No. 34PA14-2 THIRTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

DEFENDANT-APPELLANT'S NEW REPLY BRIEF

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No. 34PA14-2 THIRTIETH DISTRICT

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STATE OF NORTH CAROLINA	)	
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DEFENDANT-APPELLANT'S NEW REPLY BRIEF

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STATEMENT OF THE FACTS

The State observes that Attorney General Tarnawsky did not believe that Rule 6 of the Cherokee Rules of Criminal Procedure ("Rule 6") was violated when Mr. Nobles was not brought before a tribal magistrate. (St. Br. at 14) However, Tarnawsky also acknowledged that Rule 6 "directs that an officer making an arrest [on tribal land] deliver the arrestee to a Cherokee magistrate[.]" (8/9/13p 123) Here, Mr. Nobles was arrested by Detective Birchfield on tribal land. (8/9/13pp 32, 38) Thus, the failure of the Cherokee Police Department to deliver Mr. Nobles to a tribal magistrate violated Rule 6. *See* 8/9/13pp 46-47 (Detective Birchfield acknowledged he violated Rule 6); 9/13/13p 33 (Magistrate Reed testified that "[i]n the Cherokee Code, it states that all persons arrested by our tribal police or officers on the Indian Territory are to be brought before a tribal magistrate[.]").

The State also points out that Tarnawsky believed that the decision to not take Mr. Nobles before a magistrate "was appropriate under the circumstances." (St. Br. at 14) However, Tarnawsky's opinion was based on the fact that she believed that Jason Smith, the tribal prosecutor and a Special Assistant United States Attorney, had "prosecutorial discretion" to determine if Mr. Nobles should be sent to Jackson County. (8/9/13p 134)

However, discretionary acts are those "wherein there is no hard and fast rule as to course of conduct that one must or must not take[.]" Black's Law Dictionary 467 (6th ed. 1990). Here, there were clearly defined rules in place. First, Rule 6 directs that "[a] person making an arrest within the Qualla Boundary must take the defendant . . . before a Magistrate or Judge[.]" Second, under the Major Crimes Act ("MCA") and entrenched United States Supreme Court precedent, the State has no jurisdiction over an Indian who commits a major crime against another person on tribal land. 18 U.S.C. §1153; *see Negonsott v. Samuels*, 507 U.S. 99, 102-03, 122 L.Ed.2d 457, 463-64 (1993) *and cases cited therein*. Thus, the State "'either has jurisdiction or it does not[.]'" (St. Br. at 26) (citation omitted). Therefore, Jason Smith did not have discretion to determine in which forum Mr. Nobles should be prosecuted.

Rather than exercising discretion, it appears that the decision-makers made a conscious effort to avoid determining Mr. Nobles' status. It would have taken little effort to bring Mr. Nobles before the magistrate – as the Cherokee

Rules of Criminal Procedure require – or to simply ask him about his status. Instead, a Jackson County prosecutor, Jason Smith, and members of law enforcement held a meeting and determined that Rule 6 should be bypassed.

ARGUMENT

I. MR. NOBLES IS AN INDIAN BECAUSE THE EBCI RECOGNIZES ALL FIRST DESCENDANTS AS INDIANS. THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE.

The State notes that Mr. Nobles contended "'the Court of Appeals erred by concluding, contrary to the EBCI's jurisprudence, that all First Descendants are not Indians.'" The State claims this was not the Court of Appeals' holding. (St. Br. at 24) (citation omitted). To the extent this single sentence may be ambiguous, the argument heading for this issue, and the argument itself, show that Mr. Nobles contended the Court of Appeals erred by concluding that all First Descendants are not, categorically, Indians.

The State cites *Teesateskie v. EBCI Minors Fund*, 13 Am. Tribal Law 180 (E. Cher. 2015) for the proposition that the Cherokee appellate court did not "'consider the Cherokee Court opinions as having any precedential value since the Cherokee Court is the trial court for the appellate court.'" (St. Br. at 25) That the Cherokee appellate court does not feel bound by lower tribal court decisions does not mean that this Court should not look to those decisions for guidance as to whether First Descendants are categorically Indians under EBCI law. Further, the State has pointed to no Cherokee appellate court

decision that has disavowed the statements in *EBCI v. Lambert*, 3 Cher. Rep. 62 (2003), *EBCI v. Prater*, 3 Cher. Rep. 111 (2004), and *In re Welch*, 3 Cher. Rep. 71 (2003), indicating that First Descendants, categorically, meet the federal definition of an Indian under the MCA.

The State also asks this Court to ignore those statements in *Prater* and *Welch* because the statements were *dicta*. (St. Br. at 29) Whether or not the statements were strictly necessary for the holdings of those cases, the Cherokee Court's characterizations of *Lambert*'s holding are at least instructive as to what *Lambert* means.

The State asserts *Lambert*'s holding does not apply to all First Descendants because the trial court held an evidentiary hearing and because Lambert was a plaintiff in a pending tribal court civil suit. (St. Br. at 27) However, the overwhelming majority of the evidence presented at the hearing concerned the benefits available to *all* First Descendants from the EBCI, not just to Lambert herself. 3 Cher. Rep. at 64. The only evidence presented that was personal to Lambert was that she was a plaintiff in a civil suit. There is nothing in *Lambert* to indicate that this single fact was determinative. Instead, the court's analysis primarily focused on the relationship that all First Descendants have with the EBCI as shown by the privileges available to them under tribal law. *See id.* ("*By political definition* First Descendants are

children of enrolled members of the EBCI. *They have some of the privileges only Indians have*[.]") (emphasis added).

The State cites *State v. George*, 163 Idaho 936, 422 P.3d 1142 (2018) to support the notion that it does not matter whether the EBCI considers all First Descendants to be Indians. (St. Br. at 25-26) The State quotes, "'[T]his [c]ourt either has jurisdiction or it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute.'" (St. Br. at 26) (quoting 163 Idaho at 940, 422 P.3d at 1146). However, this statement is taken out of context. The entire paragraph reads:

> The State points out that the Coeur d'Alene Tribe requires that a person have at least one quarter Indian heritage to be eligible for Tribe membership, and that the Tribe will only prosecute enrolled members. However, the district court correctly held that this was not a necessary consideration, noting: '[t]his [c]ourt either has jurisdiction or it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute.' *See State v. Allan*, 100 Idaho 918, 923, 607 P.2d 426, 431, n. 1 (1980) (McFadden, J., specially concurring) ('state jurisdiction is not inherent, and may not be established simply by casting doubt on the correctness of other possible forums.').

163 Idaho at 940, 422 P.3d at 1146 (emphasis added).

Thus, in *George*, the tribe's notion of who qualifies as an Indian with respect to its prosecutorial jurisdiction was narrower than the federal definition of an Indian under the MCA. In contrast, the EBCI follows the MCA

definition of an Indian as adapted from *United States v. Rogers*, 45 U.S. 567, 11 L.Ed. 1105 (1846). *Prater*, 3 Cher. Rep. 112-13; *Lambert*, 3 Cher. Rep. at 64.

Moreover, the holding of *George* was that the State court improperly assumed jurisdiction. The State's quoted language was directed toward Idaho's argument that the State has inherent jurisdiction and may assume jurisdiction when the tribe defines its assumption of jurisdiction narrowly. *George* does not concern a situation where a tribe assumes jurisdiction based on the *Rogers* definition of an Indian, and has determined that a class of people associated with the tribe – First Descendants – all satisfy the second *Rogers* prong based on tribal recognition.

II. MR. NOBLES IS AN INDIAN BECAUSE HE SATISFIED THE TWO-PART TEST DERIVED FROM *UNITED STATES V. ROGERS*. THEREFORE, NORTH CAROLINA HAD NO JURISDICTION OVER THIS CASE.

Quoting *United States v. Cruz*, 554 F.3d 840, 847 (9th Cir. 2009), the State asserts that "'mere descendant status with the concomitant eligibility to receive benefits' is insufficient to demonstrate 'tribal recognition.'" (St. Br. at 38) However, the Ninth Circuit has strayed considerably from the two-part test of *United States v. Rogers*, 45 U.S. 567, 11 L.Ed. 1105 (1846) – as well as its own early jurisprudence in this area – which only requires recognition as an Indian by a tribe or the federal government. *See United States v.*

Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979) (*Rogers*' second requirement is "tribal or governmental recognition as an Indian").

The State also avers that Mr. Nobles' "argument about the factors considered by the Ninth Circuit and the Court of Appeals being an accurate reflection of the *Rogers* test is not properly before this Court." (St. Br. at 42) However, Mr. Nobles cited *Rogers* in his Court of Appeals Brief and claimed that he is an Indian under that test. Defendant-Appellant's Brief at 22, 27-30, *State v. Nobles*, No. COA17-516. Although Mr. Nobles also analyzed the second *Rogers* prong under existing non-binding federal case law, Mr. Nobles noted, "This Court is bound by *Rogers*, but is not bound by analyses of the second *Rogers* prong in lower federal decisions. . . . Nevertheless, even if this Court chooses to apply the *St. Cloud* test, Mr. Nobles is an Indian under that test." *Id.* at 32 (internal citation omitted). *See St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988).

Further, this Court granted review of this issue. In his Petition for Discretionary Review, Mr. Nobles clearly set out that the Court of Appeals erred by applying a test that is much stricter than what *Rogers* requires. Defendant-Appellant's Petition for Discretionary Review at 26, *State v. Nobles*, No. 34PA14-2 ("The Court of Appeals applied a test developed by the Ninth Circuit that is much stricter than the *Rogers* test.").

Therefore, this issue is properly before this Court.

III. ALTERNATELY, MR. NOBLES PRESENTED SUFFICIENT EVIDENCE THAT HE IS AN INDIAN TO REQUIRE THE TRIAL COURT TO SUBMIT A SPECIAL VERDICT ON SUBJECT MATTER JURISDICTION TO THE JURY.

The State contends that Mr. Nobles' argument that "he 'had a constitutional right to a jury trial, with the burden on the State to prove every factual matter necessary for his conviction and sentence beyond a reasonable doubt" is not preserved for review because he "did not raise this constitutional argument in the trial court or the Court of Appeals." (St. Br. at 45) (citations omitted).

In arguing his motion, defense counsel stated, "[I]f this is a factual issue or perhaps a mixed question of fact and law as to Mr. Nobles' status, . . . *we contend the jury has to make that finding*." (3/24/16pp 517-18) (emphasis added). *See State v. Rollins*, 221 N.C. App. 572, 575-76, 729 S.E.2d 73, 76 (2012) (citing N.C.R. App. P. 10(a)(1) (2012)) (where defendant objected and stated that '[c]ourt should be open,' it was apparent from the context that defendant was objecting to prosecution's attempt to close the trial in violation of constitutional right to a public trial).

Further, as noted by the State, Mr. Nobles cited constitutional provisions in his written motion, including the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of our State Constitution. (2Rp 271) This, combined with defense counsel's statement at

the hearing, was sufficient to preserve the constitutional basis for the motion. In opposition, the State cites only to an inapposite case concerning obtaining review in this Court on the basis of a substantial constitutional question and to Appellate Rule 10(a). Mr. Nobles complied with Appellate Rule 10(a) for the reasons stated above.

The State also contends this argument is not preserved for review because defendant did not request that a "special verdict" be submitted to the jury, but instead requested that a "special issue" be submitted. However, it is evident from the discussion among the parties and the trial court, as well as the trial court's findings of fact and conclusions of law, that Mr. Nobles requested a special verdict. (3/24/16pp 517-26)

The State further claims that *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982) shows that the issue of Mr. Nobles' Indian status need not be submitted to the jury because "this Court held [in *Darroch*] that the defendant was not entitled to an instruction on jurisdiction where his jurisdictional challenge related to the State's legal theory of jurisdiction, rather than the facts which the State contended supported jurisdiction." (St. Br. at 48) (citation omitted).

Therefore, under *Darroch*, if there are factual issues for the jury to resolve, then the jurisdictional issue should be submitted to the jury. 305 N.C. at 212, 287 S.E.2d at 866 ("[W]hether certain facts exist which would support

jurisdiction is a jury question."). In this case, there was a factual dispute as to whether Mr. Nobles is an Indian, and evidence was produced at an evidentiary hearing supporting both parties' contentions. Because a reasonable juror could find that Mr. Nobles is an Indian, Mr. Nobles had the right to have the evidence evaluated by the jury to determine whether he is a non-Indian beyond a reasonable doubt. *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977).

The State also argues that our statutes and case law do not "burden[ ] the State with proving beyond a reasonable doubt that defendant is not an Indian." (St. Br. at 49) However, it is well-settled that a special verdict is appropriate when the jury must decide factual issues. *State v. Blackwell*, 361 N.C. 41, 47, 638 S.E.2d 452, 456 (2006) (internal quotation marks and citations omitted) ("Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that special verdicts are permissible in criminal cases.").

The State also claims this issue fails because Mr. Nobles did not request the instruction in writing. (St. Br. at 50) However, because this issue is jurisdictional, this Court may address it even without any request for an instruction at all. In *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995) and *State v. Bright*, 131 N.C. App. 57, 505 S.E.2d 317 (1998), the defendants conceded on appeal they had not requested a special verdict on territorial

jurisdiction, but argued the issue was preserved as a matter of law. (App 3, 9 n.2) In both cases, the appellate court reached the merits of the issue and reversed the defendant's convictions. *Rick*, 342 N.C. at 101, 453 S.E.2d at 187; *Bright*, 131 N.C. App. at 62-63, 505 S.E.2d at 320-21. *Accord State v. Tucker*, 227 N.C. App. 627, 743 S.E.2d 55 (2013).[1]

CONCLUSION

For all the foregoing reasons, Defendant respectfully contends his conviction should be vacated. Alternately, Defendant should be granted a new trial.

Respectfully submitted this the 23rd day of April, 2019.

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[1] This Court may take judicial notice of the defendants' briefs in those cases. *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998). (App 1-14)

ATTORNEYS FOR DEFENDANT-
APPELLANT

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's New Reply Brief has been filed pursuant to Rule 26 by electronic means with the Clerk of the Supreme Court of North Carolina.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's New Reply Brief has been duly served pursuant to Rule 26 by electronic means upon Special Deputy Attorney General Amy Kunstling Irene, airene@nccourts.org.

This the 23rd day of April, 2019.

Electronic Submission
Anne M. Gomez
Assistant Appellate Defender

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No. COA97-963 TWENTY-THIRD DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Wilkes County
	)	95 CrS 8503, 05; 8602-03
RICKY BRIGHT	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST THE DEFENDANT FOR RAPE AND SEXUAL OFFENSE, BECAUSE IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER THESE CHARGES.

Assignment of Error No. 11, Rp. 62

The defendant challenged the subject matter jurisdiction of the Superior Court for Wilkes County. The trial court did not instruct the jury that it must find that the crimes were committed in North Carolina in order for the courts of our state to have subject matter jurisdiction. Accordingly, the judgments for sexual offense and rape must be vacated, and the case remanded for a new trial on these charges.

In *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977), the Supreme Court held that, once jurisdiction is challenged, the state must convince the trial court that there is sufficient evidence from which a jury could find beyond a reasonable doubt that part of the crime took place in North Carolina. The Court found that there was sufficient evidence in that case to raise a jury question on the location of the killing. The Court went on to hold that, because the jury found, by way of a special verdict, that the crime took place in North Carolina, the state proved jurisdiction. *See* N.C.P.I. - Crim. 311.10.

Batdorf, then, stands for the proposition that the determination of jurisdiction is a two-stage process. First, the trial court makes a preliminary determination that there is sufficient evidence from which the jury could conclude beyond a

reasonable doubt that the crime took place in this State. Then, the jury must find, as a matter of fact, that it did so.

In this case, one of the theories of the defense was that the rape and sexual offense took place (if at all) in the state of West Virginia. This formed a large part of the cross-examination of the complainant. (Tpp. 104-106) Thus, the defense put at issue the subject matter jurisdiction of the courts of North Carolina. This triggered the requirement that the trial court submit to the jury the question of whether these crimes were committed in this State. *See State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995). The defendant need not request such an instruction; the duty to give it arises as a matter of law. *Id.*

The state may attempt to argue that the defendant has waived his right to challenge jurisdiction by not requesting a special verdict. However, it is well-settled that subject matter jurisdiction may not be waived. *Branch v. Houston*, 44 N.C. (Bush) 85 (1852). The issue can be raised at any point, even in the Supreme Court. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962). Finally, the state has the burden of showing jurisdiction beyond a reasonable doubt. *Batdorf*. The prosecutor should have ensured that the jury was asked the critical question of where the alleged crimes took place.

Because the state has yet to prove to a jury that the crimes of rape and sexual offense took place in North Carolina, these cases must be remanded to the Superior Court for a new trial.

CONCLUSION

For these reasons, the defendant is entitled to a new trial.

Respectfully submitted, this 24th day of September, 1997.

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No. 226PA94 TWENTY-SEVEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA)
)
v.) From Gaston
)
GEORGE McCALL RICK)

****

DEFENDANT APPELLEE'S NEW BRIEF

****

B. The Court of Appeals Correctly Determined that the State Has Not Proven Beyond a Reasonable Doubt That a Second Degree Murder Took Place in North Carolina.

1. *The Trial Court's Preliminary Ruling on Jurisdiction, Although Erroneous, is Now Moot.*

The state urges this Court to look only at the evidence adduced at the pre-trial hearing. This is understandable. The state's case -- thin at the hearing -- was pitifully emaciated at trial. For instance, at the hearing, Joyce Rick testified that she saw the defendant driving a blue Mustang at 11:00 a.m. on April 21. By the time of trial, her testimony changed. Ms. Rick testified to the jury that she saw this at 1:00 a.m., only two hours after the decedent left work. Moreover, the state presented at the hearing testimony that "the rapist up the street," who Ms. Rose feared, was "Mr. Rick," a possible reference to the defendant. At trial, no evidence of the identity of that "rapist" was offered. These, and the other changes in the evidence alluded to by the Attorney General, may appear minor. However, they further weaken an already weak case.

There was not enough evidence, even at the pre-trial hearing, to raise a jury question on jurisdiction. More importantly, the preliminary ruling on jurisdiction is moot. The question now is whether the state has proven, beyond a reasonable doubt, that Ms. Rose's death took place in North Carolina.

To resolve this question, the court below focused on the evidence at trial rather than the hearing. This was proper for two reasons. First, this was the only evidence heard by a jury. The determination of jurisdiction is a question of fact, to be proved to a jury beyond a reasonable doubt. *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977).

In *Batdorf*, this Court held that, once jurisdiction is challenged, the state must convince the trial court that there is sufficient evidence from which a jury could find, beyond a reasonable doubt, that part of the crime took place in North Carolina. The Court found that there was sufficient evidence in that case to raise a jury question on the location of the killing. The Court went on to hold that, because the jury found, by way of a special verdict, that the crime took place in North Carolina, the state proved jurisdiction. *See* N.C.P.I - Crim. 311.10.

Batdorf, then, stands for the proposition that the determination of jurisdiction is a two-stage process. First, the trial court makes a preliminary determination that there is sufficient evidence from which the jury could conclude beyond a reasonable doubt that the crime took place in this State. Then, the jury must find, as a matter of fact, that it did so.[1]

In this case, based on the evidence at trial, the Court of Appeals ruled that it did not give rise to a *prima facia* showing of jurisdiction. That is, the court ruled that the jury could not reasonable have found that Ms. Rose was murdered (if at all) in North Carolina.

This case presents a second reason for focusing on the trial evidence rather than the evidence adduced at the hearing. The state's theory of the case changed between the hearing and trial.

At the time of the hearing, the state was torn between two inconsistent theories of guilt. First, the state thought that the killing might have taken place in North Carolina and the dead body transported across the state line. On the other hand, the prosecution suggested that the decedent might have been kidnapped from this state and transported to

[1] Where, as here, the evidence and the theory of prosecution changes between the hearing and trial, the trial court must make a fresh, albeit still preliminary, determination that there is a prima facia showing of jurisdiction. If such a showing has been made by the end of the trial evidence, the jury should be instructed to decide whether or not the crime took place in this state.

South Carolina, where she was killed. The hearing judge never determined as a fact that the killing took place in either of these ways. Rather, the judge deferred to the jury, who presumably was to answer the crucial question of where the killing took place. The hearing judge also declined to make findings of fact as to the location of Ms. Rose's death, and to require the state to choose from its mutually inconsistent theories of the case.

By the time of trial, the state had abandoned its kidnapping theory and relied exclusively on the theory that the killing took place in this state, followed by a trip to South Carolina to dispose of the body. The question at trial and on appeal, correctly resolved by the Court of Appeals, was whether the state presented sufficient evidence from which the jury could reasonably conclude that Ms. Rose was killed in North Carolina. That there may have been at one time another theory of jurisdiction is moot. *See Presnell v. Georgia*, 439 U.S. 14, 58 L.E.2d 207 (1978)(due process requires conviction to be reviewed in light of theory relied on by prosecution at trial).

2. *The Evidence at Trial Was Insufficient to Establish a Prima Facie Case of Jurisdiction.*

Even if the evidence adduced at the pretrial hearing had been sufficient to support one of the two pre-trial theories of prosecution, the evidence adduced at trial did not raise a jury question on the state's trial theory: that Ms. Rose was killed in North Carolina. The body was found in South Carolina, dressed in a party dress, panties and high heeled white shoes. She apparently dressed herself in those clothes after having come home dressed in jeans. There was no evidence of a struggle at her house, no testimony that any of her neighbors (who lived close nearby) saw or heard anything out of the ordinary that night. The only reasonable inference is that she left her house voluntarily. Nothing from the

decedent's house was found with the body. Even taken in the light most favorable to the state, there is no reasonable inference that Ms. Rose was killed or injured in North Carolina. As argued below, the state relies on the assumption that the defendant is guilty to explain the evidence. Assuming the jury did the same, the verdict is not the result of reasonable inferences, but circular logic.

3. *Even if the Evidence Were Sufficient to Establish a Prima Facie Case of Jurisdiction, No Fact-Finder has Determined that a Murder Took Place in this State.*

No finder of fact has yet been asked to infer, reasonably or otherwise, that the crime of murder took place in North Carolina. The trial court never submitted to the jury the question of whether the killing took place in North Carolina.[2] Nor is there any way to infer from the jury's general verdict that this was its view of the evidence. As a result, the state has yet to prove to a fact-finder that North Carolina has jurisdiction over this case. Because the state has yet to establish the validity of the judgment against the defendant, the Court of Appeals correctly vacated it.

[2] The state may attempt to argue that the defendant has waived his right to challenge jurisdiction by not requesting a special verdict. However, it is well-settled that subject matter jurisdiction may not be waived. *Branch v. Houston*, 44 N.C. (Bush) 85 (1852). The issue can be raised at any point, even in the Supreme Court. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962). Moreover, the defendant timely brought to the trial court's attention that the court did not have jurisdiction over this case. He should not be required to do more. Finally, the state has the burden of showing jurisdiction beyond a reasonable doubt. *Batdorf*. The prosecutor should have ensured that the jury was asked the critical question of where the alleged second degree murder took place.

C. The Court of Appeals Correctly Determined that the Evidence Was Insufficient to Support Any Verdict.

On a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element charged and that the defendant is the person who committed the offense. *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992). "Substantive evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, *State v. Rogers*, 109 N.C. App. 491, 428 S.E.2d 220 (1993), but it must do more than merely raise a suspicion or conjecture as to the existence of a necessary element of the charged offense. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984).

When a trial court rules upon a motion to dismiss, state and federal constitutional due process rights are at stake. Under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, when testing the sufficiency of the evidence in a criminal case, the court must find that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed.2d 560, 573 (1979)(emphasis original). This standard for ruling on a motion testing the sufficiency of the evidence safeguards against a breach of due process which protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368 (1970). Federal due process rights are at least as protective as those state constitutional rights guaranteed by the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution. *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985).

No. COA12-1068 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
DENNIS DWAYNE TUCKER	)	

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DEFENDANT-APPELLANT'S BRIEF

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II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY ON THE ISSUE OF TERRITORIAL JURISDICTION AND BY FAILING TO REQUIRE THE JURY TO RETURN A SPECIAL VERDICT FINDING JURISDICTION IN NORTH CAROLINA. BECAUSE DEFENSE COUNSEL CHALLENGED THE TRIAL COURT'S TERRITORIAL JURISDICTION, THE TRIAL COURT HAD A DUTY AS A MATTER OF LAW TO INSTRUCT THE JURY ON JURISDICTION.

Because defense counsel challenged the trial court's territorial jurisdiction to prosecute Mr. Tucker on the charge of embezzlement, the trial court erred by failing to instruct the jury on the issue of jurisdiction and by failing to require the jury to return a special verdict finding jurisdiction in this state. Where defense counsel challenged the trial court's jurisdiction, the trial court has a duty, as a matter of law, to instruct the jury on jurisdiction. The trial court's failure to properly instruct the jury on the issue of jurisdiction constitutes reversible error.

When territorial jurisdiction in a criminal prosecution is challenged, the State is required to prove beyond a reasonable doubt that the crime with which the defendant is charged occurred in North Carolina. *State v. Rick*, 342 N.C. 91, 100-101, 463 S.E.2d 182, 187 (1995) (citing *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 503 (1977)). If the trial court makes a preliminary determination that sufficient evidence exists from which a jury could find beyond a reasonable doubt that the alleged crime was committed in North Carolina, the court is obligated to "instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the [crime] occurred in North Carolina, a verdict of not guilty should be

returned." *State v. Bright*, 131 N.C. App. 57, 62, 505 S.E.2d 317, 320 (1998) (quoting *Rick*, 342 N.C. at 101, 463 S.E.2d at 187). "The trial court should also instruct the jury that if it is not so satisfied, it must return a special verdict indicating a lack of jurisdiction." *Id.* "Failure to charge the jury in this manner is reversible error and warrants a new trial." *Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. *See also Rick*, 342 N.C. at 101, 463 S.E.2d at 187.

In this case, defense counsel challenged the trial court's jurisdiction, arguing that none of the essential acts forming the offense of embezzlement occurred in North Carolina. (Tpp. 125-138). The trial court did not instruct the jury that the State bore the burden of proving jurisdiction and did not instruct the jury that if it was not convinced beyond a reasonable doubt that embezzlement, or the essential elements of embezzlement, occurred in North Carolina, it should return a special verdict so indicating. The trial court's failure to properly instruct the jury is reversible error. Therefore, Mr. Tucker's conviction should be vacated and his case remanded for a new trial. *See Bright*, 131 N.C. App. at 62, 505 S.E.2d at 320. *See also Rick*, 342 N.C. at 101, 463 S.E.2d at 187.

Where defense counsel challenged the trial court's jurisdiction, the issue of whether the trial court properly instructed the jury on jurisdiction is preserved for appellate review as a matter of law. Defense counsel did not request an instruction

on jurisdiction in either *Rick* or *Bright.* [1] These cases establish that the trial court's duty to give an instruction on territorial jurisdiction is triggered whenever the defense challenges the territorial jurisdiction of the court.

The State may argue that Mr. Tucker waived his right to challenge jurisdiction by not requesting a special verdict. It is well settled, however, that subject matter jurisdiction may not be waived. *Obo v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009). "The issue of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." *State v. Frink*, 177 N.C. App. 144, 147, 627 S.E.2d 472, 473 (2006). Because Mr. Tucker challenged the jurisdiction of the court, the trial court's failure to properly instruct the jury regarding territorial jurisdiction is preserved for appellate review, and constitutes reversible error.

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[1] Mr. Tucker requests that the Court take judicial notice of the documents filed in this Court and in the Supreme Court of North Carolina in the cases of *Rick* and *Bright*. "This Court may take judicial notice of the public records of other courts within the state judicial system." *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998). Attached in the appendix to this brief are the relevant documents from *Rick* and *Bright*. In both *Rick* and *Bright*, defense counsel acknowledged on appeal that trial counsel did not request either an instruction or a special verdict on jurisdiction. In both cases, defense counsel argued that the trial court's duty to instruct on jurisdiction arises as a matter of law, and is triggered when the defendant challenges the territorial jurisdiction of the court. (App. 2-3, Defendant-Appellant's Brief in *Bright* at 17-18; App. 9, Defendant's New Brief in *Rick* at 10, fn2). In *Rick* and *Bright*, the Court reached the merits of the appeal without any suggestion that the issue was not properly preserved for appellate review. *Bright*, 131 N.C. App. at 62-63, 505 S.E.2d at 320-321; *Rick*, 342 N.C. at 100-101, 463 S.E.2d at 187.