defendant changed clothes and left his own clothes lying on the bedroom floor. Defendant also removed an unfired bullet from his gun and placed it on Swayney's dresser. (6Tpp. 1393, 1400-04; 7Tpp. 1501-02; 10Tpp. 2237-38) Thereafter, Carothers

threw the purse into a fire in a burn barrel behind Swayney's house. (6Tpp. 1402-1408; 7Tpp. 1585-87, 1613-15; 10Tpp. 2238-39) Later, Swayney washed defendant's clothes with his own and placed them in his dresser drawer. He also placed the unfired bullet that defendant had ejected from his gun on a shelf in the bathroom. (6Tpp. 1410-11, 1418, 1440-41 1444; 7Tpp. 1500-02)

At that time, Carothers and defendant lived with Carothers's step-father, John Wolfe, on Olivet Church Road in Cherokee. Wolfe owned a gray, 2004 Ford F-150 truck that he allowed Carothers to drive. On 30 September 2012, he had a temporary paper tag on the truck's interior back window and a North Carolina Tarheels tag on the front of the truck. Carothers and defendant left in his truck that night between 8:30 and 9:00 p.m. and had not returned by the time he went to bed at 11:00 p.m. The next morning, Wolfe noticed his temporary tag had been removed from the back window of his truck and placed on the front bumper where his Tarheels tag had been. That evening, he asked Carothers about his tags and Carothers later returned the Tarheels tag to him. (7Tpp. 1682-87; 8Tpp. 1760-68, 1776, 1795-96, 1807-10; 10Tpp. 2183-84, 2187-88, 2194-98, 2217-18, 2241-42, 2248-49)

About two weeks after the shooting at the Fairfield, Carothers and defendant were hanging out with Carothers' friend, Jessica Calhoun. According to Jessica, defendant told Carothers that it was okay for Carothers to tell Jessica

about what happened and Carothers then made statements to Jessica[2]. (6Tpp. 1346-48, 1350-52) Jessica's mother, Myra Calhoun, lived with Angela Kalonaheskie in November of 2012. Jessica often talked to her mother about things that most kids would tell only to a friend. In late November 2012, Kalonaheskie had a conversation with Myra Calhoun and texted CIPD Chief Ben Reed about their conversation. (6Tpp. 1312-19)

C. The investigation

From 30 September 2012 until late November 2012, law enforcement did not make much progress in the investigation. (11Tpp. 2447, 2457-58) Then, in late November 2012, CIPD Chief Reed received a text message from Kalonaheskie regarding the person who had committed the crimes at the Fairfield and where evidence from the crime had been burned. Thereafter, law enforcement went to that location, which was Swayney's residence, and searched a fire pit after obtaining Ms. Gentry's consent. At that time, they did not know there was a separate burn barrel behind the house. (6Tpp. 1316-17, 1327-28; 11Tpp. 2457-58, 2461-63, 2467; 12Tp. 2624)

After Swayney learned that law enforcement had been digging in the fire pit, he emptied the contents of the burn barrel and removed charred items that

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[2]At trial, Carothers denied telling Jessica what happened and testified defendant is the one who told Jessica what happened at the Fairfield. (10Tpp. 2249-50)

appeared to be keys, a cell phone and a cigarette case. He put the charred items in a coffee can, which he placed in the attic. On 28 November 2012, Swayney told his nephew, Carey Swayney ("Carey"), what he had learned from defendant about what occurred at the Fairfield. Swayney also told Carey that a purse and defendant's black pants and shirt were left at Swayney's house. According to Swayney, defendant and Carothers were thinking about blaming Swayney for the robbery and murder, and he wanted Carey to bring the evidence to the police department if Swayney was ever charged with the crimes. (6Tpp. 1414-19; 7Tpp. 1471, 1493-95, 1634-37, 1647-50, 1660-62, 1678-79)

Unbeknownst to Swayney, Carey went to Swayney's house late that night and collected black pants and a shirt from Swayney's dresser. Carey then brought the clothing to the CIPD. He told law enforcement what he learned from Swayney. (6Tpp. 1412-19; 7Tpp. 1634-52, 1655-60, 1666-71, 1674; 11Tpp. 2458-60, 2464-65) According to Swayney's testimony at trial, Carey brought the wrong pants and shirt to the CIPD. (7Tpp. 1548)

The next morning, 29 November 2012, CIPD Detective Sergeant Daniel Iadonisi interviewed Swayney. Swayney reported what defendant had told him about the murder and robbery at the Fairfield. Swayney also told him about the items that were at his house. Swayney then accompanied law enforcement to his house and gave them the coffee can containing the charred items he removed

from the attic. The charred items in the coffee can included two rectangular items, a tube of something, keys, and key rings. (6Tpp. 1420-31, 1433; 8Tpp. 1833-38, 1853-63; 11Tpp. 2468-69) Law enforcement also recovered a pair of black Nike pants and two black shirts from Swayney's dresser in the bedroom and an unfired Hornady .40-caliber bullet from the bathroom shelf. (6Tpp. 1440-44; 7Tpp. 1500-02; 8Tpp. 1863-87; 9Tp. 2050; 11Tppp. 2469-71; 13Tpp. 2681)

1. Search of Wolfe property.

On 30 November 2012, law enforcement searched the property of John Wolfe, where Carothers and defendant lived. They collected a pair of black and white camouflage shorts from a dresser used by defendant. Law enforcement also found drug paraphernalia; pill bottles containing assorted medication; and boxes of ammunition in the bedroom shared by Carothers and defendant. Further, law enforcement found four Hornady .40-caliber shell casings outside the Wolfe residence, three of which were fired from the murder weapon. Although the murder weapon was never found, markings on three of the shell casings matched the markings on the shell casing found underneath Mrs. Preidt's body. Carothers testified at trial that she had previously shot defendant's gun in the front yard of Wolfe's property. Law enforcement brought Wolfe, Carothers, and defendant to the CIPD to be interviewed. (8Tpp. 1783-88, 1889-91, 1897, 1907-18; 9Tpp. 1964-74, 1978-80, 1984-92, 1995-2002, 2008-21,

2067-92; 10Tpp. 2221-23; Supp. 83-84)

2. Carothers's statement.

Carothers gave a statement to law enforcement implicating herself and defendant in the crimes at the Fairfield. She admitted defendant was with her in Wolf's truck on the night of 30 September 2012. Carothers parked the truck across the street from the casino; defendant exited the truck and said he was going to get a "book;" she heard two shots while defendant was gone; and defendant thereafter returned to the truck with a purse. Defendant told Carothers the lady would not give him the purse so he hit her with the gun and it discharged. Carothers said she and defendant then went to Swayney's house. After removing pills and money from the purse, she threw the purse in a burn barrel behind Swayney's house. (Supp. 95-96; State's Ex. 214)

3. Defendant's statement.

Law enforcement also interviewed defendant at the CIPD. Defendant initially denied any involvement in the robbery and murder at the Fairfield. (5Tp. 1187; 12Tpp. 2521-22; Supp. 99-100, 105-11, 114-34, 137-51; State's Ex. 204A) Eventually, however, defendant confessed to the crimes. He said he had a .40 caliber Glock 22 gun with him when Carothers dropped him off. He hid in the bushes and saw the Preidts exit their van. He grabbed Mrs. Preidt's purse, and she fell down. Mrs. Preidt pulled back on her purse and defendant fired one

shot in the air. During the ensuing struggle over the purse, the gun discharged and hit Mrs. Preidt. Defendant heard her say, "oh," and then he ran around the hotel and back to the truck. He instructed Carothers, "[m]an, go, go, go, go." Defendant told Carothers he thought he killed a woman when they struggled over the purse and the gun discharged. (12Tpp. 2526-33, 2537, 2626, 2630-33, 2676, 2686-87; Supp. 156, 158-61,163-67; State's Ex. 204A)

Thereafter, Carothers and defendant went to Swayney's house. Defendant told Swayney what happened. Defendant told law enforcement he sold the gun to "a black dude in Statesville[]" and the purse "got burnt." He initially said he threw away the black Nike pants, gloves, and mask he wore that night but then remembered that Swayney may have given him a change of clothes. (9Tp. 2150; 12Tpp. 2534-37, 2551-52, 2676, 2681; 13Tpp. 2671-73; Supp. 161, 165-79; State's Ex. 204A) Portions of defendant's videotaped interview were played at trial. (12Tpp. 2542-43, 2547-50; State's Ex. 204A)

D. Additional trial evidence.

Defendant's mother testified she had seen defendant with a short, black pistol that looked like a Glock. (6Tpp. 1294-98, 1305, 1309)

Carothers testified that defendant was with her in Wolfe's truck on the night of 30 September 2012. At defendant's instruction, she pulled over and parked the truck across from the casino behind an abandoned motel next to the

Fairfield. Defendant said, "I'm going to go get a book;" exited the truck; and was gone for about 15 to 20 minutes. During that time, Carothers heard two shots. Shortly thereafter, defendant jumped into the truck and said, "go, go, go." Carothers turned right onto the highway in front of the Fairfield. Defendant had a purse with him and told Carothers that he was trying to grab the purse from an elderly woman and the woman did not let go of it. When defendant grabbed her purse again, the gun discharged and the woman said, "oh." Defendant told Carothers that he ran when he saw an older man coming toward him. (10Tpp. 2187-98, 2217-29, 2243-44, 2246)

Carothers and defendant found pills and $5,000.00 in the purse. They went to Swayney's house and defendant told Swayney what happened. Defendant was wearing all black that night, including a black toboggan, and Carothers thinks Swayney gave defendant a change of clothes. Carothers threw the purse into a fire in the burn barrel behind Swayney's house, but kept the money and pills. Carothers testified they moved the temporary tag to the back of Wolfe's truck. She also testified defendant disposed of the gun used in the murder. (10Tpp. 2217-18, 2229-30, 2232-43, 2246-48)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION.

Defendant contends the trial court erred by denying his motion to dismiss for lack of jurisdiction. The basis of defendant's motion was that he is an Indian and should have been tried in the federal courts rather than in the state courts of North Carolina. The trial court properly denied defendant's motion.

A. Standard of review.

A trial court's order ruling on a motion to dismiss for lack of subject matter jurisdiction is reviewed de novo, but the court's findings of fact are binding on appeal if supported by competent evidence. Cooke v. Faulkner, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513-14 (2000); State v. Kostick, 233 N.C. App. 62, 72, 755 S.E.2d 411, 418 ("A claim that the trial court lacks subject matter jurisdiction presents a question of law which is reviewed de novo."), disc. rev. denied, 367 N.C. 508, 758 S.E.2d 872 (2014).

B. Evidence presented at the hearing.

Defendant's motion to dismiss for lack of jurisdiction was heard in Jackson County Superior Court before The Honorable Bradley B. Letts, who grew up in the Cherokee community and is a member of the Eastern Band of Cherokee Indians ("EBCI"). (8/9/13Tp. 5; 2Rp. 166) The parties stipulated and Judge Letts

found the crimes occurred in front of the Fairfield located at 568 Paint Town Road in Cherokee; the Fairfield is located on the Qualla Boundary, land held in trust by the United States for the EBCI; defendant was arrested by a CIPD officer at the CIPD which is located on the Qualla Boundary; defendant was brought before a Jackson County Magistrate; defendant was born in Polk County, Florida to Donna Lorraine Smith Crowe, now known as Donna Mann; Donna Mann is an enrolled member of the EBCI, a federally recognized tribe; and defendant is not an enrolled member of the EBCI but, instead, would be a first descendant of an enrolled member. (8/9/13Tpp. 6-11; 1Rpp. 64-65, 87, 91-94, 104, 108-11)

The following additional evidence was presented at the hearing.

1. State's evidence.

On 28 January 1993, defendant was convicted in Florida for armed burglary and grand theft. In a presentence report, defendant's race/sex is designated as "W/M." Defendant was released from the custody of the Florida Department of Corrections on 4 November 2011. Defendant's post-release supervision was transferred from Florida to Gaston County, North Carolina. Defendant is classified as white in both the OPUS System (Offender Population Unified System) and the Interstate Compact for Adult Supervision System ("ICAOS"). When defendant arrived in North Carolina, he lived with his mother

in Kings Mountain until he transferred his supervision to Swain County on 26 March 2012. (8/9/13Tpp. 13-16, 26-27, 71; 1Rpp. 87-88, 129)

Defendant lived with his aunt in Swain County at an address located on the Qualla Boundary. On 3 April 2012, defendant told Probation Officer Olivia Ammons that he was employed at a restaurant, which also was located on the Qualla Boundary. From 17 May 2012 until 11 July 2012, defendant reported living at two different addresses, neither of which were on the Qualla Boundary. When Ammons went to an address in Bryson City where defendant reportedly was living on 22 June 2012, defendant was not there. Ammons learned that defendant stayed there part of the time and with his girlfriend at an unapproved and unknown residence part of the time. (8/9/13Tpp. 71-77; 1Rpp. 88-90)

On 25 June 2012, defendant advised Ammons that he had quit his job and was going to stay in Bryson City. He also asked for help obtaining a photo ID, so Ammons printed off a document with his photograph and demographic information. The document designated defendant's race as white, and defendant never indicated this designation was incorrect. Thereafter, defendant said he was returning to his mother's house and his supervision was transferred back to Gaston County on 12 July 2012. Defendant had no changes of address from 12 July 2012 until 30 September 2012. (8/9/13Tpp. 15, 20-22, 24-27, 78-83; 1Rp. 90; Supp. 1)

EBCI Assistant Enrollment Officer Kathy McCoy testified that defendant's mother is an enrolled member of the EBCI but defendant is not an enrolled member. To be an enrolled member, the EBCI requires an Eastern Cherokee blood quantum of at least 1/16, among other requirements. (8/9/13Tpp. 90-96, 106-07; 1Rpp. 94, 96, 145)

Certain benefits and preferences are available to first generation descendants of enrolled members ("first descendants"). A first descendant includes all children born to or adopted by an enrolled member. The document issued to first descendants by the Tribal Enrollment Office is called a "Letter of Descent" and is used to establish eligibility for services, including the Indian Health Service. Although defendant is eligible to be designated as a first descendant, he never applied for or received certification establishing his first descendant status. (8/9/13Tpp. 93-95, 106; 1Rpp. 95, 97)

The EBCI provides benefits and opportunities to EBCI members that are not afforded to first descendants. For example, tribal money cannot be expended for the use or benefit of anyone other than an enrolled member of the tribe. Further, as set forth below, first descendants are treated differently than EBCI members in the areas of real property, inheritance, health care, employment, education, and voting. (8/9/13Tpp. 108-16; 1Rpp. 97-99, 101)

Real property. Tribal land is divided into possessory holdings, which can

be held only by enrolled members of the tribe. First descendants cannot purchase a possessory holding or hold property in their name. Instead, first descendants only have use rights to the possessory holdings that their enrolled member parent had at the time of his or her death. These use rights, however, are limited. For example, first descendants have the right to sell, rent, or lease dwellings on the property, but only at fair market value to an enrolled member and only with the approval of the Tribal Business Committee. Further, a first descendant cannot enter into a lease that extends beyond his life expectancy. First descendants also cannot minimize or destroy the value of the possessory holding (e.g., they cannot deplete the mineral rights, remove any permanent structures, or harvest timber except for their own personal use). These restrictions are not placed on enrolled members. (8/9/13Tpp. 108-110, 115-16; 1Rpp. 46-47, 97-98)

Inheritance. The sole basis upon which a first descendant is given the right to use or occupy a possessory holding is from a parent through a valid will. Unlike a first descendant, an enrolled member can inherit a possessory holding either by will or intestate succession. If a first descendant inherits a possessory holding, he cannot devise it. (8/9/13Tpp. 111-12; 1Rpp. 46-47, 98)

Health care. First descendants do not receive the same health care benefits as enrolled members. One major distinction is that first descendants

cannot receive any services that are funded by tribal money; they are eligible to receive only those services funded by federal money. First descendants living in one of five designated counties can receive direct care at the Cherokee Indian Hospital ("CIH") and contract health services for life-threatening conditions; they cannot receive contract services for chronic conditions. First descendants living outside the five designated counties can receive only direct care at CIH; they are ineligible for outside referrals. Enrolled members, however, receive all health care services for free wherever such services are needed. (8/9/13Tpp. 108-09; 1Rp. 97)

Employment. The EBCI has four levels of employment preferences and gives first preference in initial hiring decisions to enrolled members who meet minimum requirements. The fourth and last employment preference is given to first descendants. (8/9/13Tpp. 112-13; 1Rpp. 43, 98)

Higher education. Enrolled members have first priority to funds provided for higher education and adult education services. First descendants may receive such funds only when they are available. (8/9/13Tpp. 113-14; 1Rpp. 51, 99)

Voting and holding elected office. First descendants cannot vote in tribal elections or hold a tribal elected office. (8/9/13Tpp. 114-16; 1Rp. 99)

EBCI Attorney General Annette Tarnowsky testified she is not aware of

any applications or attempts by defendant to use any of the rights and benefits provided to first descendants. (8/9/13Tpp. 102-03, 116-17)

Myrtle Driver Johnson ("Driver") is an enrolled member of the EBCI with a blood quantum of 4/4. She has been described as an icon in the Cherokee culture who is accepted as a tribal elder and "very well-recognized." Driver has preserved and taught the Cherokee language since 1974 and been involved in the Cherokee government. The word for "first descendant" in the Cherokee language is aniyonega, which means people of light or white complexion. Driver testified that the societal view held by the EBCI is that first descendants are non-Native American. The EBCI believe that the government promised health, education and welfare to Indians, not descendants. (8/9/13Tpp. 117-18, 137-39, 141-45; 1Rpp. 100-102)

Driver testified that defendant's tattoos, a Native American with a headdress and an eagle, were not Cherokee symbols. The headdress is that of a Western Plains Indian and she testified that such a tattoo would be "frowned upon" by the tribal elders because it shows "you're not proud of your Cherokee heritage, because that is not of Cherokee." The eagle is "generic" because all Native American tribes honor the eagle. Driver also testified about various tribal events that are held on the Qualla Boundary. She testified she does not know defendant and is not aware of defendant's participation in EBCI social life.

(8/9/13Tpp. 141-48; 1Rpp. 101-02)

Mrs. Preidt's husband, John, testified that Mrs. Preidt was white. (8/9/13Tpp. 155-57; 1Rp. 102)

2. Defendant's evidence.

Defendant's mother, Donna Mann, testified that defendant was born on 17 January 1976 in Polk County, Florida. Defendant's father was white and was not a member of any federally recognized Indian tribe. In 1983 or 1984, Mann moved from Florida to Cherokee. Thereafter, she and defendant lived both on and off the Qualla Boundary. After moving to the Cherokee area and until around 1990, defendant attended both Swain County and Cherokee Central schools. Cherokee Central schools are open to non-Indians. Defendant's school records were admitted into evidence. On one Bureau of Indian Affairs ("BIA") form, Mann listed defendant's "Degree Indian" as "none." Defendant's race is listed as white on both a "North Public Schools Elementary Standardized Test Record Form" and an "Elementary Scholastic Record," and his race is listed as "I" on an "Individual Student Record" for the 1986-1987 school year. (9/13/13Tpp. 56-67, 74-75, 90-96, 99; Supp. 48, 57, 59, 64; 1Rpp. 50, 109)

Mann testified that defendant received treatment at Swain County Hospital and CIH for injuries suffered in automobile accidents in 1984 and 1985. According to Mann, "Cherokee" paid for the medical expenses not covered by

third-party insurance. (9/13/13Tpp. 67-77)

Vicky Jenkins, the medical records director at CIH, testified that CIH serves enrolled members and first descendants. Patients of CIH do not receive a bill or pay for medical services. Jenkins testified that defendant's records show he received services at CIH on 5 occasions: 10/31/85; 10/1/87; 3/12/89; 3/16/89; and 2/28/90. CIH is currently a tribal facility run by the EBCI, but was a federal Indian Health Service ("IHS") facility at the time defendant received services. (8/9/13Tpp. 168-82; 1Rpp. 104-05, 109)

3. Trial court's order.

Based on the above evidence, the trial court made extensive findings of fact which support its conclusions that defendant is not an Indian and the State has jurisdiction. (1Rpp. 86-2Rpp. 165)

C. North Carolina precedent establishes the State has jurisdiction over crimes committed on the Qualla Boundary.

The unique history and legal relationship of the EBCI to the State of North Carolina has been set forth in prior court decisions. See e.g., Cherokee Trust Funds, 117 U.S. 288, 29 L. Ed. 880 (1886); United States v. Wright, 53 F. 2d 300 (4th Cir. 1931), cert. denied, 285 U.S. 539, 76 L. Ed. 932 (1932). Based upon this unique history and relationship, all the decisions of this State's Supreme Court regarding jurisdiction over crimes committed on the Qualla

Boundary have held that North Carolina has jurisdiction without regard to whether the defendant was an Indian or non-Indian. See e.g., State v. McAlhaney, 220 N.C. 387, 388-89, 17 S.E.2d 352, 353-54 (1941) (holding the State had jurisdiction over a felonious assault committed by a white person on an Indian within the Qualla Boundary); State v. Adams, 213 N.C. 243, 247, 195 S.E. 822, 824 (1938) ("the criminal laws of the State are applicable to offenses committed within the Indian Reservation."); State v. Wolf, 145 N.C. 440, 441-46, 59 S.E. 40, 41-43 (1907) (holding that an Indian who lived on the Qualla Boundary was subject to the general laws of the State in a case involving a prosecution for violation of a compulsory school attendance law); State v. Ta-cha-na-tah, 64 N.C. 614, 615-18 (1870) (exercising jurisdiction in prosecution of an Indian for killing another Indian).

This State first exercised criminal jurisdiction over a Cherokee Indian in 1870. Ta-cha-na-tah, 64 N.C. at 615-18. In Ta-cha-na-tah, this State's Supreme Court stated, "[p]rima facie, all persons within the State are subject to its criminal law, and within the jurisdiction of its Courts; if any exception exists, it must be shown. . . . Unless expressly excepted, our laws apply equally to all persons, irrespective of race." Id. at 615-16. Thereafter, the United States Supreme Court stated, with reference to the EBCI, "they are citizens of [North Carolina] and bound by its laws." Cherokee Trust Funds, 117 U.S. at 309, 29 L.

Ed. at 886. Further, the Fourth Circuit stated in Wright, that "the members of the [EBCI], by separation from the original tribe, have become subject to the laws of the state of North Carolina[.]" Wright, 53 F.2d at 307.

The last time this State's Supreme Court addressed the issue of jurisdiction over a crime committed on the Qualla Boundary was in 1941 in McAlhaney. In that case, a white defendant was convicted of feloniously assaulting an Indian on the Qualla Boundary. McAlhaney, 220 N.C. at 388-89, 17 S.E.2d at 353. On appeal, he contended the federal government, by enacting 25 U.S.C. § 213, had assumed jurisdiction of all felonious assaults committed by white persons on Indians within Indian country and such jurisdiction was exclusive, thereby depriving the state courts of jurisdiction to try a white person charged with a felonious assault on the Qualla Boundary. Id. at 388, 17 S.E.2d at 353. This State's Supreme Court rejected the defendant's contention, stating that "[c]riminal statutes relating to Indians, enacted by The Congress in furtherance of the guardianship relation the Federal Government undertakes to maintain towards Indians, are not exclusive." McAlhaney, 220 N.C. at 389, 17 S.E.2d at 354.

Quoting from Wright, the Court also stated:

> [C]learly no act of Congress in their behalf would be valid which interfered with the exercise of the police powers of the State. In such a situation, a law to be sustained must have relation to the purpose for which the Federal Government exercises guardianship

> and protection over a people subject to the laws of one of the States; i.e., it must have reasonable relation to their economic welfare.

Id. (quoting Wright, 53 F.2d at 307); but see United States v. John, 437 U.S. 634, 654, 57 L. Ed. 2d 489, 503 (1978) (holding that, pursuant to 18 U.S.C. §1153, the United States had jurisdiction over an assault with intent to kill committed by a Choctaw Indian in Indian country and that the State of Mississippi had no power similarly to prosecute the defendant for the same offense). The Court, thus, held that "the enactment by The Congress of U.S.C.A., Title 25, sec. 213, was not the exercise of a power vested exclusively in the Federal Government and creates no such conflict as would oust the jurisdiction of the State courts." McAlhaney, 220 N.C. at 389, 17 S.E.2d at 354.

As this Court has recognized, "[f]or many years the courts of this state have exercised at least concurrent jurisdiction to try Cherokee Indians for certain crimes committed on the Cherokee Indian Reservation." State v. Dugan, 52 N.C. App. 136, 137-39, 277 S.E.2d 842, 843-44 (holding the State had jurisdiction to try an Indian for a traffic offense occurring on the Qualla Boundary and stating the Major Crimes Act does not preempt North Carolina from jurisdiction to try such offense), disc. rev. denied, 303 N.C. 711, 283 S.E.2d 137 (1981). The Fourth Circuit also has said that the United States and North Carolina exercise concurrent criminal jurisdiction over the Qualla Boundary. United States v. Hornbuckle, 422 F.2d 391, 391 (4th Cir. 1970) (Indian

committed assault with a deadly weapon in violation of 18 U.S.C. §§ 113(c) and 1153); see also In re McCoy, 233 F. Supp. 409, 414 (E.D.N.C. 1964) (holding that North Carolina and the United States have concurrent criminal jurisdiction under 18 U.S.C. §§ 1151 and 1153: "the state government derives it from the treaty of New Echota, and the federal government derives it from its position as guardian and protector of these native Americans."); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through A Jurisdictional Maze, 18 Ariz. L. Rev. 503, 551-52 (1976) (citing, as an exception to the general federal statutory scheme set forth in 18 U.S.C. §§ 1152, 1153, and 3242, the long line of state and federal decisions holding there is concurrent state and federal jurisdiction over the EBCI as a result of "the peculiar history of that reservation.").

The above cases establish that North Carolina at least has concurrent criminal jurisdiction over the Qualla Boundary without regard to whether the defendant is an Indian or non-Indian. Therefore, the State had jurisdiction to try defendant for the offenses in this case, which were committed against a white woman on the Qualla Boundary, regardless of whether defendant is an Indian or non-Indian. See McAlhaney, 220 N.C. at 388-89; Adams, 213 N.C. at 247, 195 S.E. at 824; Wolf, 145 N.C. at 441-46, 59 S.E. at 41-43; Ta-cha-na-tah, 64 N.C. at 615-18; see also Hornbuckle, 422 F.2d at 391; In re McCoy, 233 F. Supp. at

414. The trial court, thus, did not err by denying defendant's motion to dismiss for lack of jurisdiction based upon defendant's claim that he is an Indian.

Defendant fails to analyze or even cite to any of the above decisions from this State's Supreme Court holding that North Carolina has jurisdiction over crimes committed on the Qualla Boundary regardless of whether the defendant is an Indian or non-Indian. Instead, without providing any analysis, defendant states in a footnote that "North Carolina asserted jurisdiction in older cases that are now invalid." (Def's Br 26 n.20 (citing discussions in Eastern Band of Cherokee Indians v. Lynch, 632 F. 2d 373, 379 n.34 (4th Cir. 1980) and Wildcatt v. Smith, 69 N.C. App. 1, 2 n.1, 316 S.E.2d 870, 872 n.1 (1984)). Defendant, however, fails to identify which cases he believes are invalid or explain why he believes the footnotes in Lynch and Wildcatt invalidate the binding precedent of this State's Supreme Court. Defendant argues only that jurisdiction is governed by federal law known as the Major Crimes Act ("MCA"), 18 U.S.C. § 1153(a), and that, under the MCA, jurisdiction lies in federal court to the exclusion of state court when an Indian commits one of the enumerated offenses against another person within Indian country. (Def's Br. 21-22)

D. The Major Crimes Act.

The MCA provides in part that:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses,

> namely, murder, manslaughter, . . . robbery, and [other specified felonies] within Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). To the extent the MCA preempts the exercise of North Carolina's jurisdiction when an Indian commits one of the enumerated offenses[3] against another person on the Qualla Boundary, jurisdiction in this case would lie in federal court rather than in state court if and only if defendant is an Indian. See New York ex rel. Ray v. Martin, 326 U.S. 496, 500, 90 L. Ed. 261, 264 (1946) (holding that states have jurisdiction over crimes committed in Indian country "between whites and whites which do not affect Indians."); accord United States v. McBratney, 104 U.S. 621, 624, 26 L. Ed. 869, 870 (1882).

The MCA does not define "Indian." But four federal circuits have accepted and applied the test set forth by the United States Supreme Court more than 150 years ago: whether the defendant (1) has some Indian blood and (2) is recognized as an Indian by a tribe or the federal government or both. United States v. Rogers, 45 U.S. 567, 572-73, 11 L. Ed. 1105, 1107 (1846) (interpreting

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[3] As acknowledged by defendant, possession of a firearm by a felon is not an enumerated offense under the MCA. Defendant does not argue the State lacked jurisdiction over this offense, stating in a footnote only that "federal jurisdiction may lie under 18 U.S.C. §§ 13 and 1152." (Def Br. 22 n.18) (emphasis added). In any event, for the reasons stated in Arguments I.C. and I.E., the State had jurisdiction over this offense and, alternatively, defendant is not an Indian.

a predecessor of 18 U.S.C. § 1152); see also United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009) (recognizing test); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (same); Scrivner v. Tansy, 68 F.3d 1234, 1241 (10th Cir. 1995) (same), cert. denied, 516 U.S. 1178, 134 L. Ed. 2d 223 (1996); United States v. Torres, 733 F.2d 449, 456 (7th Cir.) (concluding that jury instruction setting forth the two-part test was "in accord with present Federal law" regarding "what constitutes an Indian for purposes of 18 U.S.C. § 1153"), cert. denied, 469 U.S. 864, 83 L. Ed. 2d 135 (1984). The second prong of this test, recognition as an Indian, has also been stated as "a sufficient non-racial link to a formerly sovereign people." St. Cloud v. United States, 702 F. Supp. 1456, 1461 (D. S.D. 1988).

While the first prong of the Rogers test is a rather straightforward issue of blood quantum, the second prong of the test is more difficult to apply. Federal courts have considered what are commonly known as the St. Cloud factors to determine whether the defendant is recognized as an Indian: (1) enrollment in a tribe; (2) government recognition through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian. Id. Although tribal enrollment is the common evidentiary means of establishing Indian status, Bruce, 394 F.3d at 1224, the United States Supreme Court stated in dicta that "enrollment in an official tribe

has not been held to be an absolute requirement for federal jurisdiction[.] . . ." United States v. Antelope, 430 U.S. 641, 646 n.7, 51 L. Ed. 2d 701, 708 n.7 (1977).

In the absence of enrollment, federal courts have taken different approaches to determine what factors should be relied upon to determine whether a defendant is recognized as an Indian. The Ninth Circuit examines each of the St. Cloud factors in declining order of importance. See United States v. Cruz, 554 F.3d 840, 846-49 (9th Cir. 2009); Bruce, 394 F.3d at 1224. The Eighth Circuit has approved of these factors but has not assigned any order of importance to them, other than tribal enrollment, which is sufficient itself to show defendant is recognized as an Indian. Stymiest, 581 F.3d at 763-66. The Eighth Circuit also has considered additional factors such as whether the defendant has been subjected to tribal court jurisdiction and whether the defendant has held himself out to be an Indian. Id.

This State's Supreme Court, however, has never decided whether to utilize the Rogers test or how to apply it - likely because it has always held that North Carolina has jurisdiction over crimes committed within the Qualla Boundary without regard to whether the defendant is an Indian or non-Indian. Nevertheless, and to the extent the MCA preempts the exercise of North Carolina's jurisdiction when an Indian commits one of the enumerated offenses

against another person within the Qualla Boundary, the State has jurisdiction in this case because defendant is not an Indian under the Rogers test.

E. Defendant is not an Indian.

Under the first prong of the Rogers test, the trial court found that defendant has an Indian blood quantum of 11/256. (1Rp. 121)

Under the second prong of the test, the court considered the St. Cloud factors in declining order of importance to determine whether the defendant is recognized as an Indian. (1Rp. 121) As to the first St. Cloud factor, the trial court found defendant is not an enrolled member of the EBCI or any other federally recognized Indian tribe. Indeed, defendant is not even eligible to become an enrolled member of the EBCI because he has less than 1/16 EBCI blood quantum, which is the minimum amount necessary for enrollment. (1Rpp. 94, 121)

The second St. Cloud factor is government recognition through receipt of assistance reserved only to Indians. As the trial court found, defendant received federally-funded medical services at CIH on five occasions. Those medical services, however, are not reserved only to Indians because they are also provided to first descendants. (1Rpp. 104-05, 124) Defendant attended school for a period of time in the Cherokee Central school system, but this school system is open to non-Indian students. (1Rpp. 50, 109, 123-24) Thus, there is no

evidence defendant received assistance from the government or EBCI reserved only to Indians.

The third St. Cloud factor is enjoyment of the benefits of tribal affiliation. As the trial court found, defendant was not born on or near the Qualla Boundary, never inherited a possessory interest in tribal land, and has no tribal identification card. Defendant has never voted in tribal elections or held elected office. Indeed, he is ineligible to do so. Defendant also is ineligible to participate in EBCI medicine ceremonies or receive the biannual distribution of gaming proceeds shared by all enrolled members. (1Rpp. 99, 109, 122-23) Further, defendant never received any payments for settlements owed by the federal government to enrolled members of the EBCI, nor has he served on a tribal jury in Cherokee Tribal Court. (1Rp. 122)

As the trial court also found, there are benefits available to first descendants in the areas of real property, higher education, health care, inheritance, and employment preferences. However, defendant never applied for or received certification from the tribal enrollment office establishing his first descendant status. With the exception of receiving acute care at CIH when he was a minor, there was no evidence that defendant enjoyed any of the benefits available to first descendants. As the trial court properly recognized, the receipt of defendant's medical services "must be viewed through the prism of receiving

acute medical treatment as [a] child where as a child he took no active involvement in the decision for treatment and with his last visit being more than 23 years ago." (1Rpp. 125-26)

The fourth St. Cloud factor is social recognition as an Indian. There is no evidence that defendant was socially recognized as an Indian or socially involved with the EBCI community. As the trial court found, "the record is devoid of any social involvement in the Cherokee community by the Defendant[]" after his probation was transferred from Florida to North Carolina. (1Rp. 125, FOF 271) Moreover, Driver, who is "somewhat of an icon in the Cherokee culture" and accepted as a tribal elder, testified there is a societal view held by the EBCI that first descendants are non-Indians. She also testified she does not know defendant and is not aware of defendant's participation in EBCI social life. (8/9/13Tpp. 145-48)

The trial court made additional findings of fact regarding the St. Cloud factors that were challenged by defendant. In particular, defendant challenged the court's findings that defendant "never enjoyed the benefits of a possessory interest by renting or leasing an interest in tribal lands[;]" "was never employed by the [EBCI] government or any of its enterprises[;]" and never applied for or received financial assistance from the EBCI "for attendance at any post-secondary educational institutions." (1Rpp. 122-23, FOF 262(c), (l), (p)) These

findings, however, are supported by the evidence. EBCI Attorney General Annette Tarnowsky testified that she is not aware of any "attempts to use any of these rights" by defendant, and defendant presented no evidence contradicting her testimony. (8/9/13Tpp. 116-17)

Defendant also challenged the court's findings that he never participated in Indian religious ceremonies, cultural festivals, or dance competitions; and is not fluent in the Cherokee language. (1Rp. 123, FOF 262(r) & (t)) Driver, who has taught the Cherokee language since 1974 and participated in the ceremonies and events on the Qualla Boundary, testified she does not know defendant and is not aware of defendant's participation in EBCI social life. (8/9/13Tpp. 117-18, 145-48) Defendant presented no evidence contradicting her testimony. The court's findings, thus, are supported.

Defendant further challenged the court's finding that defendant was never a party to a civil or criminal matter in Cherokee Tribal Court. (1Rp. 122, FOF 262(h)) However, CIPD Detective Sergeant Sean Birchfield testified there was no record of defendant being charged with any offenses in tribal court. Although Birchfield does not believe juvenile records would have been revealed by the criminal records search, defendant presented no evidence that he was a party to any matter in Cherokee Tribal Court. (8/9/13Tpp. 101-02) The court's finding, thus, is supported by the evidence.

Finally, defendant challenged the court's findings that his race was identified as white/Caucasian in certain documents in his probation file, because the documents referenced were not admitted into evidence or available to the parties at the hearing. (1Rpp. 88, 89,123, FOF 13, 25, 263) Although defendant's probation file was not admitted into evidence, the trial court ordered the file to be turned over to the parties. (10/9/13Tp. 4-5; 1Rpp. 84-85) To the extent it was improper for the court to rely on such probation documents in making findings 13, 25, and 263, defendant is entitled to no relief because the court's unchallenged and supported findings support its conclusion that defendant is not an Indian and the State has jurisdiction. See State v. Hernandez, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) ("[A]n order will not be disturbed because of . . . erroneous findings which do not affect the conclusions.") (quotation marks and citations omitted).

In sum, defendant has an Indian blood quantum of 11/256. (1Rp. 121) To the extent this is a sufficient blood quantum to satisfy the first Rogers prong, defendant does not meet the second prong. Defendant is not an enrolled member of the EBCI or any other federally recognized Indian tribe; there is no evidence defendant received benefits from the government or EBCI reserved only to Indians; although he received some medical services when he was a minor, those services are not reserved only to Indians because they are also provided to first

descendants; defendant never applied for or received certification establishing his first descendant status; defendant attended school for a period of time in the Cherokee Central school system, which is open to non-Indian students; and there is no evidence defendant was socially recognized as an Indian or socially involved with the EBCI community. The trial court, thus, correctly concluded defendant is not an Indian. See Cruz, 554 F.3d at 846-49 (concluding the defendant was not an Indian where he was not enrolled in a tribe; had descendant status but had never taken advantage of the benefits available to descendants; lived on a reservation for less than a quarter of his life; was subject to the criminal jurisdiction of the tribal court as a descendant; was at one time prosecuted in tribal court; attended a school on the reservation that is open to non-Indians; worked as a firefighter for the federal Bureau of Indian Affairs, a job that is also open to non-Indians; never participated in Indian religious ceremonies or dance festivals; and never voted in tribal elections); State v. LaPier, 242 Mont. 335, 341-44, 790 P.2d 983, 986-88 (1990) (holding the defendant was not an Indian where he had a significant amount of Indian blood; was not an enrolled member of a tribe; received some educational assistance through a Native American program and some health benefits through IHS; had been prosecuted in tribal courts for criminal offenses; and his tribal affiliation and social recognition as an Indian was tenuous).

Contrary to any argument by defendant, the fact that he lived on the Qualla Boundary for some of his life, attended school in the Cherokee tribal school system, which is open to non-Indian students; and received federally-funded medical services as a first descendant when he was a minor is insufficient to establish he is an Indian. See Cruz, 554 F.3d at 846-49; LaPier, 242 Mont. at 341-44, 790 P.2d at 986-88; see also Stymiest, 581 F.3d at 764 ("Holding oneself out as an Indian by submitting to tribal court jurisdiction or seeking care at a tribal hospital or participating in tribal community activities is relevant to being recognized by the tribe, but it is not otherwise sufficient to satisfy the political underpinnings of the Rogers test.").

E. Defendant's first descendant status does not satisfy the second prong of the Rogers test as a matter of law.

Nevertheless, defendant contends the Cherokee Court in E. Band of Cherokee Indians v. Lambert, 3 Cher. Rep. 62 (2003) held that all first descendants of the EBCI meet the second prong of the Rogers test as a matter of law as a result of which he satisfies the second prong of the Rogers test based on his first descendant status alone. Defendant misconstrues the holding in Lambert. In Lambert, the parties stipulated the defendant was not an enrolled member of a tribe and was a first descendant. Nevertheless, the court determined that additional evidence was required to decide the matter and held

a hearing. Id. at 62. The court then applied the St. Cloud factors to determine whether the second prong of the Rogers test was met; it did not hold that all first descendants of the EBCI meet the second Rogers prong as a matter of law. Id. at 64-65.

Alternatively, and to the extent first descendants are subject to the criminal jurisdiction of the EBCI tribal courts, that does not mean first descendants meet the second Rogers prong for purposes of criminal federal jurisdiction as a matter of law. Instead, to the extent the EBCI tribal courts exercise criminal jurisdiction over first descendants, that would be only one factor to consider under the second Rogers prong. See Cruz, 554 F.3d at 846-49 (concluding the defendant was not an Indian even though he was subject to the criminal jurisdiction of the tribal court as a descendant and was at one time prosecuted in tribal court).

F. The matter should not be remanded for a new hearing.

In the alternative, defendant contends the matter should be remanded for a new hearing because some findings of fact are unsupported, the trial court failed to make findings of fact on relevant evidence, and the trial court found it was required to follow Ninth Circuit law in analyzing the second prong of the Rogers test.

In addition to the challenged findings discussed above, which are

supported by competent evidence, defendant also challenges the court's finding that defendant "neither informed DAC of any unique Native American programs available to him nor sought assistance from any DAC employee seeking special programs available for Native American individuals . . ." (Def's Br. 37-38; 1Rp. 88, FOF 15) Probation Officers Ammons and Clemmer testified that defendant had not discussed his race with them. Clemmer also testified that defendant had not discussed the EBCI with him. (8/9/13Tpp. 16-17, 80-81) Defendant presented no evidence contradicting this testimony. This finding, thus, is supported.

To the extent this Court determines that any of the challenged findings[4] are not supported, the matter need not be remanded for a new hearing because the supported and unchallenged findings support the trial court's conclusion that defendant is not an Indian and the State had jurisdiction. See Hernandez, 170 N.C. App. at 305, 612 S.E.2d at 424 ("[A]n order will not be disturbed because of . . . erroneous findings which do not affect the conclusions. . . . Moreover, irrelevant findings in a trial court's decision do not warrant a reversal of the trial court.") (quotation marks and citations omitted).

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[4]In addition to the challenged findings of fact previously discussed, defendant also challenged portions of findings 27, 58, 109, 112, 116, and 262(s). (Def's Br. 34, 38-39; 1Rpp. 89, 93, 100-01). To the extent the challenged portions of these findings are not supported by the evidence, they are irrelevant.

Defendant also contends, without citing any legal authority, the matter should be remanded for a new hearing because the trial court failed to make findings of fact on relevant evidence. The court, however, need not make findings on each piece of evidence presented.

Finally, defendant contends the case should be remanded because the trial court acted under a misapprehension of the law when it "erroneously found it was required to follow Ninth Circuit law in analyzing the second Rogers prong." (Def's Br. 36, 41-42; 1Rp. 121, FOF 253-54) Defendant misconstrues the court's order. As explained above, this State's Supreme Court has never decided whether to utilize the Rogers test or how to apply it. Further, the federal courts have taken different approaches to determine what factors should be relied on in analyzing the second prong of the Rogers test. Here, the trial court made a choice to consider and apply the same factors in the same way as the Ninth Circuit. By choosing to follow Ninth Circuit precedent, the court simply recognized it had to consider the St. Cloud factors in declining order of importance. (1Rp. 121, FOF 253-54) Contrary to defendant's contention, this choice did not constitute a misapprehension of the law[5]. For these reasons, the matter should not be remanded for a new hearing.

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[5]In defendant's motion to dismiss for lack of jurisdiction, defendant himself relied on Ninth Circuit precedent when setting forth the test for determining Indian status.(1Rp. 19)

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUBMIT THE ISSUE OF SUBJECT MATTER JURISDICTION TO THE JURY.

Although defendant argues the trial court erred by denying his request for a special verdict,[6] his argument is actually one of alleged instructional error based on the court's failure to instruct the jury on the issue of subject matter jurisdiction. (Def's Br. 43-48) In particular, defendant argues "the trial court should have instructed the jury that if it was not satisfied beyond a reasonable doubt that [defendant] was not an Indian, it must return a special verdict indicating lack of jurisdiction." (Def's Br. 45) The trial court did not err.

A. There was no need to submit the issue to the jury.

As set forth in Argument I.C. above, the State has jurisdiction over crimes committed on the Qualla Boundary regardless of whether the defendant is an Indian or non-Indian. Therefore, the State had jurisdiction in this case regardless of whether defendant is an Indian. Because the jury's determination of whether defendant is an Indian would not have deprived the State of jurisdiction, there was no need to submit the issue to the jury and the trial court did not err by failing to do so.

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[6]Defendant never specifically asked for a special verdict in the trial court. Instead, he filed a motion to submit the issue of subject matter jurisdiction to the jury without specifying how the issue should be submitted. (1Rpp. 271-73; 3/24/16Tpp. 517-19) Thus, any argument the court erred by failing to submit a special verdict is not preserved. See N.C. R. App. P. 10(a) (2018).

B. The territorial jurisdiction cases cited by defendant are inapposite in any event.

Defendant relies solely on cases involving territorial jurisdiction (i.e., whether the crimes occurred in North Carolina), to support his position that the trial court erred by failing to instruct the jury on subject matter jurisdiction. (Def's Br. 43-46 (citing State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995); State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977); and State v. Bright, 131 N.C. App. 57, 505 S.E.2d 317 (1998), disc. rev. improvidently allowed, 350 N.C. 82, 511 S.E.2d 639 (1999)). These cases hold that when jurisdiction is challenged on the ground the crimes did not occur in North Carolina and the trial court makes a preliminary determination that sufficient evidence exists upon which the jury could conclude the crimes occurred in North Carolina, "the trial court must also instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the murder occurred in North Carolina, a verdict of not guilty should be returned." Rick, 342 N.C. at 101, 463 S.E.2d at 187 (citing Batdorf, 293 N.C. at 494, 238 S.E.2d at 503); accord Bright, 131 N.C. App. at 62, 505 S.E.2d at 320. The cases further hold that the court also should instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction. Id.

Unlike in Rick, Batdorf, and Bright where it was unclear whether the crimes were committed in North Carolina, the parties here stipulated the crimes occurred in North Carolina. (1Rp. 64-65) Because territorial jurisdiction was not

challenged here, the cases cited by defendant do not control. See State v. White, 134 N.C. App. 338, 341, 517 S.E.2d 664, 666 (1999) (rejecting the defendant's argument that he was entitled to an instruction on jurisdiction under Batdorf and Bright where it was undisputed the offenses occurred in North Carolina). Defendant cites no cases holding that subject matter jurisdiction should be submitted to the jury.

Further, the issue of where a crime occurred is purely a question of fact, whereas the issue of subject matter jurisdiction is a question of law, Kostick, 233 N.C. App. at 72, 755 S.E.2d at 418, and the issue of whether a person is an Indian for purposes of federal criminal jurisdiction is a mixed question of law and fact, see generally State v. Allen, 222 N.C. App. 707, 719, 731 S.E.2d 510, 519 (2012) (stating "any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law.") (citation omitted). For these reasons, the trial court did not err by not instructing the jury on the issue of subject matter jurisdiction. See State v. Darroch, 305 N.C. 196, 212, 287 S.E.2d 856, 866 (holding that the defendant was not entitled to an instruction on jurisdiction where his jurisdictional challenge raised a legal question rather than a factual one involving the location of the crime), cert. denied, 457 U.S. 1138, 73 L. Ed. 2d 1356 (1982); State v. Daniels, 134 N.C. 671, 678, 46 S.E. 991, 993 (1904) (stating that a defendant "is entitled

to be tried by 'the ancient mode of trial by jury,' in which the court decides all questions of law, and the jury all questions of fact.").

C. Defendant failed to submit a special instruction in writing.

Assuming, arguendo, an instruction on the issue of subject matter jurisdiction or whether defendant is an Indian would be appropriate, the trial court did not err by failing to submit such an instruction. As recognized by this State's Supreme Court, Rule 21 of the General Rules of Practice for the Superior and District Courts directs that "[i]f special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference." State v. McNeill, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (emphasis added), cert. denied, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998); see also N.C.G.S. § 15A-1231 (2015). A trial court does not err by failing to give a special instruction where the defendant does not submit his proposed special instruction in writing. See McNeill, 346 N.C. at 240, 485 S.E.2d at 288; State v. Craig, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005).

Here, defendant never submitted a proposed written instruction to the trial court on the issue of jurisdiction or whether defendant is an Indian. As a result, the trial court did not err by failing to give such an instruction. See id. Further, and in any event, defendant is entitled to no relief because he failed to show he was prejudiced by the court's failure to give such an instruction. See

N.C.G.S. § 15A-1443(a) (2015).

III. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO SUPPRESS.

Defendant argues the trial court erred by denying his motion to suppress his 30 November 2012 statement to law enforcement. The basis of his motion was that his statement was made after he unambiguously invoked his right to counsel. Defendant's argument fails because his motion was untimely and he did not unambiguously invoke his right to counsel.

A. Standard of Review.

Review of a trial court's order on a motion to suppress is limited to a determination of whether its findings are supported by competent evidence and whether the findings support the court's conclusions of law. State v. Waring, 364 N.C. 443, 467, 701 S.E.2d 615, 631 (2010), cert. denied, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). "'[A] trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" Id. at 469, 701 S.E.2d at 632 (citation omitted). Unchallenged findings of fact are deemed supported and are binding on appeal. State v. Biber, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Conclusions of law are reviewed de novo. Id.

B. Evidence presented at suppression hearing and trial court's orders.

On 30 November 2012, defendant was interviewed at the CIPD.

Defendant first waived his Miranda rights and then spoke with law enforcement. (3/22/16Tpp. 245-50, 261, 320-25)

Law enforcement told defendant that Carothers had implicated herself and defendant in the crimes at the Fairfield. Defendant repeatedly asked to speak to Carothers and indicated he would admit his participation in the crimes if she confirmed her statement. Law enforcement denied his request to speak to Carothers face-to-face, but accommodated defendant's request by showing him the portion of Carothers's videotaped statement where she identified defendant as the shooter. (Supp. 108-54; State's Ex. 204A) After watching Carothers's videotaped statement, defendant said "I told y'all what I would do, man[,]" and "I gave y'all my word on that. I gave y'all my word. Y'all did what I asked . . . I'm going to do that, man." (Supp. 153-54; State's Ex. 204A) Then, the following exchange occurred:

> [Defendant]: Can I consult with a lawyer, I mean, or anything? I mean, I - I - I did it. I'm not laughing, man, I want to cry because it's fucked up to be put on the spot like this.
>
> BY DETECTIVE IADONISI:
>
> Q George, you have that right, okay.
>
> A I mean, off the record, off the record, off the record.
>
> Q If you want to talk about it without him here, that's fine, okay. We just read you your rights. I mean, you have the right to have him here. But if you want to talk to us eyeball to eyeball, that's fine too. It's up to you. It's up to you.

BY AGENT OAKS:

Q We can never make that choice for you one way or another.

A Yeah, but - - -

BY DETECTIVE IADONISI:

Q We kept up our end.

A And I told you I'm going to keep up mine. But man, listen, now don't let that girl go down now. Because what happened that night, man, that girl did not know - - -

. . .

(Supp. pp. 154-55; State's Ex. 204A). Thereafter, defendant continued talking to law enforcement and confessed to the robbery and murder of Mrs. Preidt. Defendant never again mentioned a lawyer, nor did he request a lawyer. (3/23/16Tpp. 341; Supp. 153-81; State's Ex. 204A)

At the suppression hearing, defendant argued the statement, "Can I consult with a lawyer, I mean, or anything?" was an unambiguous invocation of his right to counsel such that further questioning by law enforcement should have ceased. (3/23/16Tpp. 456-62) Judge Letts disagreed and made the following findings of fact, among others:

81. . . . [T]here never was an assertion of a right but rather simply a question. Further Defendant did not stop talking after asking the question to allow law enforcement to respond. Defendant did not cease talking or refuse to answer more questions but rather

continued talking to investigators for the entirety of the interview. The undersigned determines that no assertion of a right to counsel was made by Defendant.

. . .

83. This ambiguous statement by Defendant fails to support a finding that *Miranda* rights were asserted.

84. . . . [C]onsidering the context of that section of the interview, Defendant also fails to objectively establish he unequivocally and unambiguously invoked his *Miranda* rights to counsel.

85. Reviewing the entire transcript, the Defendant asked about the attorney as a question on page 58. Law enforcement clearly and appropriately answered the question posed. Most telling, Det. Iadonisi in response told Defendant he had a right to have an attorney followed immediately by SBI Agent Oaks further clarifying and explaining that law enforcement can never make the decision to invoke *Miranda* rights for a defendant. After answering Defendant's question, explaining he did have and continued to possess *Miranda* rights and that no person except Defendant could elect to assert and invoke *Miranda* rights, the Defendant continued to talk to law enforcement.

86. With further import, it is essential to note that for the entire remainder of the interview the Defendant never again mentioned an attorney or told law enforcement he wished to stop talking.

. . .

89. Law enforcement at all times honored the *Miranda* rights of the Defendant.

90. Defendant never clearly and unambiguously asserted and invoked his right to an attorney during the

> interview with law enforcement on November 30, 2012.
>
> 91. Because Defendant posed a question that was ambiguous regarding an attorney, law enforcement had no obligation to stop questioning Defendant.
>
> . . .
>
> 93. . . . On page 59 Defendant was told he had the right to have an attorney present and that whether he elected to exercise his *Miranda* rights was a decision only the Defendant could make. The Defendant voluntarily continued to speak with law enforcement ultimately confessing to the murder of Barbara Preidt.

(3R pp. 442-43) Defendant has not challenged any of these findings and, thus, they are binding on appeal. Biber, 365 N.C. at 168, 712 S.E.2d at 878.

Based on the findings, Judge Letts concluded that defendant never unambiguously invoked his right to counsel after waiving his Miranda rights and defendant's constitutional and statutory rights were not violated. (3Rpp. 443-44, COL 7-9) Defendant has not specifically challenged these conclusions of law, and these conclusions support the denial of defendant's motion to suppress.

In another written order, Judge Letts also summarily dismissed defendant's motion to suppress the statement as untimely pursuant to N.C.G.S. § 15A-976(b). (4Rpp. 475, 482)

C. Defendant's motion was untimely.

"A defendant who seeks to suppress evidence upon a ground specified in

N.C.G.S. 15A-974 must comply with the procedural requirements of Article 53, Chapter 15A of the General Statutes." State v. Holloway, 311 N.C. 573, 576-77, 319 S.E.2d 261, 264 (1984). N.C.G.S. § 15A-976(b) (2015) provides that:

> If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if [the] motion is made not later than 10 working days following receipt of the notice from the State.

Here, the State gave written notice of its intention to introduce defendant's statement on 25 February 2016, more than 20 working days before the trial commenced on 28 March 2016. (4Rp. 484) Defendant filed his motion to suppress his statement, a type of evidence listed in N.C.G.S. § 15A-975(b)(1), on 17 March 2016. (4Rpp. 323-25) Defendant's motion was filed two days after the deadline imposed by N.C.G.S. § 15A-976(b) and, thus, Judge Letts acted within his authority to dismiss summarily defendant's motion which failed to comply with the procedural requirements of Article 53. See State v. Smith, ___ N.C. App. ___, ___, 789 S.E.2d 873, 877 (2016) (holding that the trial court acted within its authority to deny summarily the defendant's motion to suppress when it was untimely). Alternatively, Judge Letts correctly denied defendant's motion because defendant did not unambiguously invoke his right to counsel.

D. Defendant did not unambiguously invoke his right to counsel.

The Fifth Amendment of the United States Constitution guarantees that

"no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), "the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination gives rise to a right to the presence of counsel during custodial interrogation." State v. Coffey, 345 N.C. 389, 399, 480 S.E.2d 664, 670 (1997). If an accused has invoked his right to have counsel present, he is not subject to further interrogation without counsel present, unless the accused himself initiates further communication. Edwards v. Arizona, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981); State v. Daughtry, 340 N.C. 488, 506, 459 S.E.2d 747, 755 (1995), cert. denied, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996).

For a suspect to invoke his right to counsel during custodial interrogation such that police questioning must cease, he "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis v. United States, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994). Whether a suspect has invoked his right to counsel is an objective inquiry, and officers are not required to take action to clarify an ambiguous request. Id. at 458-62, 129 L. Ed. 2d at 371-73. Thus, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of

the circumstances would have understood only that the suspect might be invoking the right to counsel," the officer is not required to stop questioning the suspect. Id. at 459, 129 L. Ed. 2d at 371. Officers are not required to take action to clarify an ambiguous request. Id. at 461-62, 129 L. Ed. 2d at 373.

For example, in Davis, the defendant stated, about an hour and a half into the interview, "Maybe I should talk to a lawyer." Id. at 455, 129 L. Ed. 2d at 368. The United States Supreme Court held that this statement was not an unambiguous request for counsel. Id. at 462, 129 L. Ed. 2d at 373.

In State v. Boggess, 358 N.C. 676, 600 S.E.2d 453 (2004), the defendant said, "If y'all going to treat me this way, then I probably would want a lawyer." Id. at 686, 600 S.E.2d at 459. This State's Supreme Court held that the statement was conditional and not an unambiguous request for counsel. Id. at 687, 600 S.E.2d at 460.

In State v. Dix, 194 N.C. App. 151, 669 S.E.2d 25 (2008), disc. rev. denied, appeal dismissed, 363 N.C. 376, 679 S.E.2d 140 (2009), the defendant said, "I'm probably gonna have to have a lawyer." Id. at 153, 669 S.E.2d at 26. The officer responded, "okay. . . . But, ya know, I mean, . . . it's up to you if you wanna answer questions or not. I mean, you can answer till you don't feel comfortable, whatever and then not answer. Ya know, that's totally up to you. . . ." Id. at 153, 669 S.E.2d at 26. The defendant agreed to continue talking to the officer. This

Court held that, when viewed in context, the defendant's statement was not an unambiguous request for counsel. This Court noted the defendant had already expressed a desire to "tell his side of the story" and had given a brief confession, so the officer was understandably unsure of what the defendant's purpose was in making the statement. Further, the officer did not try to dissuade the defendant from exercising his right to counsel. Id. at 156-58, 669 S.E.2d at 28-29.

In State v. Shelly, 181 N.C. App. 196, 638 S.E.2d 516, disc. rev. denied, 361 N.C. 367, 646 S.E.2d 768 (2007), the defendant said, "I don't know if I go ahead an [sic] tell you then when I do get my lawyer . . . I've done wrong, because I went ahead and said anything or -- I don't know," "Oh, so can I have a lawyer come here now?" and "one won't be appointed to me now?" Id. at 202, 638 S.E.2d at 521. This Court held that the defendant did not unambiguously invoke his right to counsel. Instead, he made these statements in what appeared to be an effort to understand his rights and the interview process. In reaching its holding, this Court noted the officer truthfully answered the defendant's questions and the defendant then chose to sign the waiver form and proceed with the interview. Id. at 202, 638 S.E.2d at 521-22; see also State v. Barnes, 154 N.C. App. 111, 118, 572 S.E.2d 165, 170 (2002) ("Do I need a lawyer?" not an unambiguous request for counsel), disc. rev. denied, 356 N.C. 679, 577 S.E.2d 892 (2003).

As in all of those cases, in this case, the transcript and videotape of defendant's interview with law enforcement on 30 November 2012[7] show that when defendant's statement about a lawyer is viewed in context, he did not unambiguously invoke his right to counsel. (3Rp. 442, FOF 84) Defendant's statement was made after he had already waived his Miranda rights and talked to law enforcement. Defendant also had just expressed his intention to keep his word about admitting his participation in the crimes because law enforcement had done what he asked of them. Further, before giving law enforcement an opportunity to respond to his statement, defendant continued talking and said "I mean, I - I - I did it." (Supp. 153-54; State's Ex 204A) Assistant Special Agent ("ASA") Oaks testified she interpreted defendant's statement to mean "he was asking a question like is he entitled to an attorney[]" and explained she "wasn't sure what [defendant] was asking." (3/22/16Tpp. 330-31, 340; 3/23/16Tpp. 378-81, 384-85, 390, 393-94) Viewing defendant's statement in context, it is understandable that law enforcement was unsure of what defendant was asking.

Further, neither Detective Sergeant Iadonisi nor ASA Oaks interpreted

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[7]The transcript of defendant's interview was admitted at the suppression hearing as State's Exhibit 25 (3/22/16Tpp. 300-02), and a redacted copy of the transcript was admitted at trial as State's Exhibit 204. (12Tp. 2542-43; Supp. 97-182) The videotape of defendant's interview was admitted at the suppression hearing as State's Exhibit 24 (3/22/16Tpp. 322-23, 333), and a redacted copy of the videotape was admitted at trial as State's Exhibit 204A. (12Tp. 2542-43)

defendant's statement as an unambiguous request to have counsel present (3/22/16Tpp. 260, 275, 331-32), which is some indication of how a reasonable officer under the circumstances would have interpreted defendant's statement. See Dix, 194 N.C. App. at 155, 669 S.E.2d at 28 ("[T]he understanding of the officer to whom a defendant's statement is made may be indicative of how a reasonable officer under the circumstances would have interpreted the defendant's statement."). Although Detective Sergeant Iadonisi and ASA Oaks were not required to try to clarify defendant's ambiguous statement, see Davis, 512 U.S. at 461-62, 129 L. Ed. 2d at 373, they did in fact follow-up in order to clarify what defendant was saying by truthfully informing him that he had the right to have a lawyer and the decision about whether to have a lawyer was a decision only he could make. (3Rp. 443, FOF 91, 93; 3/22/16Tpp. 330-32; 3/23/16Tpp. 340-41, 378-80, 393) They did not try to dissuade defendant from exercising his right to counsel, and defendant chose to proceed with the interview. (Supp. 154-55; State's Ex. 204A) Under the totality of these circumstances, Judge Letts correctly concluded defendant did not unambiguously invoke his right to counsel and correctly admitted defendant's statement at trial.

Nevertheless, defendant argues this Court's decision in State v. Taylor, ___ N.C. App. ___, 784 S.E.2d 224, disc. rev. denied, 793 S.E.2d 222 (2016), shows he

made an unambiguous request for counsel. In Taylor, the defendant asked, "Can I speak to an attorney?" while he was on the telephone with his grandmother. The detective truthfully answered the defendant and told him that he could call an attorney. Id. at ___, 784 S.E.2d at 229-30. On appeal, the defendant cited other federal court decisions holding there were unambiguous requests for counsel to support his argument that he made an unambiguous request for counsel. Id. at ___, 784 S.E.2d at 230. This Court distinguished those decisions on the ground they did not involve requests made during a telephone conversation. Id. at ___, 784 S.E.2d at 230. This Court also noted that if the defendant in Taylor had asked his question before or after his telephone conversation, then the federal cases would become more factually similar. Id. Because the defendant in Taylor asked his question while he was on the telephone, this Court held it was not an unambiguous request for counsel. Id. at ___, 784 S.E.2d at 229-31.

Defendant asserts this Court cited the federal decisions discussed in Taylor "with favor" and agreed with their analyses. (Def's Br. 52) Contrary to defendant's assertion, the fact that this Court addressed and factually distinguished cases cited by the defendant in Taylor does not mean this Court agreed with their analyses, nor does it constitute citing such cases "with favor." In any event, Taylor does not establish that defendant here unambiguously

invoked his right to counsel.

E. Any error was harmless beyond a reasonable doubt.

Assuming, arguendo, this Court determines defendant's statement was admitted in violation of his constitutional rights, defendant still is entitled to no relief because any error in admitting his statement was harmless beyond a reasonable doubt pursuant to N.C.G.S. § 15A-1443(b) (2015). One way of determining that error is harmless beyond a reasonable doubt "is by viewing the totality of the evidence against the defendant and determining if the independent non-tainted evidence is 'overwhelming.'" State v. Peterson, 361 N.C. 587, 594-595, 652 S.E.2d 216, 222 (2007), cert. denied, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008); accord State v. Autry, 321 N.C. 392, 404, 364 S.E.2d 341, 348 (1988).

Here, any error in admitting defendant's statement was harmless beyond a reasonable doubt because defendant had already confessed to the crimes by saying, "I mean, I - I - I did it." (Supp. 154; State's Ex. 204A) Further, there was overwhelming other evidence of defendant's guilt. Carothers testified that defendant was with her in Wolfe's truck on the night of 30 September 2012; at defendant's instruction, she parked the truck behind an abandoned motel next to the Fairfield; defendant said he was "going to go get a book[;]" defendant exited the truck and she heard two shots while defendant was gone; defendant

instructed her to "go, go, go" when he returned to the truck; and defendant had a purse with him from which they later took $5,000.00. (10Tpp. 2194-98, 2217-21, 2225-30, 2239, 2243)

Swayney and Carothers testified that defendant told them he grabbed the woman's purse at the Fairfield; she would not let go of the purse; and the gun discharged during a struggle over the purse. Carothers testified that she later threw the woman's purse into a burn barrel behind Swayney's house. Law enforcement recovered the charred items that Swayney had removed from the burn barrel, including items that appeared to be keys, a key chain, a cellular phone, a cigarette case, and a tube of something. The fact that they found a tube in the charred items was significant because Mr. Preidt had told law enforcement that his wife had a tube of eye medication in her purse. (6Tpp. 1382-97, 1404-07, 1416-17, 1442-43; 8Tpp. 1854-62; 10Tpp. 2233-39, 2243-46; 13Tpp. 2646-48)

Further, the clothing that defendant was wearing when he arrived at Swayney's house matched the description of the shooter's clothing. The manufacturer and caliber of the unfired bullet that defendant removed from his gun at Swayney's house was the same manufacturer and caliber as the shell casing found underneath Mrs. Preidt's body. Further, three of the four Hornady .40-caliber shell casings found outside the residence where defendant and

Carothers lived were fired from the murder weapon. (4Tpp. 988-994, 1037, 1060-62, 1066-68; 5Tpp. 1093-95; 6Tpp. 1393, 1440-44; 8Tpp. 1885-87; 9Tpp. 1995-2002, 2008-21, 2067-92; 10Tp. 2220, 2237; 11Tpp. 2413, 2425; Supp. 83-84) In light of all this overwhelming other evidence of defendant's guilt, any error in admitting defendant's statement would be harmless beyond a reasonable doubt.

IV. THE MATTER SHOULD BE REMANDED FOR CORRECTION OF A CLERICAL ERROR.

Defendant contends the trial court's order arresting judgment contains a clerical error. The State agrees. The jury convicted defendant of first degree murder under the felony murder rule; armed robbery in 13 CRS 1363; and possession of a firearm by a felon in 12 CRS 1362. (4Rpp. 565-66, 574) Judge Letts orally rendered an order arresting judgment on armed robbery. (15Tp. 3049) The written order arresting judgment reflects the correct file number for the armed robbery offense but incorrectly lists the offense as "possess firearm by felon[,]" an offense for which defendant was separately sentenced. (4Rpp. 577-78, 581) The matter, thus, should be remanded to the superior court for the sole purpose of correcting the order arresting judgment in 12 CRS 1363 to correctly reflect the offense as armed robbery. See State v. Streeter, 191 N.C. App. 496, 505, 663 S.E.2d 879, 886 (2008) ("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.").

CONCLUSION

With the exception of remanding the matter for the sole purpose of correcting the order arresting judgment in 12 CRS 1363 to reflect the offense as armed robbery, the State respectfully requests that this Court find no error.

Electronically submitted this the 22nd day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure and this Court's 21 December 2017 order allowing the State to file a brief not exceeding 13,750 words (proportional type) in length in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 13,750 words as indicated by Word Perfect, the program used to prepare the brief.

This the 22nd day of January, 2018.

Electronically Submitted
Kathleen N. Bolton
Assistant Attorney General

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:

Anne M. Gomez
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This the 22nd day of January, 2018.

Electronically Submitted
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