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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-199

Filed 6 February 2024

Craven County, No. 20 CRS 594

STATE OF NORTH CAROLINA

v.

ASHLEY DEANNA VELEZ, Defendant.

Appeal by Defendant from Judgment entered 8 July 2021 by Judge Joshua W. Willey Jr. in Craven County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni, for the State.

Christopher J. Heaney, for defendant-appellant.

MURPHY, Judge.

Defendant was convicted of being an accessory after the fact to first-degree murder. She argues the State did not present substantial evidence of her intent to aid the principal and, therefore, the trial court erred by denying her motion to dismiss. Assuming, *arguendo*, that such specific intent is required to convict a

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defendant of being an accessory after the fact, the State met its burden here by presenting evidence from which a reasonable jury could find Defendant's conduct was voluntary and free from duress.

Defendant also argues the trial court abused its discretion by declining to find three additional statutory mitigating factors and imposing an aggravated sentence. The trial court did not abuse its discretion by declining to find additional mitigating factors where Defendant did not present substantial, uncontradicted, and manifestly credible evidence of them. Further, the trial court did not abuse its discretion by imposing an aggravated sentence, as it reached its sentence by properly weighing one factor over another and not by relying on any improper sentencing factors. However, we have discovered a clerical error in the trial court's written judgment, and we remand for correction.

BACKGROUND

This case arises from an attempted-robbery-turned-murder on 3 August 2017 that led to Defendant's indictments for first-degree murder, conspiracy to commit armed robbery, attempted armed robbery, and accessory after the fact to first-degree murder. The indictments alleged Defendant attempted to—and conspired with Anthony Johnson, Brittany Leal, and Marquis Malloy to—rob the Cove City Country Store, resulting in the murder of Mr. Scottie Morton. Defendant then became an accessory after the fact to the murder by sheltering Johnson and Leal, providing cleaning supplies for the getaway vehicle, attempting to provide further

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transportation, replacing the previously removed license plate on the getaway vehicle, and making false statements to law enforcement. Defendant pled not guilty to all counts, and the jury ultimately convicted her only of accessory after the fact to first-degree murder.

At trial, the State presented evidence, including testimony from Leal, recounting the events of 3 August 2017, which, in the light most favorable to the State, evidenced Defendant's involvement with Johnson and Leal before and after—but not during—the attempted-robbery-turned-murder. Leal testified she and Defendant, who were romantic partners, began discussing a potential robbery as early as 30 June 2017. They ultimately selected the Cove City Country Store—Defendant's place of employment—as their target because it would have an extra \$5,000.00 on hand on 3 August 2017 and lacked security cameras.

Defendant and Leal spent the night of 2 August 2017 in Fayetteville. The next day, Leal contacted Malloy to borrow a car for the robbery. Malloy also connected her with Johnson, as Leal needed someone not known in the Cove City community who could enter and rob the store anonymously. Defendant, Leal, and Johnson then drove from Fayetteville to Cove City, discussing their plan along the way. After driving past the Cove City Country Store, Defendant—in a break from the original plan—asked Leal to drop her off at the nearby home of Defendant's sister. At her sister's house, Defendant removed the car's license plate; then, Leal and Johnson resumed their plan.

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After leaving Defendant's sister's home, Leal and Johnson proceeded to the store, where Johnson entered with a gun and demanded the bag of cash. Mr. Morton, who was present to install an air conditioner, drew his own gun in an attempt to intervene, but Johnson shot him and retreated. Mr. Morton suffered two gunshot wounds, one of them fatal. Johnson returned to Leal's car, and the pair departed for Defendant's sister's home.

Either before or upon arriving at the sister's home, Leal apprised Defendant that "somebody had been shot at the store." After Leal and Johnson returned, Defendant replaced the license plate on the car, provided Leal and Johnson with "cleaning supplies to wipe down the car[,] and tied the garbage bag where Leal and Johnson had disposed of their guns.

The police arrived at the home while Defendant, Leal, and Johnson were still present. Johnson fled, and Leal "was taken into custody and placed in the back of a patrol car." An officer interviewed Defendant, who denied knowing Johnson and said Leal had picked him up *after* dropping her at her sister's house. Another officer transported Defendant to the Craven County Sheriff's Office for further interviewing, where Defendant again denied that Johnson travelled from Fayetteville to Cove City with her and Leal.

Testifying in her own defense, Defendant contradicted some of the State's evidence, but admitted to travelling from Fayetteville to Cove City with Leal and

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Johnson, replacing the license plate after learning of the shooting, and lying to law enforcement officers.

Defendant moved to dismiss for insufficient evidence on each and every element of each charge at the close of the State's evidence and renewed the motion at the close of all evidence. The trial court denied the motion each time, and the jury found Defendant guilty only of accessory after the fact to first-degree murder.

During the sentencing hearing, the State offered evidence that Defendant had violated conditions of probation within ten years prior to the offense, an aggravating factor under N.C.G.S. § 15A-1340.16. *See* N.C.G.S. § 15A-1340.16(d)(12a) (2022). Defendant offered mitigation evidence pertaining to her community support system and diagnosed post-traumatic stress disorder, including how the condition affected her relationship with Leal. The trial court found the probation violation as an aggravating factor and only Defendant's community support as a mitigating factor. It then found the aggravating factor outweighed the mitigating factor and imposed an aggravated sentence.

ANALYSIS

On appeal, Defendant argues the trial court (A) erred by denying her motion to dismiss her accessory after the fact charge, (B) abused its discretion by declining to find additional statutory mitigating factors, and (C) abused its discretion by imposing an aggravated sentence. We hold the trial court made no reversible error; however, we have discovered a clerical error in the written judgment and remand for

correction.

A. Motion to Dismiss

Defendant argues the trial court erred by denying her motion to dismiss the accessory after the fact to first-degree murder charge. Specifically, she argues that the State did not present substantial evidence of her specific intent required to assist the principal. We disagree.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.”

State v. Smith, 186 N.C. App. 57, 62 (2007).

When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant’s being the perpetrator of the offense. If so, the motion to dismiss is properly denied. . . .

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

. . . .

The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both.

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State v. Earnhardt, 307 N.C. 62, 65-68 (1982) (citations and marks omitted). In other words,

[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379 (2000) (alteration in original) (citation and marks omitted).

“When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, resolving all conflicts in the evidence in favor of the State and giving it the benefit of all reasonable inferences.” *State v. Tirado*, 358 N.C. 551, 582 (2004). “Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence.” *Fritsch*, 351 N.C. at 379 (citation and marks omitted).

“The elements necessary to prove someone is an accessory after the fact[, N.C.G.S. § 14-7 (2022),] are: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony;

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and (3) the accused rendered assistance to the felon personally.” *State v. Ditenhafer*, 373 N.C. 116, 126 (2019) (second alteration in original) (marks omitted).

Defendant does not challenge any of these elements on their face, but argues “[a]cting as an accessory after the fact requires more than an act that has the effect of helping someone else who has committed a crime. Instead, the alleged act must be done ‘with the intention, and for the purpose of enabling the felon to escape detection, arrest or the like.’” Defendant grounds this specific intent requirement in *State v. Potter*, which, after reciting the three elements of accessory after the fact liability, stated,

to be an accessory after the fact one need only aid the criminal to escape arrest and prosecution. . . . this rule, however, does not render one an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof, nor will the act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact.

It is stated . . . that to constitute one an accessory after the fact the aid or assistance must have been rendered with the intention, and for the purpose of enabling the felon to escape detection, arrest or the like.

State v. Potter, 221 N.C. 153, 156 (1942) (marks omitted).

Although the State does not argue that Defendant is mistaken about a specific intent requirement, it, in a footnote, points us to *State v. Martin*, 30 N.C. App. 166 (1976). In *Martin*, we rejected an argument similar to Defendant's and read *Potter* narrowly as "applicable to situations where a person merely fails to give information of the committed felony or denies knowledge of the committed felony." *Id.* at 170. However, *Martin's* reading of *Potter* appears narrower than subsequent decisions from our Supreme Court. *See, e.g., State v. Ditenhafer*, 373 N.C. 116, 121 (2019) ("Under *Potter*, an individual can be held to be an accessory after the fact only for her actions (such as concealment or giving false testimony), not for her omissions (like failure to report)."); *Earnhardt*, 307 N.C. at 68 (entertaining the defendant's argument that "he acted out of fear of [the principals] and not with the intent to aid them" but rejecting it on factual grounds). Ultimately, we need not determine for this case whether, under *Potter*, accessory after the fact liability requires the specific intent to aid the principal, as, regardless, the State presented substantial evidence from which a reasonable jury could infer Defendant acted with such intent.

Defendant argues "the State offered no direct evidence that [Defendant] acted with the intention, and for the purpose of enabling the felon to escape detection, arrest or the like" and "[t]he evidence allowed at most a suspicion or conjecture that [Defendant] wanted to help [] Leal and [] Johnson[.]" However, the State did not need to prove intent by direct evidence, as it is well established from other contexts that a reasonable jury may infer a defendant's intent from circumstantial evidence.

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E.g., State v. James, 321 N.C. 676, 668 (1988) (“The [d]efendant’s intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.”).

In this context, circumstances suggesting an alleged accessory acted voluntarily or otherwise free from duress or fear are sufficient for a reasonable jury to infer the alleged accessory’s intent to aid the principal. In *State v. Cousin*, we held a reasonable jury could infer that the defendant intended to shield the principal’s identity by giving false statements to law enforcement where he made such statements knowingly and “on his own volition[.]” *State v. Cousin*, 233 N.C. App. 523, 532, *disc. rev. denied*, 367 N.C. 521 (2014). Likewise, in *Earnhardt*, our Supreme Court rejected the defendant’s intent argument because the “[d]efendant told [a] false story to the officer when [the principals, whom he claimed to have feared,] were not present, a time when he would have no reason to fear for his safety.” *Earnhardt*, 307 N.C. at 69.

Here, the State presented sufficient evidence for a reasonable jury to infer that Defendant acted “with the intention, and for the purpose of enabling the felon to escape detection, arrest or the like.” *Potter*, 221 N.C. at 156. Defendant argues she did not act with the intent to aid, but rather acted out of fear of Leal and Johnson.¹ Yet, she continued to aid, particularly by actively lying to law enforcement, after

¹ The trial court declined to instruct the jury on duress, and Defendant does not challenge that decision on appeal.

Johnson fled and Leal entered police custody. As in *Earnhardt*, the principal's—or in Leal's case, a co-accessory's—absence gave Defendant “no reason to fear for [her] safety[,]” *Earnhardt*, 307 N.C. at 68, so her continued active lying is circumstantial evidence to infer her true reason for doing so was not fear, but an intent to aid.

Defendant invites us to consider several points of the State's and her own evidence that she argues permits a reasonable jury to infer she acted out of fear, including that Johnson or Leal, despite their absence, could have eventually retaliated for Defendant's statements to law enforcement. However, Defendant's own evidence is inappropriate under our standard of review, and any of the State's evidence favorable to her merely raises factual questions for the jury. *See State v. Best*, 196 N.C. App. 220, 226 (2009) (“[A]ny evidence in the State's case-in-chief tending to show that [the] [d]efendant acted under duress did not require the trial court to dismiss the accessory-after-the-fact charges. [The] [d]efendant's duress defense presented a question of fact for the jury to decide; indeed, in the face of conflicting evidence, duress was not an appropriate ground for the trial court to grant [the] [d]efendant's motion to dismiss.”).

The State presented substantial evidence from which a reasonable jury could infer that Defendant acted with specific intent to aid Johnson and Leal. Consequently, we need not determine whether Defendant's conviction for accessory after the fact required evidence of such intent at all. The trial court did not err.

B. Mitigating Sentencing Factors

Defendant argues the trial court abused its discretion by not finding additional mitigating factors. Specifically, she argues the trial court should have found three additional statutory mitigating factors:

(1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.

(2) The defendant was a passive participant or played a minor role in the commission of the offense.

(3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.

See N.C.G.S. § 15A-1340.16(e)(1-3) (2022). Defendant did not present substantial, uncontradicted, and manifestly credible evidence to support any of these three factors. The trial court acted within the scope of its discretion by declining to find them.

“Before it imposes a sentence exceeding the presumptive term, the sentencing court must consider all statutory mitigating factors that are supported by the evidence.” *State v. Heatwole*, 333 N.C. 156, 163 (1992). This is true regardless of whether the defendant has requested the trial court find a particular factor. *State v. Spears*, 314 N.C. 319, 321 (1985) (“Even in the absence of a specific request by counsel, the sentencing judge has a duty to examine the evidence to determine if it would support one of the statutorily enumerated factors.”).

“[T]he offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.” N.C.G.S. § 15A-1340.16(a) (2022).

The existence of [a statutory] mitigating factor was to be determined in the discretion of the trial judge. A matter committed to the discretion of a trial court is not subject to review except upon a showing of an abuse of discretion, and a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision[.]

State v. Barts, 321 N.C. 170, 183 (1987) (citation omitted). “A trial judge’s failure to find a statutory mitigating factor is error only where evidence supporting the factor is uncontradicted, substantial, and manifestly credible.” *State v. Maness*, 321 N.C. 454, 462 (1988). Moreover, “the same evidence may not be used to support more than one mitigating factor.” *State v. Lovell*, 93 N.C. App. 726, 730 (1989).

We consider each of Defendant’s three proffered mitigating factors in turn.

1. Duress, Coercion, Threat, or Compulsion

Defendant argues her abusive relationship with, and fear of, Leal—fear that Defendant says “likely transferred” to Johnson—compelled her to cooperate with Leal and Johnson. However, duress, coercion, threat, or compulsion require more than mere generalized fear; they require direct external pressure on the defendant.

“[T]he mitigating factor [of duress, coercion, threat, or compulsion] is intended to apply to situations in which some type of external pressure is directly exerted upon the defendant in an attempt to force commission of the offense.” *State v. Holden*, 321 N.C. 689, 695 (1988) (considering the four terms as a unitary factor). In *Holden*, the

defendant received an aggravated sentence for murdering her infant child. *Id.* at 694. She argued “her deprived background and abusive environment[,]” including “constant physical and emotional abuse” from her child’s father, compelled her to murder the child. *Id.* at 693, 695. Our Supreme Court concluded the trial court had more appropriately considered the evidence as that of the defendant’s mental condition rather than duress because “this abuse was not directed toward forcing [the] defendant to commit the crime.” *Id.* at 695.

Here, Defendant presented evidence that Leal threatened her, but such threats, like the abuse in *Holden*, were not directed at forcing Defendant to commit any crime. Rather, the abuse involved relationship issues, such as Leal threatening to beat and hurt Defendant if Defendant ever left Leal. Whatever pressure this exerted on Defendant was indirect; therefore, Defendant did not present substantial, uncontradicted, and manifestly credible evidence in support of this factor, and the trial court did not abuse its discretion by not finding duress, coercion, threat, or compulsion as a mitigating factor.

2. Passive Participant or Minor Role

Defendant next argues that replacing the license plate and making false statements about Johnson to law enforcement were “minor act[s,]” and, therefore, she “was a passive participant and had a minor role.” However, far from being minor, Defendant’s acts were the sole basis of the offense, as being an “[a]ccessory after the

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fact is a substantive crime—not a lesser degree of the principal crime.” *State v. Johnson*, 136 N.C. App. 683, 695 (2000) (marks omitted).

A passive participant can be defined as one who has an inactive part in the commission of an offense. A minor role can be defined as one in which the individual performs a comparatively unimportant function in the commission of an offense. Despite the closeness of these definitions, they still can refer to separate types of conduct. Since N.C.[G.S.] § 15A-1340.4(a)(2)(c) is stated in the disjunctive, proof of either type of conduct is sufficient to support the finding of a mitigating factor.

State v. Crandall, 83 N.C. App. 37, 40 (1986), *disc. rev. denied*, 319 N.C. 106 (1987).

Both definitions require a defendant’s conviction to be based in part on a co-felon’s activity rather than on a defendant’s personal involvement alone. *E.g.*, *State v. Jones*, 309 N.C. 214, 221 (1983) (concluding the defendant played a minor or passive role in the murder of a store clerk where one of the defendant’s fellow robbery perpetrators returned to the store to kill the clerk, against the defendant’s plan and pleas to spare the clerk); *Crandall*, 83 N.C. App. at 40 (concluding the defendant was a passive participant in breaking and entering and larceny where the defendant was “highly intoxicated and was ‘passing out’ during the break-in and was not aware of what was happening” and stayed in the car while co-felons committed the break-in).

Here, Defendant’s conviction for being an accessory after the fact is based solely on her own acts. Defendant’s replacing of the license plate and actively lying to police in aid of Johnson—each of which she admitted to—constitute sufficient aid to render her an accessory after the fact. *See State v. Brewington*, 179 N.C. App. 772,

776 (2006) (“[P]ersonal assistance in *any* manner so as to aid a felon in escaping arrest or punishment is sufficient to support a conviction as an accessory.”); *Martin*, 30 N.C. App. at 169 (“It is not necessary that the aid be effective to enable the felon to escape all or a part of his punishment.”). Defendant did not have a passive or minor role in *herself* being an accessory after the fact and, consequently, has not presented any evidence to support this mitigating factor, much less substantial, uncontradicted, and manifestly credible evidence. Therefore, the trial court did not abuse its discretion in declining to find this mitigating factor.

3. Mental or Physical Condition

Defendant next argues the trial court should have found as a mitigating factor that her post-traumatic stress disorder significantly reduced her culpability. But, Defendant does not explain how her condition and its effects reduced her culpability; therefore, the trial court did not abuse its discretion in declining to find this factor.

“While a mental condition may be capable of reducing a defendant’s culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. The burden of proving that the condition reduced his culpability is on the defendant.” *State v. Jackson*, 119 N.C. App. 285, 291-22 (1995) (citation omitted). Such proof requires the defendant show an “essential link” between her condition and her culpability. *See State v. Salters*, 65 N.C. App. 31, 36 (1983), *disc. rev. denied*, 310 N.C. 479 (1984) (“[The] defendant has failed to establish the essential link between [the] defendant’s condition and his

culpability for the offense. We hold that the judge was not required to consider either condition as a mitigating factor in this case.”).

Here, Defendant presented her psychiatric report, which indicated her diagnosis and extensively reported the condition’s roots and its effects on Defendant. Specifically, the condition “left her vulnerable to [] Leal’s manipulation.” Moreover, the trial court recommended “maximum levels of mental health treatment” be available to Defendant during her incarceration, suggesting it found Defendant’s evidence of her mental condition was credible. *See id.* (“The judge recommended that [the] defendant be treated for [his conditions], indicating that the testimony [regarding them] was credible.”). However, Defendant’s evidence ended there: she did not show how Leal manipulated her or how any such manipulation related to Defendant’s criminal conduct. She did not establish an essential link between her condition and her culpability for accessory after the fact to first-degree murder. As such, she did not present substantial, uncontradicted, and manifestly credible evidence that her condition significantly reduced her culpability, and the trial court did not abuse its discretion in declining to find Defendant’s post-traumatic stress disorder as a mitigating factor.

C. Defendant’s Aggravated Sentence

Defendant argues the trial court abused its discretion by imposing an aggravated sentence. Specifically, she argues the trial court mis-weighed the aggravating and mitigating factors and impermissibly considered her exercise of her

right to a jury trial as a sentencing factor. However, the trial court may permissibly weigh one factor over another, and nothing in the record supports her inference that the court considered her jury demand as a factor.

1. Balance of Aggravating and Mitigating Factors

Defendant echoes her prior arguments by arguing her “history of dysfunctional relationships and mental health difficulties” explains her inability to comply with probation. Presumably, Defendant would have this reduce the weight of this aggravating factor to the point where it should not outweigh the mitigating factor—that Defendant had a support system in the community. However, the trial court did not abuse its discretion by weighing the factors otherwise.

The balance struck by a sentencing court in weighing the aggravating and mitigating factors is a matter left to the sound discretion of the sentencing court and will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason. The sentencing court need not justify the weight it attaches to any factor.

State v. Butler, 341 N.C. 686, 694 (1995). “The court may very properly emphasize one factor more than another in a particular case. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.”

State v. Melton, 307 N.C. 370, 380 (1983). In other words, “[a] trial court’s weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion.” *State v. Wampler*, 145 N.C. App. 127, 133 (2001).

Here, the trial court found Defendant's probation violation outweighed the mitigating factor that Defendant has a support system in the community. The record supported the trial court's finding of this ultimately weightier aggravating factor. Further, the trial court's recommendation that Defendant have the opportunity to receive mental health treatment during her incarceration indicates it did not ignore the evidence of Defendant's mental health history but weighed the aggravating factor in spite of it. *Cf. Salters*, 65 N.C. App. at 36 ("The judge recommended that defendant be treated for [the defendant's conditions], indicating that the testimony was credible."). We cannot say the trial court abused its discretion simply because Defendant would have weighed this evidence—and thus the aggravating factor—differently.

2. Defendant's Exercise of Her Right to a Jury Trial

Defendant also argues, in essence, that the trial court's balancing of the factors was pretextual and her aggravated sentence is actually punishment for exercising her right to a jury trial, particularly because Leal received a lesser sentence "after pleading guilty to accessory after the fact to first-degree murder, attempted robbery, and conspiracy to commit robbery."² However, the record does not support this argument.

² Defendant does not raise any constitutional arguments.

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“The [sentencing] judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.” N.C.G.S. § 15A-1340.16(d) (2022). Since a trial court will rarely, if ever, consider this as an aggravating factor explicitly, we inquire whether “it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because [the] defendant . . . insisted on a trial by jury[.]” *See State v. Cannon*, 326 N.C. 37, 39 (1990) (holding such a sentence would violate the defendant’s constitutional right to trial by jury). However, the trial court merely informing the defendant of the potential consequences of going to trial does not permit an inference that the ultimate sentence was in any part based on the defendant’s exercise of the right to a jury trial. *See State v. Tice*, 191 N.C. App. 506, 512-13, 515 (2008) (“While such comments are unnecessary, they do not necessarily mandate . . . the conclusion that the trial judge was basing his choice of sentence on [the] defendant’s exercise of his constitutional right to a jury trial.”).

There are several issues with Defendant’s argument. First, Defendant does not point to any specific language that permits an inference that the trial court considered Defendant’s exercise of her right to a jury trial as a sentencing factor. Rather, she asks us to infer this from the fact that she received a longer sentence than Leal. But the relevant comparison is not to Leal’s sentence but to Defendant’s hypothetical sentence had she not exercised her jury trial right and instead pled guilty.

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Second, nonetheless examining the trial court's language, we find nothing that would permit us to infer the trial court considered Defendant's exercise of her jury trial right at sentencing. In a discussion of the State's plea offer,³ the transcript does reflect:

THE COURT: I'll be glad to talk to y'all in chambers if anyone thinks it would be at all useful. I mean, you know, the potential consequence to your client if she loses at trial is the rest of her life in prison.

[DEFENSE COUNSEL]: Yes, sir.

[] DEFENDANT: Your Honor, the sentence that I'm facing is a life sentence. I'm 30 years old. After 20 years I'll be 50, and the chances of me having a life after that, in my opinion, are not a life that I would be favorable of having.

THE COURT: Okay. I've had a pretty good life after 50, but I don't know.

[] DEFENDANT: It didn't start at 50 though.

THE COURT: If that's your position though, that's your position. I wanted to make sure you understood what the consequences are for you. And, you know, it's your decision. If you would rather take your chances, than resolve the case in a way that would pretty much guarantee you of getting out of prison at some time, I mean that's your decision, and I'm not going to try to talk you out of it, okay.

But this is merely the trial court warning of a potential consequence of proceeding to trial and ensuring Defendant understood the plea's less risky—albeit, in hindsight,

³ The State offered for Defendant to plead guilty to first-degree murder, conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and accessory after the fact to first-degree murder, and receive an active sentence of 317 to 393 months.

worse—alternative. Under *Tice*, this does not support an inference that the trial court considered the Defendant’s exercise of her right to a jury trial at sentencing.

Third, were we to consider Leal’s shorter sentence at all relevant, Defendant’s factual support regarding Leal’s sentence comes from outside the record. “In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal.” N.C. R. App. P. 9(a) (2022). “We will consider no argument relating to” evidence outside the record. *See Horton v. New South Ins. Co.*, 122 N.C. App. 265, 167-68, *disc. rev. denied*, 343 N.C. 511 (1996) (declining to consider arguments relating to evidence not in the record that the appellant attached to its brief). The only information in the record about Leal’s sentence is her testimony that she agreed to testify and “not plead to charges that carry a mandatory life without parole sentence.” This does not factually support Defendant’s argument that Leal ultimately received a lesser sentence than Defendant, and is an additional reason why we do not consider that Leal’s shorter sentence raises an inference that the trial court considered Defendant’s exercise of her jury trial right at sentencing.

Finally, were we to nevertheless consider this argument, the disparate sentencing does not show that the trial court considered Defendant’s exercise of her jury trial right at sentencing. Assuming, *arguendo*, Leal’s sentence was appropriate—rather than overly lenient—Defendant has not shown that her and Leal had comparable prior record levels or aggravating and mitigating factors. *See* N.C.G.S. §§ 15A-1340.13 to -1340.17 (2022). Because we cannot control for these

variables—as, again, Leal’s sentence is not in the record—we cannot agree with Defendant that “[t]he only [] fact to explain the different [sentencing] outcomes is that [Defendant] chose a jury trial, and [] Leal did not.”

We reject Defendant’s argument that the trial court, in any part, based her sentence on her choice to exercise her right to a jury trial. Rather, the trial court reached its aggravated sentence by weighing Defendant’s aggravating factor that she violated conditions of probation over her mitigating factor that she had a support system in the community. We conclude the trial court did not abuse its discretion by imposing an aggravated sentence.

D. Clerical Error

“When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845 (2008) (marks omitted).

A clerical error is defined as [a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination. . . .

[A]n error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing.

State v. Gillespie, 240 N.C. App. 238, 245 (2015) (first and second alterations in original) (marks and citations omitted).

The trial court, using form AOC-CR-605 (12/17), made written findings of the aggravating and mitigating factors, as required for Defendant’s aggravated sentence. *See* N.C.G.S. § 15A-1340.16(c) (2022). In its judgment, using form AOC-CR-601 (12/20), the trial court checked two inconsistent boxes: (1) “[t]he [c]ourt makes no written findings because the term imposed is: . . . in the aggravated range, pursuant to [N.C.]G.S. [§] 20-141.4(b)(1a)” and (2) “[t]he [c]ourt finds the [d]etermination of aggravating and mitigating factors on the attached AOC-CR-605.” N.C.G.S. § 20-141.4(b)(1a) defines felony death by vehicle—a crime Defendant was not accused of—and the record includes the trial court’s written findings on form AOC-CR-605. *See* N.C.G.S. § 20-141.4(b)(1a) (2022). This makes clear the trial court inadvertently checked box one and properly checked box two. Given “the importance that the record speak the truth[,]” *Smith*, 188 N.C. App. at 845 (marks omitted), we remand to the trial court to correct its written judgment by removing box one’s inadvertent checkmark.

CONCLUSION

The trial court did not err by denying Defendant’s motion to dismiss her accessory after the fact to first-degree murder charge. The trial court did not abuse its discretion by declining to find additional statutory mitigating factors or by imposing an aggravated sentence. However, the trial court made a clerical error in its written judgment, and we remand for correction.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

STATE V. VELEZ

Opinion of the Court

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).