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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-940

Filed: 16 May 2017

Wake County, Nos. 13 CRS 218273, 218275

STATE OF NORTH CAROLINA

v.

QUENTIN JAVON HOLLOWAY, Defendant.

Appeal by defendant from judgments entered 24 July 2015 by Judge W. Osmond Smith, III in Wake County Superior Court. Heard in the Court of Appeals 7 March 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant.*

ZACHARY, Judge.

Quentin Javon Holloway (defendant) appeals from judgments entered upon jury verdicts finding him guilty of first-degree kidnapping, attempted armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon inflicting serious injury. Defendant's primary argument on appeal is that a fatal variance

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existed between the allegations contained in the kidnapping indictment and the evidence presented at trial. Alternatively, defendant claims that, if the previous issue has not been preserved for appellate review, his trial lawyer provided ineffective assistance of counsel by failing to make the fatal variance argument at trial. Finally, defendant argues that the trial court erred by instructing the jury that it could convict defendant of first-degree kidnapping if it found that he removed the victim from a car to the roadside for the purposes of facilitating the commission of the felony of armed robbery or for doing serious bodily harm to the victim. For the reasons that follow, we find no error in defendant's convictions.

### **I. Background**

On 19 August 2013, the Wake County Grand Jury indicted defendant for attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted armed robbery, conspiracy to commit armed robbery, and first-degree kidnapping. The charges against defendant came on for trial at the 20 July 2015 criminal session of Wake County Superior Court. Defendant did not present evidence at trial, and the State's evidence showed the following.

On 18 July 2013, Randy Gardner arranged for victim Michael Camacho to sell four ounces of marijuana to a man that Gardner knew as "Goo" or "Cuda." This individual was later identified as Glen Pigford. The drug deal was set to take place at the Tower Shopping Center in Raleigh, North Carolina. After dropping Gardner

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off at the shopping center, Camacho went to a residence to get the marijuana and then he returned to the shopping center with two other acquaintances. At that point, Gardner identified Pigford's car by sitting on the hood. Camacho got into the front passenger seat of Pigford's car. Pigford was in the driver's seat and two other men, defendant and Lamar Spence, were seated in the back.

When Camacho entered the car, defendant asked to see the marijuana and Camacho complied with that request. Camacho asked for the money, but Pigford, Spence, and defendant told Camacho that they felt it was "too hot" (referring to potential law enforcement presence) in the shopping center's parking lot, and they urged Camacho to go "into the cut" (i.e., between buildings) to finish the drug deal. Feeling uneasy about the situation, Camacho refused to leave the car. At defendant's request, Spence exited the car, retrieved a bag from the trunk, and returned to the back seat. Camacho believed the bag might contain a gun. Although the bag's contents were never established at trial, it is clear that, at some point, defendant acquired possession of a handgun, possibly a .22 or .38 caliber pistol.

In a statement he gave to police after the shooting, defendant claimed that he had a gun in his lap while sitting behind Camacho in Pigford's car. After defendant "started to mess with" the gun, which was supposedly pointed at the car's floorboard, the gun went off. According to defendant's statement, Camacho turned around and grabbed for the gun, and when defendant "pulled [the gun] back[,] it went off again.

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However, Camacho specifically testified that he never attempted to grab the gun. In any event, both gunshots struck Camacho's upper body. The first bullet pierced through the front passenger seat's headrest and hit Camacho's neck, entering his "C-6 vertebrae and then lodg[ing] into the C-5 vertebrae." Due to this spinal cord injury, Camacho was suddenly paralyzed from the chest down. At the time of defendant's trial, Camacho's paralysis remained the same, save some limited arm movement. The second bullet entered Camacho's left arm and exited his left shoulder.

Camacho's body went limp after the second gunshot, and he fell into Pigford's lap. Pigford then sped away from the shopping center, causing Camacho to fall onto the car's floorboard. After driving roughly a mile and a half from the shopping center, Pigford pulled over at an "S curve" in Lake Woodard Road that was "desolate and . . . surrounded by forest." Pigford, Spence, and defendant then removed Camacho from the car, tossed him facedown onto the roadside, and took off in Pigford's car. When Camacho landed on the ground, half of his body was in the road and he was unable to move. Although residential and commercial properties were situated nearby, the area where Pigford pulled over was described as a "dead spot" that was populated with trees, weeds, and brush.

Shortly thereafter, Nikki Davis was driving down Lake Woodard Road when she discovered defendant "in the street." Davis called law enforcement and positioned her vehicle so as to prevent oncoming traffic from hitting Camacho. Davis testified

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that “there’s a curve on Lake Woodard and anybody coming around that curve would -- it would have shocked them. They may have even gotten too close to [Camacho] before they could have [stopped] because of the visibility. It was not clear right there.” Camacho received medical treatment at the scene and was then transported to Wake Medical Center’s trauma department. He was later transferred to a rehabilitation center for treatment of his C5-C6 spinal cord injury.

During the ensuing investigation, police identified defendant as a suspect, issued warrants for defendant’s arrest, and eventually transported him to the Raleigh Police Department (RPD) for questioning. While there, defendant executed a waiver of his *Miranda* rights and participated in an interview with RPD Sergeant Matthew Frye. Defendant revealed that the drug deal was a robbery ploy, and he admitted to shooting Camacho. Defendant also indicated that he was supposed to have attempted to rob Camacho “earlier in the process.” After the interview, Sergeant Frye served the arrest warrants on defendant and took him into custody.

At the close of the State’s evidence, defendant moved for the dismissal of all charges, but made specific arguments only as to the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court denied defendant’s general and specific motions to dismiss. After declining to present any evidence, defendant renewed his general and specific motions to dismiss. Once again, these motions were denied.

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Prior to closing arguments, defendant agreed to plead guilty to the charges of attempted armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. As a result, the trial court held a *Harbison*<sup>1</sup> colloquy with defendant on the record to establish defendant's informed consent. The trial court instructed the jury that it could convict defendant of first-degree kidnapping if it found that Camacho was moved from one place to the other for the purpose of facilitating the armed robbery or for the purpose of causing Camacho serious bodily harm. On 24 July 2015, the jury returned verdicts finding defendant guilty of first-degree kidnapping, attempted armed robbery, conspiracy to commit armed robbery, and assault with a deadly weapon inflicting serious injury. The trial court imposed consecutive prison sentences totaling 268 to 372 months for these offenses. The trial court declared a mistrial as to the attempted murder charge after the jury became hopelessly deadlocked on it. Defendant appeals.

## II. Discussion

### A. Fatal Variance On First-Degree Kidnapping Charge

Defendant first argues that there is a fatal variance between the allegations contained in his indictment for first-degree kidnapping and the evidence presented at trial.

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<sup>1</sup> In *State v. Harbison*, 315 N.C. 175, 179-80, 337 S.E.2d 504, 507-08 (1985), our Supreme Court held that a *per se* claim of ineffective assistance of counsel is established where the evidence shows that the defendant's counsel admitted guilt to any charge without the defendant's informed consent.

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“It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State’s proof must conform to the specific allegations contained therein.” *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014) (citation, quotation marks, and brackets omitted). “A variance occurs where the allegations in an indictment . . . do not [correspond] to the evidence actually established at trial.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002) (citation omitted). “In order for a variance to warrant reversal, the variance must be material[,]” that is, concerning an “essential element of the crime charged.” *Id.* (citations omitted).

The issue of variance between the indictment and the proof is properly raised by a motion to dismiss in the trial court. *State v. Skinner*, 162 N.C. App. 434, 446, 590 S.E.2d 876, 885 (2004) (citation omitted). But the defendant must specifically assert variance as a ground for the motion to dismiss. *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137 (2010). When the defendant fails to make a specific variance argument at the trial level, he waives the right to raise the issue on appeal. *Id.* at 385, 692 S.E.2d at 138.

Here, defendant specifically argued for the dismissal of the charges of attempted murder and assault with a deadly weapon inflicting serious injury, and he made a general motion to dismiss the remaining charges. Defendant renewed both motions to dismiss at the close of all evidence. However, defendant never argued that

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a variance existed between the first-degree kidnapping indictment and the evidence presented at trial, nor did defendant make an argument as to the sufficiency of the evidence regarding the first-degree kidnapping charge. Accordingly, defendant failed to preserve the variance issue for appellate review. N.C. R. App. P. 10(a) (1) (2015); *Curry*, 203 N.C. App. at 385-86, 692 S.E.2d at 138.

Nevertheless, defendant requests that we review his variance argument pursuant to Rule 2 of the Rules of Appellate Procedure, which permits this Court to suspend the rules concerning preservation of issues for appeal. Pursuant to Rule 2, an appellate court may address an unpreserved argument “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]” The authority to invoke Rule 2, however, is purely discretionary, and this discretion must be exercised only in “exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (internal quotation marks omitted).

This Court has repeatedly refused to review unpreserved fatal variance arguments. *E.g.*, *State v. Pender*, \_\_ N.C. App. \_\_, \_\_, 776 S.E.2d 352, 358 (2015); *State v. Hester*, 224 N.C. App. 353, 358, 736 S.E.2d 571, 574 (2012), *aff'd*, 367 N.C. 119, 748 S.E.2d 145 (2013); *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012); *Curry*, 203 N.C. App. at 385, 692 S.E.2d at 137. In contrast, a line of cases exists in which this Court has found that a defendant’s fatal variance claim presented

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circumstances justifying appellate review through the invocation of Rule 2. *E.g.*, *State v. Campbell*, \_\_ N.C. App. \_\_, \_\_, 777 S.E.2d 525, 530 (2015), *review allowed in part*, \_\_ N.C. \_\_, 794 S.E.2d 800 (2016); *State v. Everette*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 589-90 (2009). Given the somewhat unusual factual circumstances presented in this case, and given that defendant argues that a material (fatal) variance occurred in this case, we elect to exercise our discretion under Rule 2 and review this issue.

Our Legislature has defined kidnapping, in pertinent part, as follows:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

...

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

...

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the

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second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 (a), (b). Thus, “[t]here are two degrees of kidnapping. N.C. Gen. Stat. § 14-39(b) [(2015)]. The elements set forth in subsection (a) of N.C. Gen. Stat. § 14-39 are required for both degrees of kidnapping. Subsection (b) sets forth the difference between the two degrees of kidnapping.” *State v. Rodriguez*, 192 N.C. App. 178, 184, 664 S.E.2d 654, 658 (2008).

Because kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the victim for one of the purposes listed in subsection 14-39(a). *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). “The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment.” *Id.* (citations omitted). Even so, when the indictment alleges “more than one purpose . . . , the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping.” *Id.* (citations omitted).

The first-degree kidnapping indictment in the present case alleged that defendant

unlawfully, willfully and feloniously did kidnap Michael Lamont Camacho, a person who had attained the age of 16 years, by unlawfully removing the victim from one place to another without the victim’s consent and for the purpose of facilitating the commission of a felony, robbery with a dangerous weapon[,] and doing serious bodily injury to the

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victim.

Defendant contends that the evidence presented at trial did not support his kidnapping conviction because the State failed to prove the theory alleged in the indictment: removal of Camacho from one place to another in order to facilitate the commission of the felony of armed robbery and to cause Camacho serious bodily injury.

1. *Facilitating The Commission of The Armed Robbery*

Defendant asserts that all of the elements of attempted armed robbery were complete before Camacho was removed from Pigford's car. Therefore, defendant argues, the State failed to prove that "Camacho was transported and dropped off on the side of the road" to facilitate the attempted armed robbery because the "attempted robbery occurred *before* Camacho was shot."

Unfortunately for defendant, his argument is foreclosed by our Supreme Court's decision in *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In *Hall*, the indictment for kidnapping alleged that the defendant had moved the victim to facilitate the felony of armed robbery. *Id.* at 82, 286 S.E.2d at 555. The evidence presented at trial showed that the defendant and an accomplice, who was armed with a pistol, robbed a service station. *Id.* at 80, 286 S.E.2d at 554. After emptying the cash register and removing \$40.00 from the service station's night attendant—the

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victim—the defendant and his accomplice forced the victim into a car and drove him nearly five miles down Interstate 95. *Id.* At some point, the defendant stopped the car and forced the victim out of it. *Id.* The accomplice then shot the victim, causing partial paralysis, and left him on the side of the highway. *Id.*

On appeal, the defendant argued that because the crime of armed robbery was complete at the time when the victim was taken from the service station, the kidnapping was for the purpose of facilitating flight, not for the purpose of facilitating the commission of the armed robbery. *Id.* at 82, 286 S.E.2d at 555. According to the defendant, there was a fatal variance between the indictment and the proof. *Id.* Our Supreme Court disagreed, and declined either to recognize a bright line distinction between the several motives listed in section 14-39(a) or to take a narrow view of when the armed robbery was completed:

A single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim. So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in G.S. 14-39(a) is immaterial and may be disregarded.

So it is here. Defendant kidnapped [the victim] for the purpose of facilitating the armed robbery and also for the purpose of facilitating flight. Thus the evidence proved the *crime charged* in the indictment. Although defendant contends that the crime was “complete” when [his accomplice] pointed his pistol at [the victim] and attempted to take property by this display of force, the fact that all

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essential elements of a crime have arisen does not mean the crime is no longer being committed. *That the crime was “complete” does not mean it was completed.*

*Id.* at 82-83, 286 S.E.2d at 555-56 (first emphasis in original and later emphasis added) (citation omitted).

Here, the evidence showed that immediately after Camacho sustained the second gunshot, he was driven approximately a mile and a half from the shopping center and moved from Pigford’s car to the roadside. However, just because “all [the] essential elements of [armed robbery may] have arisen” before this removal occurred “does not mean the [armed robbery was] no longer being committed. That the crime was ‘complete’ does not mean it was completed.” *Id.* at 82-83, 286 S.E.2d at 556 (citation omitted). Consequently, the jury might have concluded that defendant’s actions were part of a continuing transaction, one that was not complete until Camacho was removed from Pigford’s car.

Nevertheless, defendant maintains that while “evidence could possibly show that Camacho was kidnapped” for the purpose of facilitating flight from the armed robbery, the “kidnapping could only have been done for the purpose of committing armed robbery if [defendant] or the other men shot Camacho and then attempted to rob him.” This line of reasoning was squarely rejected in *Hall*. That the kidnapping in this case may have had a dual purpose—to facilitate the armed robbery and to facilitate flight—did not create a fatal variance. *See id.* at 82, 286 S.E.2d at 555 (“So

long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose . . . is immaterial and may be disregarded.”). As in *Hall*, the evidence at defendant’s trial supported a conclusion that one purpose of the kidnapping was to facilitate the armed robbery. This purpose was alleged in the indictment. Accordingly, defendant’s argument is without merit.

2. *Intent to Cause Serious Bodily Harm*

As to whether the removal of Camacho was for the purpose of causing him serious bodily harm, “the extent of physical damage to [the victim]” is not the material issue. *State v. Washington*, 157 N.C. App. 535, 539, 579 S.E.2d 463, 466 (2003). Instead, “ [t]he question is whether [the] defendant’s actions could show a specific intent *on his part* to do serious bodily harm to [the victim].’ ” *State v. Boozer*, 210 N.C. App. 371, 376, 707 S.E.2d 756, 761 (2011) (quoting *Washington*, 157 N.C. App. at 539, 579 S.E.2d at 466). “A defendant’s intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions.” *Rodriguez*, 192 N.C. App. at 187, 664 S.E.2d at 660 (citations omitted).

Defendant asserts that because Camacho was shot “*before*” he was removed from the car, the alleged kidnapping could not have been done for the purpose of causing him serious injury. At its very heart, defendant’s argument is that the State could only prove that Camacho was removed for the purpose of seriously injuring him

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by presenting evidence that defendant or the others injured Camacho “*after* he was removed against his will.” In response, the State contends that the decisions in *Boozer* and *State v. McCullers*, 227 N.C. App. 455, 744 S.E.2d 498, 2013 WL 2189862 (2013) (unpublished), should control our reasoning on this issue.

The two defendants in *Boozer* severely beat the victim in the front yard of a residence. 210 N.C. App. at 373, 707 S.E.2d at 760. After stealing money from the victim, the defendants dragged the victim into a driveway and attempted to stuff him in a garbage can. *Id.* When unable to do so, the defendants dragged the victim to a nearby, rocky, water-filled ditch—10-to-12 feet in depth—tossed him in, and then fled the scene. *Id.* The victim was later discovered unresponsive and in several inches of water. *Id.*

On appeal, the defendants argued that “because it was dark at the time, the[y] . . . could not have known the depth of the ditch or that there were rocks at the bottom, and, thus, they [could not] have intended to do serious bodily harm to [the victim].” *Id.* at 376, 707 S.E.2d at 761. After noting that one defendant had been to the residence “on several prior occasions, during which he may have seen the deep ditch[,]” and that the victim “could not recall anything after the assault began and was not struggling or moving during this process[,]” this Court held that the evidence presented “could support a reasonable inference that [the d]efendants intended to cause [the victim] serious bodily injury if they believed he was unconscious and

unable to protect himself as he was thrown into the deep ditch, landing on rocks and possibly drowning.” Accordingly, the trial court properly denied the defendants’ motions to dismiss the charges of first-degree kidnapping. *Id.* at 377, 707 S.E.2d at 762.

The defendant in *McCullers* was convicted for, *inter alia*, first-degree kidnapping based upon the same incident at issue in *Boozer*, and he argued that the evidence was insufficient to establish that he “confined, restrained, or removed [the victim] for the purpose of . . . doing serious bodily injury to [the victim].” 2013 WL 2189862, at \*3. As in *Boozer*, the *McCullers* Court rejected this contention:

[T]he evidence is sufficient to establish that prior to being thrown into the ditch [the victim] had sustained sufficient injuries to render him unconscious, or at least unresponsive. As [the victim] had sustained such injuries prior to being confined, restrained, or removed, a reasonable jury could conclude that defendant intended to cause [the victim] additional serious bodily harm by attempting to put [the victim] in a garbage can and then throwing him into the ditch. At a minimum, placing [the victim] in a garbage can could make any attempt to render medical care more difficult and the act of throwing him in a ditch, however shallow, could compound injuries already inflicted.

*Id.*

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A careful examination of *Boozer* and *McCullers*<sup>2</sup> reveals that a kidnapping victim may be seriously injured in one location and then removed to another location for the purpose of causing him or her (additional) serious bodily harm. How the victim is removed and where the victim is taken also matter. Applying this line of reasoning to the present case, we conclude that the State presented sufficient evidence to show that defendant removed Camacho from the car for the purpose of causing him serious bodily harm.

Evidence admitted at trial showed that while inside Pigford's car, Camacho suffered one gunshot to his neck, which paralyzed him from the neck down. Within seconds, defendant shot Camacho again, this time in his shoulder. At that point, Camacho fell into the lap of Pigford, who started the car and sped away from the shopping center. Camacho fell onto the car's floorboard soon thereafter. When Camacho remarked to Holloway, "you didn't have to shoot me," Holloway told Camacho to "shut up" before Holloway shot him again. Pigford eventually pulled over in a "dead spot" in the road, an area of low "visibility" that was surrounded by trees, weeds, and brush. It was there that Camacho, in his own words, was "tossed," not placed, facedown onto the roadside. Camacho was deposited "half off the road, [and] half in the [road,]" unable to move.

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<sup>2</sup> Although clearly not controlling, we find the reasoning in *McCullers* (an unpublished case) to be persuasive, especially because it expounded on this Court's decision on the kidnapping issue in *Boozer* (a published case).

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The evidence was sufficient to establish that prior to being abandoned on the roadside, Camacho was seriously wounded by two gunshots to his upper body. Whether defendant knew the full extent of Camacho's injuries prior to tossing Camacho from the car is not in issue. Camacho's injuries caused him to fall into Pigford's lap and then onto the car's floorboard. It was also clear that Camacho was actively bleeding, as his blood stained multiple areas in the front passenger area of Pigford's car. Camacho was then tossed onto the edge of the roadside, where he landed facedown. The intent to cause serious bodily harm in such a situation—one in which a gunshot victim was pitched onto a hard surface in a secluded area with half of his body in the road—could be reasonably inferred by the fact finder as a matter of common knowledge.

Indeed, both the manner in which Camacho was removed from the car and the location in which he was abandoned could support an inference that defendant intentionally left Camacho in a position where he would be unable to protect himself from further harm (namely, getting run over by a motor vehicle), thereby compounding the injuries already inflicted on him. Similarly, defendant's participation in the act of removal could also support the inference that he intended to make it more difficult for Camacho to seek help from law enforcement or medical personnel. Accordingly, the evidence supported a conclusion that defendant intended to cause serious bodily harm to Camacho.

In sum, the indictment alleged that defendant removed Camacho from Pigford's car for the purposes of facilitating the commission of the felony of armed robbery and causing serious bodily harm to Camacho. Because the evidence presented was sufficient to sustain both of those allegations, there was no fatal variance between the allegations and the proof. Therefore, defendant's motion to dismiss the first-degree kidnapping charge (via the general motion to dismiss all charges) was properly denied.

B. Ineffective Assistance of Counsel

As an alternative argument to the contentions raised in sections II. A. 1-2 above, defendant asserts that his trial counsel provided ineffective assistance of counsel when he failed to make the fatal variance argument at trial.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and internal quotation marks omitted).

As discussed above, there was not a fatal variance between the allegations contained in the first-degree kidnapping indictment and the evidence presented at trial. Even assuming that defendant's trial counsel's performance was deficient, defendant cannot show the requisite prejudice: had the alleged variance(s) been made the basis for defendant's motion to dismiss, the trial court would likely (and properly) have denied the motion. Accordingly, defendant cannot sustain his claim of ineffective assistance of counsel.

C. Jury Instructions On First-Degree Kidnapping Charge

Defendant's final argument is that the trial court committed plain error in instructing the jury that it could convict defendant of first-degree kidnapping if the jury found that defendant removed Camacho for the purpose of facilitating the commission of armed robbery or for the purpose of seriously injuring Camacho. "It is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence." *Moore*, 315 N.C. at 749, 340 S.E.2d at 408. Once again, however, there was sufficient evidence from which the jury could reasonably infer that defendant kidnapped Camacho for both of the purposes outlined in the jury instructions. Accordingly, the trial court did not commit any error, much less plain error, in instructing the jury on the first-degree kidnapping charge.

**III. Conclusion**

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The evidence presented was sufficient to sustain the allegations contained in defendant's first-degree kidnapping indictment, and there was no fatal variance between the allegations and the proof at trial. As a result, defendant's claim of ineffective assistance of counsel and his argument regarding plain error in the trial court's jury instructions on the first-degree kidnapping charge—both of which are premised on the same alleged fatal variance—are without merit. Accordingly, we conclude that defendant received a fair trial, free from error.

NO ERROR.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).