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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1255

Filed: 6 June 2017

Brunswick County, No. 13 CRS 2004, 2008-11

STATE OF NORTH CAROLINA

v.

ALFRED LAMONT BUTLER, aka MUHAMMAD HAKEEM

Appeal by defendant from judgment entered 19 December 2014 by Judge Gale M. Adams in Brunswick County Superior Court. Heard in the Court of Appeals 4 May 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.*

*William D. Spence for defendant-appellant.*

TYSON, Judge.

Alfred Lamont Butler (“Defendant”) appeals from judgment entered after he was convicted of multiple drug related charges alleged in 13 CRS 2004 (attain habitual felon status), 13 CRS 2008 (aggravating factor), 13 CRS 2009, 13 CRS 2010, and 13 CRS 2011. We find no error.

I. Factual Background

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In the spring of 2013, the Brunswick County Sherriff's Department hired Angela Ripley and Priscilla Hudson to act as undercover drug buyers in the Longwood community. Ripley and Hudson had worked together for fifteen years. During that time, they had conducted many undercover drug buys for state agencies, local sheriffs' offices, and other law enforcement agencies. Ripley and Hudson were not instructed to target anyone in particular, but were tasked to find anyone who was "selling anything illegal."

Shortly after they were hired, Ripley and Hudson visited the Longwood community in Brunswick County and met Defendant. During their first encounter with Defendant, Ripley and Hudson observed that Defendant was smoking marijuana and asked where they could buy some. They exchanged phone numbers with Defendant, but did not purchase marijuana or any other drugs at that time.

Between April and May of 2013, Ripley and Hudson returned to Defendant's home on six different occasions for the purpose of buying drugs. Prior to each transaction, officers searched Ripley, Hudson, and Hudson's vehicle. The officers fitted Hudson's vehicle with a video recording device, and Hudson received either a watch or key fob to use as an additional recording device.

On 23 April 2013, Ripley and Hudson went to Defendant's home to buy drugs. Ripley and Hudson spoke with Defendant, and he weighed the marijuana on scales, which he had placed on the floor of Hudson's vehicle. Defendant and Hudson

discussed the price and weight of the marijuana, which Ripley purchased. Defendant instructed Ripley to hide the marijuana. After the purchase, Ripley and Hudson returned to meet with the officers and turned over the marijuana.

The next day, Ripley and Hudson returned to Defendant's house to purchase additional marijuana. Ripley again purchased the marijuana, but left a potato chip bag in Defendant's truck. On 22 May 2013, Ripley and Hudson met Defendant for a third transaction. This time Defendant dropped what appeared to be the same potato chip bag in Hudson's vehicle. The bag contained cocaine, which Hudson paid for using money given to her by the Brunswick County Sheriff's Department. Hudson testified she handled all the purchase transactions involving cocaine.

These three transactions were recorded and the recordings were played for the jury. Ripley and Hudson testified to three additional transactions, which allegedly occurred on 24 May 2013, 28 May 2013, and 31 May 2013.

Defendant was charged in the following indictments:

1. 13 CRS 2009: one count possession with intent to sell and deliver marijuana and one count of sale and delivery of marijuana with the offense date of April 23, 2013.
2. 13 CRS 2010: one count possession with intent to sell and deliver marijuana and one count of sale and delivery of marijuana with the offense date of April 24, 2013.
3. 13 CRS 2011: one count possession with intent to sell and deliver cocaine and one count of sale and delivery of cocaine with the offense date of May 22, 2013.

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4. 13 CRS 2013, one count possession with intent to sell and deliver cocaine and one count of sale and delivery of cocaine with the offense date of May 24, 2013.

5. 13 CRS 2012: one count possession with intent to sell and deliver marijuana and one count of sale and delivery of marijuana with the offense date of May 28, 2013.

6. 13 CRS 2015: one count possession with intent to sell and deliver marijuana and one count of sale and delivery of marijuana with the offense date of May 31, 2013.

Defendant was also charged in 13 CRS 2004 with having attained habitual felon status and in 13 CRS 2008 with an aggravating factor of being on pre-trial release for other crime.

The jury found Defendant not guilty of the charges presented in 13 CRS 2012, 13 CRS 2013, and 13 CRS 2015. The jury found Defendant guilty on all counts presented in 13 CRS 2009, 13 CRS 2010, and 13 CRS 2011. The same jury found Defendant to be guilty of being a habitual felon and found the aggravating factor existed that the offense was committed while Defendant was on pre-trial release for murder.

The trial court sentenced Defendant to aggravated, active prison terms on all counts. All sentences imposed were ordered to run consecutively. Defendant appeals.

II. Jurisdiction

Jurisdiction from a final judgment in a superior court criminal case lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

### III. Issues

Defendant asserts the trial court committed plain error, when it allowed the State to offer the “Judgment and Commitment upon Revocation of Probation” in 93 CRS 9398 as evidence to support his habitual felon conviction. Defendant asserts the trial court erred when it: (1) failed to grant Defendant’s motions to dismiss for insufficient evidence on the charge of attaining habitual felon status, (2) failed to dismiss the “sale and delivery” charges for a fatal variance between the indictments and evidence presented; (3) failed to charge the jury on both the sale of a controlled substance and the delivery of a controlled substance as a lesser-included offense; and (4) refused to declare a mistrial after the jury heard reference to Defendant’s pending murder charge.

Defendant further asserts the trial court erred when sentencing him because (1) the State did not provide proper notice to Defendant of its intent to present evidence of an aggravating factor, (2) the trial court failed to hold a recorded charge conference before instructing the jury on the aggravating factor, and (3) the trial court considered irrelevant and improper matters in determining the severity of Defendant’s sentence.

In the alternative, if this Court concludes no single alleged error sufficiently prejudiced Defendant to warrant a new trial, Defendant argues the cumulative effect of the errors in Defendant's trial and sentencing requires award of a new trial.

#### IV. Evidence of Prior Felony Conviction

Defendant argues the trial court committed plain error, when it allowed the admission of State's Ex. 2 "Judgment and Commitment Upon Revocation of Probation," which the State used to support Defendant's habitual felon conviction. We find no plain error.

##### A. Standard of Review

Where a defendant does not object to the admission of evidence at trial, the admission of such evidence is reviewed for plain error. *State v. Locklear*, 174 N.C. App. 547, 552, 621 S.E.2d 254, 258 (2005). Under plain error review,

a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

“It is the [defendant’s] burden in plain error analysis to prove that the jury probably would have reached a different verdict absent the error.” *State v. Bellamy*, 172 N.C. App. 649, 664, 617 S.E.2d 81, 92 (2005) (internal quotation marks and citation omitted).

B. Analysis

Where a defendant is charged with having attained habitual felon status, “[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.” N.C. Gen. Stat. § 14-7.4 (2015). “[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence.” *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984).

While N.C. Gen. Stat. § 14-7.4 “contemplates the most appropriate means to prove prior convictions for the purpose of establishing habitual felon status, it does not exclude other methods of proof.” *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000) (holding a facsimile, certified copy of a 1989 court record referencing defendant’s felony larceny conviction was sufficient for the purpose of establishing defendant’s status as a habitual felon), *cert. denied*, 566 S.E.2d 480 (2002); *see State v. Jordan*, 120 N.C. App. 364, 370, 462 S.E.2d. 234, 239 (1995) (“[T]he reliability of the method of proof is the important inquiry to be made in determining its admissibility.”), *disc. review denied*, 342 N.C. 416, 465 S.E.2d 546 (1995).

Here, the State entered the “Judgment and Commitment upon Revocation of Probation” in 93 CRS 9398 to prove the second of three prior convictions. The document included the original file number; the name, date, and classification of the offense; the name of Defendant; and indicated the trial court modified the sentence for this conviction. The State introduced this document as a true copy of a Brunswick County court record, which bore a raised seal and signature, and presented testimony of an employee of the Brunswick County’s Clerk’s Office to authenticate the document.

We conclude the “Judgment and Commitment upon Revocation of Probation” “appears to be a reliable source of [Defendant’s] prior conviction[ ]” for felony assault with a deadly weapon with intent to kill inflicting serious injury. *Jordan*, 120 N.C. App. at 370, 462 S.E.2d at 239. The trial court did not plainly err when it allowed the admission of this evidence. Defendant’s argument is without merit and is overruled.

#### V. Motions to Dismiss

Defendant contends the trial court erred when it denied his motion to dismiss the charge of having attained habitual felon status, because the State presented inadequate evidence to prove he had been previously convicted of three felony offenses. Defendant also argues the trial court erred when it denied his motion to dismiss the “sale and delivery” charges in 13 CRS 2009, 13 CRS 2010, and 13 CRS



2011. He asserts a fatal variance exists between the indictments and the evidence presented.

A. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

B. Habitual Felon Charge

A defendant, who has been convicted of or pled guilty to three felony offenses, may be charged as a habitual felon. N.C. Gen. Stat. § 14-7.1 (2015). “[A] felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned *regardless of the sentence actually imposed*.” *Id.* (emphasis supplied). The statute further notes that,

“[f]or the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony.” *Id.*

In 92 CRS 7743, Defendant pled guilty to felony assault. The assault occurred when Defendant was seventeen years old. The sentencing judge ordered: “[D]efendant shall serve as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B.” Defendant argues because the sentencing judge did not check the box indicating, “[D]efendant should not obtain the benefit of release pursuant to G.S. 148-49.15,” the law at the time required Defendant to be unconditionally discharged. As such, he asserts this conviction does not constitute a final conviction to qualify as a felony conviction within the meaning of N.C. Gen. Stat. § 14-7.1. We disagree.

The long-repealed Committed Youthful Offender Act did not convert the offender’s felony conviction into something less, or other than, a felony conviction. The statute only affected the sentence a youthful offender would receive and allowed the court “an additional sentencing possibility.” *State v. Niccum*, 293 S.E.2d 276, 280, 238 S.E.2d 141, 144 (1997). As noted in N.C. Gen. Stat. § 14-7.1, it is the conviction of or guilty plea to a felony offense that matters for purposes of being declared a habitual felon, “regardless of the sentence actually imposed.” Defendant unambiguously pled guilty and was convicted of felonious assault in 92 CRS 7743.

The defendant bears the burden of showing whether a conviction has been set aside, reversed or vacated. *State v. Brewington*, 170 N.C. App. 264, 283, 612 S.E.2d

648, 660, *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005). Although Defendant asserts he received an unconditional discharge of his sentence based upon the judgment entered, “he did not present any evidence proving with any certainty that the conviction had been set aside.” *Id.* at 284, 612 S.E.2d at 660.

We hold the “Judgment and Commitment upon Revocation of Probation” was sufficient to prove Defendant’s conviction in 93 CRS 9398. Defendant failed to meet his burden to show the conviction in 92 CRS 7743 was set aside. The trial court properly denied Defendant’s motion to dismiss the habitual felon charge. Defendant’s argument is overruled.

#### C. Fatal Variance

It is well established that “[a] defendant must be convicted, if at all, of the particular offense charged in the indictment” and that “[t]he State’s proof must conform to the specific allegations contained” therein. *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). The rationale for this rule is “to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). However, not every variance is fatal, because “[i]n order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.” *Id.* (citation omitted).

This Court has held, “an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known.” *State v. Wall*, 96 N.C. App. 45, 49-50, 384 S.E.2d 581, 583 (1989) (finding a fatal variance between the indictment and the evidence, because the defendant had no knowledge that the middleman was acting on behalf of the undercover police officer).

Here, each indictment alleged Defendant “unlawfully, willfully, and feloniously did sell and deliver to Pricilla Hudson and Angela Ripley, a controlled substance[.]” Defendant contends a fatal variance occurred because the indictments allege drug sales to both Ripley and Hudson, whereas the evidence only shows one of the undercover buyers to be the purchaser in each transaction.

The facts of the present case are distinguishable from those in *Wall*. *See id.* While Ripley’s and Hudson’s testimonies indicated Ripley primarily handled the marijuana transactions and Hudson primarily handled the cocaine transactions, both women were present and involved in each transaction. The evidence demonstrates Ripley and Hudson arrived together in the same vehicle for each transaction, each had substantial interactions with Defendant, and Defendant believed the two women were sisters.

The indictment gave Defendant sufficient notice of the charges against him and insured his ability to prepare his defense. *See Norman*, 149 N.C. App. at 594, 562

S.E.2d at 457. If Defendant desired further specificity to aid in his defense, he could have sought a bill of particulars. *See* N.C. Gen. Stat. § 15A-925 (2015); *see State v. Wadford*, 194 N.C. 336, 338, 139 S.E.2d 608, 609 (1927) (holding while a bill of particulars cannot cure a defect in the indictment, it may cure uncertainty and add specificity). The trial court correctly denied Defendant’s motion to dismiss the sale and delivery charges in 13 CRS 2009, 13 CRS 2010, and 13 CRS 2011. Defendant’s arguments are overruled.

#### V. Jury Charge

Defendant argues the trial court failed to separately charge the jury on both the *sale* of a controlled substance and on the *delivery* of a controlled substance as a lesser-included offense. We disagree.

#### A. Standard of Review

“We review a trial court’s denial of a request for jury instructions *de novo*.” *State v. Ramseur*, 226 N.C. App. 363, 373, 739 S.E.2d 599, 606 (2013) (citation omitted).

“A trial court’s instructions to the jury must be construed contextually and in their entirety.” *State v. Williams*, 308 N.C. 47, 63, 301 S.E.2d 335, 346 (1983). An error in a jury instruction is prejudicial and requires a new trial only if “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen.

Stat. § 15A-1443(a) (2015). The defendant carries the burden of showing such prejudice. *Id.*

“[A] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State’s evidence but not all of it.” *State v. Bumgarner*, 147 N.C. App. 409, 417, 556 S.E.2d 324, 330 (2001) (citation omitted).

### B. Analysis

N.C. Gen. Stat. § 90-95(a)(1) (2015) provides it is unlawful for an individual to “sell or deliver” a controlled substance. While the sale of the controlled substance and the delivery of the controlled substance may be charged as separate offenses, a defendant is not prejudiced where the State elects to charge the defendant on one count of “sale and delivery.” *State v. Dietz*, 289 N.C. 488, 498-99, 223 S.E.2d 357, 363-64 (1976) (holding where the defendant was charged with “sale and delivery,” the trial court did not err when it failed to mention delivery in the jury charge).

Our Supreme Court has held after reviewing this statute:

[t]he transfer by sale or delivery of a controlled substance is one statutory offense, the gravamen of the offense being the transfer of the drug. So long as each juror finds that the defendant transferred the substance, whether by sale, by delivery, or by both, the defendant has committed the statutory offense[.]

*State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127 (1990).

Here, Defendant was charged with “sale *and* delivery.” The jury was clearly instructed they must find evidence beyond a reasonable doubt that on the alleged dates, Defendant “knowingly sold *and* delivered” the drug. The trial court instructed, “[t]o sell means the exchange of a controlled substance for money or any other form of consideration. To deliver means the transfer or attempted transfer from one person to another of a controlled substance.” In all of the jury verdict sheets at issue, the jury found Defendant to be “guilty of selling *and* delivering” the specific controlled substance on the date alleged.

Read in their entirety, the trial court’s instructions properly instructed the jury on the applicable law. Were we to presume, *arguendo*, the trial court erred by failing to instruct separately on delivery, the potential error would not have prejudiced Defendant. The State presented ample evidence to show Defendant not only sold, but also delivered the controlled substances to Ripley and Hudson. The trial court did not err in its instructions to the jury on this charge. Defendant’s arguments are overruled.

## VI. Mistrial

Defendant argues the trial court erred by failing to declare a mistrial after the State played a portion of the recording in which he alluded to his pending murder charge, even though the trial court gave a curative instruction. We disagree.

### A. Standard of Review

A trial court's decision to declare a mistrial due to manifest necessity is reviewed for abuse of discretion. *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998). Manifest necessity exists when "the occurrence of some incident of a nature [renders] impossible a fair and impartial trial under the law." *State v. Crocker*, 239 N.C. 446, 450, 80 S.E.2d 243, 246 (1954).

### B. Analysis

"Our system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Moore*, 276 N.C. 142, 149, 171 S.E.2d 453, 458 (1970) (internal brackets, quotation marks, and citation omitted).

Depending upon the nature of the erroneous evidence heard by the jury and the particular circumstances of the case, this Court has recognized a curative instruction may not always remove the prejudice of the admitted evidence. *State v. Aycoth*, 270 N.C. 270, 272-73, 154 S.E.2d 59, 60-61 (1967); *see State v. Brunson*, 180 N.C. App 188, 191, 636 S.E.2d 202, 204 (2006) (holding the trial court did not abuse its discretion when it gave a curative instruction and denied the defendant's motion for a mistrial after the State's witness testified the defendant had shot his first wife), *aff'd per curiam*, 362 N.C. 81, 653 S.E.2d 144 (2007);

Our Supreme Court has held:



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In appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict. In some instances because of the serious character and gravity of the incompetent evidence and the obvious difficulty in erasing it from the mind, the court has held to the opinion that a subsequent withdrawal did not cure the error. But in other cases the trial courts have freely exercised the privilege, which is not only a matter of custom but almost a matter of necessity in the supervision of a lengthy trial. Ordinarily where the evidence is withdrawn no error is committed.

*State v. Strickland*, 229 N.C. 201, 207-08, 49 S.E.2d 469, 473 (1948).

Based upon *Aycoth*, Defendant argues the admission of his statement regarding his pending murder charge was prejudicial. In *Aycoth*, the defendant was on trial for armed robbery. *Aycoth*, 270 N.C. at 271, 154 S.E.2d at 59 (1967). The State asked its last witness, a deputy sheriff, if he knew who owned the car. *Id.* at 271-72, 154 S.E.2d at 60. The deputy sheriff's answer included information that the defendant had been indicted for murder. *Id.* at 272, 154 S.E.2d at 60. The trial court instructed the jury not to consider the pending murder charge. *Id.*

The Supreme Court held “[u]pon the record before us, we apprehend the court’s instruction did not remove from the minds of the jurors the prejudicial effect of the knowledge they had acquired from [deputy sheriff’s] testimony.” *Id.* at 273, 153 S.E.2d at 61. In so holding, the Court specifically noted “[s]ubsequent incidents”

during the trial tended “to emphasize rather than dispel the prejudicial effect of [the officer’s] testimony.” *Id.*

Here, Defendant’s pending murder charge was briefly and indirectly mentioned in a single sentence solely by Defendant during one of many hours of audio and video evidence offered to the jury in the middle of a lengthy trial. Defendant stated, “It ain’t always been smooth sailing with me . . . the last year and a half, I’ve been going through it. . . . I had that murder situation[.]”

While Defendant’s statement was included in the recording played during Ripley’s direct examination, neither the State nor Ripley made any mention of Defendant’s statement. No other events occurred during the trial to place any further emphasis on this sole mention by Defendant.

The trial court’s curative instruction did not mention the nature of the pending charge, nor did it confirm the charge or place any emphasis on the charge. The trial court instructed:

Ladies and Gentlemen of the jury, any reference you may have heard to any other charges that the defendant may or may not be facing are not to be considered by you for any reason. The only issue for you for your consideration is whether the defendant is guilty or not guilty of the charges presently before you. If you all understand this instruction, please raise your hand.

The transcript indicates all jurors raised their hands in response.

The State and Defendant had agreed to a bifurcated trial and that the underlying felony would be heard without any mention of the fact that Defendant was on pre-trial release, so long as Defendant did not testify and open the door to his pre-trial release status. However, Defendant's attorney: (1) had access to all the audio and video evidence well in advance; (2) knew it would be played to the jury; (3) did not request the State to redact Defendant's statement; and, (4) did not object to the recording when it was played before the jury.

The trial court quickly addressed the issue, instructed the jury to disregard the evidence, and polled the jury to confirm they understood the instructions. Unlike in *Aycoth*, after review of the entire record before us, Defendant has failed to demonstrate any abuse of discretion in the court's refusal to declare a mistrial. *See id.* at 273, 153 S.E.2d at 61. Defendant's argument is overruled.

## VII. Alleged Sentencing Errors

Defendant asserts the trial court erred when sentencing Defendant because (1) the State did not provide proper notice to Defendant of its intent to present evidence of an aggravating factor, (2) the trial court failed to hold a recorded charge conference before instructing the jury on the aggravating factor, and (3) the trial court considered irrelevant and improper matters in determining the severity of Defendant's sentence.

### A. Standard of Review

Alleged statutory errors regarding sentencing issues are questions of law and, as such, are reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719,721 (2011).

“A sentence within the statutory limit will be presumed regular and valid.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977).

### B. Proper Notice

N.C. Gen. Stat. § 15A-1340.16 (2015) provides:

The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b) (7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

The State argues the indictment in 13 CRS 2008 gave Defendant proper notice of its intent to present evidence on the aggravating factor that “the offense was committed while the defendant was on pretrial release for murder.” Presuming, *arguendo*, the indictment did not satisfy the prior notice requirements of the statute, Defendant has failed to show any asserted error was prejudicial. The record indicates Defendant had received prior notice of the State’s intent to use the aggravating factor, as he made the motion for a bifurcated trial based upon the aggravating factor. Defendant’s argument is without merit and is overruled.

### C. Charge Conference

N.C. Gen. Stat. § 15A-1231(b) (2015) provides:

Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. . . . *The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.*

Defendant acknowledges he was given a copy of the proposed charge instructions before they were presented to the jury. He argues this provision was not sufficient to constitute the mandatory conference required by statute.

The record indicates the trial court asked counsel to approach the bench and offered to let both counsel read the instructions. After reading the proposed instructions, defense counsel indicated he had no objections and failed to request further instructions. Defense counsel again indicated he had no objections to the instructions immediately following the trial court's charge.

The court then stated, "[a]s to the charge conference that was held at the bench, the Court gave a copy of the instructions to both sides and both sides agree that there was no objection. The defendant was also shown a copy of the instructions."

Defendant has failed to show the charge conference, conducted at the bench and with copies of the proposed instructions provided, "materially prejudiced [his] case." See N.C. Gen. Stat. § 15A-1231(b). Defendant's argument is overruled.

D. Consideration of Irrelevant and Improper Evidence

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While a sentence that is imposed within the statutory limit is presumed to be valid, where the record on appeal demonstrates “the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence [imposed] is in violation of defendant’s rights.” *Boone*, 293 N.C. at 712, 239 S.E.2d at 465.

“It is well established that a trial judge may not consider, when imposing a sentence, other charges pending against a defendant for which he has not been convicted.” *State v. Westall*, 116 N.C. App. 534, 550, 449 S.E.2d 24, 34 (1994). In order for this Court to hold error occurred and to remand for resentencing, the record must “*affirmatively disclose* that the trial court enhanced defendant’s sentence due to [his] pending cases.” *Id.* (emphasis supplied).

Defendant was sentenced within the allowed statutory range. Both parties made extensive arguments regarding the appropriate sentence. While the State noted the aggravating factor of being on pretrial release for murder and Defendant’s prior convictions in its arguments on sentencing, nothing on the record “affirmatively disclose[s]” that the trial court used Defendant’s pending charges to impose a greater sentence than she would have imposed otherwise. It is well established that the decision of whether sentences imposed for multiple convictions shall run concurrently or consecutively rests within the sentencing court’s discretion. *See* N.C. Gen. Stat. §

15A-1354(a) (2015). Defendant's argument has shown no abuse of that discretion, is without merit, and is overruled.

VIII. Conclusion

The trial court did not commit plain error when it allowed the State to admit the "Judgment and Commitment Upon Revocation of Probation," to support Defendant's habitual felon conviction. The trial court did not err when it: (1) denied Defendant's motion to dismiss the charge of having attained habitual felon status due to insufficient evidence, (2) denied Defendant's motion to dismiss for fatal variance between the indictments and the evidence presented, (3) declined to instruct the jury separately on both the sale of a controlled substance and delivery of a controlled substance, and (4) refused to declare a mistrial after evidence was presented to the jury of Defendant's pending charge. The trial court did not commit any prejudicial errors when imposing Defendant's sentence.

We hold Defendant's trial was free from prejudicial error. *It is so ordered.*

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).