IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-317

Filed: 6 March 2018

Wilson County, No. 12 CRS 53186-87; 13 CRS 000082-83, 000085-86, 000088-89

STATE OF NORTH CAROLINA

v.

DEVON SHAMARK CROOMS, Defendant.

Appeal by Defendant from judgment entered 12 August 2016 by Judge Alma L. Hinton in Wilson County Superior Court. Heard in the Court of Appeals 14 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathleen M. Joyce for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Devon Shamark Crooms ("Defendant") appeals from a 12 August 2016 judgment entered after a jury convicted him of two counts of accessory before the fact of first-degree murder, two counts of accessory after the fact of felony discharging a

weapon into occupied property, and four counts of accessory after the fact to first-degree murder. Defendant argues the trial court erred by (1) entering judgment on indictments which were facially insufficient to charge accessory before the fact to murder; (2) denying Defendant's motion to dismiss the charges of accessory before the fact to murder where there was insufficient evidence Defendant caused the principals to commit murder and where there was a fatal variance between the indictments and the evidence; (3) instructing the jury on felony murder rather than on premeditation and deliberation and by not fully instructing the jury on the statute governing accessory before the fact liability; (4) failing to instruct the jury Defendant could not be both a principal and an accessory to murder; (5) denying Defendant's motion to dismiss the charge of accessory after the fact to the felony of discharging a weapon into occupied property when the principal of that charge was previously acquitted; and (6) entering judgments as class F felonies when sentencing Defendant as an accessory after the fact to discharging a weapon into occupied property when Defendant should have been sentenced as a class G felon. For the reasons discussed *infra*, we arrest the four judgments for accessory after the fact to murder, and vacate Defendant's conviction for one of the two counts of accessory after the fact to the felony of discharging a weapon into occupied property (13 CRS 83). Finally, we vacate and remand the clerical error in Defendant's Class F sentence for accessory after the

fact to the felony of discharging a weapon into occupied property so the trial court can properly resentence Defendant to a Class G offense (13 CRS 82).

I. Procedural and Factual Background

On 14 January 2013, a grand jury indicted Defendant on multiple counts of accessory before the fact to first-degree murder, accessory after the fact of felony discharging a weapon into occupied property, and accessory after the fact of first-degree murder. On 4 February 2013, Defendant was re-indicted on two counts of accessory before the fact to first-degree murder via superseding indictments.

On 16 November 2015, the trial court called Defendant's case for trial. The State's evidence tended to show the following. The State called Michael Evans ("Evans"). Evans lived at 1009 Wilson Street for 63 years. On the evening of 9 November 2011, Evans was in bed and almost asleep. At that point he heard "boom boom." Shortly thereafter, the police arrived at his house and he allowed them to come inside to look for bullets. The police determined a bullet entered one room and went through a wall into another room, where it landed in a sofa. There were also two bullet holes on the side of his house and "one in the window." The side of Evans's house with the bullet holes was the side next to apartment 1011 Wilson Street.

The State called Officer D.C. Moore ("Moore") with the Wilson Police Department. Moore was on duty on 9 November 2011, and around 11:00 p.m. he responded to a "shots fired" call on Wilson Street. Upon arrival, he observed a parked

vehicle in the front of a residence located at 1011 Wilson Street. Five to ten people surrounded the vehicle, and "there was some screaming and yelling from pretty much everybody out there." Moore commanded the surrounding people to back away from the car. As Moore approached the car he "was able to see there [were] two individuals in the vehicle that appeared to be slumped over in the front and back seats." According to Moore's information, he was able to assume "they were the victims that had been shot." Moore retrieved latex gloves because "it was a life saving situation at that point." The woman in the front seat was "unresponsive" and Moore saw what appeared to be "brain matter" around the front passenger side of the car. Moore then went to the back seat "to start trying to check a pulse or determine if she was responsive." Moore did not perform any "life saving techniques" since about that time EMS arrived. Both women appeared to have gunshot wounds to the head.

The State called Dexter Graham ("Graham"). In November 2011, Graham was a member of a street gang called 8 Trey or 8 Trey Crips. This gang "hung out" on Wilson Street behind Moe's Store, and also at Lulu's house nearby. Members of the 8 Trey Crips included individuals named Darrick Moody ("Moody"), Bobby Brink ("Brink"), and Darnnel Alston ("Alston"). Graham also knew Demetrius Eatmon ("Eatmon") who was not part of a gang.

Another gang called the Neighborhood Crips was also in the area, but further down the street from the 8 Trey Crips. Members of the Neighborhood Crips included

Defendant, David Applewhite ("Applewhite"), Deshaun Long ("Long"), Shone Fleming ("Fleming"), and Emmanuel Holden ("Holden"). The two gangs got along with each other until sometime in November 2011, when there was an "altercation" on Wilson Street. This altercation began when "[s]ome guys came and tried to altercation with our neighborhood guys and they was saying they stuff wasn't right." At that point, Graham saw Defendant "pull a gun on Eatmon." After Defendant pointed the gun at Eatmon "he waved it towards everybody that was standing out there." Defendant stated "if anybody walk up on him he'll shoot him." Defendant then got in a car with Applewhite, Jones, and Long and drove away.

Graham and the members of his gang decided to "retaliate" by shooting "back at their house from him pointing the gun at everybody else." The house they decided to shoot was Holden's house since it was their main "hang-out." Graham drove Moody, Alston, and Brinkley to Holden's house. Graham parked the car, Alston and Brinkley exited the car, and Moody stayed in the car with Graham. Graham saw Alston and Brinkley go "to the house behind the cut behind Emmanuel Holden house." Graham could no longer see Alston and Brinkley, but he heard "multiple gunshots." Alston and Brinkley returned to Graham's car, and Graham later dropped them off at their vehicle. Graham knew something else was going to happen since "we were retaliate on them so I knew they were going to retaliate back on us."

On 9 November 2011, before the girls in the vehicle were killed, Graham "rode by [Defendant's] mother house and shot his mother house up." Graham knew the two girls who were shot later that evening. One of the victims was Graham's sister, and the other victim was Graham's best friend. Their car was parked on Wilson Street behind Moe's Store and near Lulu's apartments. This was the area where 8 Trey Crips hung out. When Graham found out his sister and best friend were killed, he wanted to "retaliate" by shooting whoever had "something to do with it." Graham believed Defendant and Holden were involved with the "hit on the girls because they was the highest rank in the gang."

The State next called Holden. Holden was a member of the Neighborhood Crips gang in November 2011. On 7 November 2011, Holden left work because "someone said . . . a shooting had happened at my house." Defendant was at Holden's house at that time. Defendant told Holden "an incident had happened where he had to pull a gun out on this guy named Montrel Eatmon on Wilson Street." Holden knew Eatmon was in the 8 Trey gang. After Defendant told Holden what he did, "everybody was talking about how they want to get back at 8 Trey for shooting at them." Holden was mad at Defendant for "bringing this this stuff to my house while I was at work." At that time, Defendant, Holden and Paul Thomas were the leaders of the Neighborhood Crips. Being a leader of the Neighborhood Crips meant that you gave orders such as "[r]etaliation orders."

Holden went to work on 9 November 2011. As he got off work, he talked to Defendant about retaliation on 8 Trey. Defendant told Holden he gave Applewhite permission to retaliate. Prior to that conversation with Defendant, Holden was not aware of any plan to shoot back at the 8 Trey Crips.

In the days following the shooting of the two girls, Defendant was "nervous and scared because he had gave them permission to retaliate[.]" Defendant was also "nervous he might get in trouble for going to buy them bullets." A few days later, "[Defendant] asked David Applewhite and Tresvon Jones did they get rid of the guns and he told them he did."

The State called Long. In November 2011, Long was a member of the Neighborhood Crips. The Neighborhood Crips had a rank structure starting with "foot soldier . . . and it just went all the way to big homie and O.G." According to Long, Applewhite and Jones were lower-ranked foot soldiers. Defendant was a "big homie" who had "leadership over the gang." When one has a position of leadership, then "[y]ou go order people to go on missions." A mission "is something that you do in order to move up in the gang," and includes activities such as "[s]elling drugs, beat somebody up, shooting, robbing, anything else like that." Holden was a "big homie" alongside Defendant. The Neighborhood Crips sometimes hung out at Holden's house.

On 7 November 2011, Long got a call "saying that the 8 Trey had shot up Emmanuel Holden, shot at neighborhood, at Emmanuel Holden house." On 8 November 2011, Long picked up Defendant and drove him to Wal-Mart. Defendant told Long they were going to Wal-Mart to buy bullets to go shoot in the country. Long believed "when Man house got shot up, Emmanuel Holden house got shot up, I figured that the Neighborhood was going to shoot back at 8 Trey for shooting Emmanuel Holden house." After they entered Wal-Mart, Defendant bought Tulammo brand .9 millimeter bullets and .22 bullets. Applewhite had a .9 millimeter gun, and "Tresvon had the .22."

On 9 November 2011, Long left school and was with Applewhite. Applewhite was on the phone with Defendant, and Long could overhear their conversation. Long heard Defendant "tell David Applewhite to do that tonight." Defendant then got on the phone with Long and told him to pick up Applewhite after work. At that point, Long thought "we was going to retaliate against 8 Trey." Long then took Applewhite home. At Applewhite's house, Applewhite told Long "to pull up to the back of the house and he loaded the .9 millimeter and .22 rifle in [the trunk of] my car." This all occurred within ten minutes of the phone conversation with Defendant. Long did not question why Applewhite put the guns in his car because he figured "we was going to retaliate."

Later that night, Long picked up Applewhite and Jones. Long still had the guns in the trunk of his car. Applewhite rode in the front passenger seat, with Jones in the back seat. They told Long they had spoken with Holden, and Holden "told them to be ready to shoot at the 8 Trey House." Long also told the police "Emmanuel Holden, David Applewhite and Tresvon seen 8 Trey members" in the yard in front of Lulu's apartments. Also, Applewhite and Tresvon "picked the spot from which they were going to shoot."

Long noticed Applewhite and Jones had on two layers of clothes "[s]o the gun residue can't get on that layer and throw it off." Those two men also put on gloves "so their fingerprints wouldn't get on the bullets." Long parked in an empty parking lot. He was able to "look through the houses [nearby] and see the 8 Trey house." Applewhite and Jones exited the car, and Long could see Applewhite had the .9 millimeter and Jones had the .22 caliber. Applewhite and Jones went over the parking lot fence and Long could no longer see them. However, Long heard "around ten, ten, 12 bullets, shots." After the gunshots, Applewhite and Jones ran to Long's car and they all proceeded to Wal-Mart in order to have an alibi.

Long first learned Shikia Hall had died when they were pulling into Wal-Mart. After they left Wal-Mart, Defendant called Long, told him two girls had died, and told them to "be safe." A few days later, Defendant told Long, Applewhite and Jones to

"get rid of the guns." Long was not initially truthful with the police because Defendant told him to not say anything to the police.

The State called Jones. In November 2011 Jones was a member of the Neighborhood Crips. When Jones first joined the Neighborhood Crips, he thought Defendant was in charge of the gang. That is because "[h]e did all the talking when everybody was together." It turned out Defendant's rank was "big homie." The rank of "big homie" was "pretty high up at the top, he can give orders, he could do what he want to do, he could recruit members." Holden was also a "big homie." Jones usually took orders from Defendant.

On 7 November 2011, two days before the victims were shot, Jones was at Holden's house. Defendant did most of the talking that night. He spoke "words of retaliation about getting back at the 8 Trey gang for shooting at Emmanuel Holden's house." Jones also recalled Defendant having a revolver that night. On 9 November 2011, Applewhite told Holden they were "about to go handle it." When Applewhite spoke, they all "looked up Wilson Street towards the 8 Trey's hangout." Jones then got into Long's car with Applewhite.

A few days after 9 November 2011, and after the shooting, Jones talked with Defendant. Defendant told Jones to "get rid of the guns." Defendant wanted "us to destroy them or, you know, throw them in a body of water[.]" Defendant also told

Jones if he "was questioned or anything by police not to say nothing." Jones then met with Defendant about a month later in a park.

> [Defendant] pulled me and Applewhite to the side and wanted to talk to us. So when he talked to us he asked us had we gotten rid of the guns. We had just recently gotten rid of the guns by this time. He was telling me about he wanted to get rid of Deshaun Long because he felt like he would tell if anything happened.

The State called Adam Tanner ("Tanner"), a "fire and toolmark examiner in the North Carolina State Crime Laboratory." Tanner tested the bullets recovered by law enforcement at the scene of the shooting. He concluded the bullets recovered from the victims' heads were fired from Applewhite's rifle. He also determined the rounds the police recovered from 1009 Wilson Street also originated from Applewhite's rifle. Finally, Tanner concluded, based upon the cartridge casings found near the scene, the ammunition was .9 millimeter Tulammo.

The State called Johnny Hendricks ("Hendricks"), a "detective/consultant" with the Homicide Task Force with the Wilson Police Department. Hendricks interviewed Defendant on 7 March 2013. Defendant admitted he was a member of the Neighborhood Crips Gang. Defendant also identified Holden, Applewhite, Jones and Long as members of the Neighborhood Crips. Defendant told Hendricks about the confrontation on 7 November 2011. After that confrontation, Defendant directed a Neighborhood Crips member to "to tell the boys to go behind the house where 8 Trey hung out to get it all over with."

Hendricks testified Defendant bought bullets for Applewhite on 8 November 2011 "so they could shoot his gun in the country." Defendant bought .9 millimeter bullets and .22 caliber rifle bullets. Defendant also stated that on 9 November 2011, he called and spoke to Applewhite one time. Hendricks had an opportunity to review Defendant's and Applewhite's phone records. Hendricks determined that on 9 November 2011, Defendant and Applewhite called each other approximately 12 times. As to one the phone calls:

> It was our understanding that David Applewhite's phone was malfunctioning, therefore, he had to have it on speaker phone. Through that investigation we learned that David Applewhite, Don Langston, Deshaun and [Long] all heard this conversation when [Defendant] gives [Applewhite] the go-ahead with shooting up the 8 Trey house.

The State rested. Defense counsel asked "the charge be dismissed for insufficiency of the evidence." Defense counsel also requested dismissal of the charges in the two counts of accessory before the fact to murder due to "a fatal variance . . . existing in the indictments." Additionally, Defense counsel stated:

> I believe the evidence is consistent with this being a felony murder, and that there was no evidence whatsoever that he could have done as he has been indicted to have done and for that reason we would ask that those charges be dismissed being a fatal, having a fatal variance from the facts that have thus far been submitted.

Defense counsel admitted he believed there was sufficient evidence to support the indictment for accessory after the fact to the felony of discharging a weapon into

occupied property (13-CRS-82), as well as for the two accessories after the fact to the two murders committed by Applewhite (13-CRS-88 and 89). However, as to the other charges, defense counsel asked the court for a dismissal because the indictments had "a fatal variance with the facts that have been elicited at this trial." The trial court denied Defense counsel's motions, and asked if Defendant would present any evidence. Defendant elected not to put on any evidence. Defense counsel again asked for dismissal of all the charges. The trial court denied Defendant's motion for dismissal.

The trial court dismissed the jurors around 12:30, in order to begin the charge conference. The trial court instructed the jurors to return at 2:30. Following the charge conference and lunch recess, the trial court announced:

> During the luncheon recess, Defense Counsel became aware that, through family members, that the Defendant was no longer in their presence. There was inquiry made of the sheriff's department who monitors the electronic monitoring and there was evidence that the Defendant's electronic monitoring apparatus had been tampered with.
>
> The Defense Counsel has made efforts to contact the Defendant via his cell phone which is no longer being answered.
>
> The Defendant's Counsel has previously been able to communicate with the Defendant via that cell phone and as late as during the luncheon recess.
>
> Having - - since the Defendant has not produced himself, the Court deems that he has chosen to voluntarily

> absent himself from these proceedings and, therefore, has waived his presence at these proceedings.

The next morning, the trial court stated:

> Before we bring the jury in, note that the Defendant is still absent. I have made inquiry of Counsel for the Defendant as well as the State as to their desire for me to acknowledge and caution the jury that his absence is not to be considered by them in reaching their verdict.

The trial court proceeded to instruct the jury. As part of its instruction, the trial court stated, "Discharge of a weapon into occupied property is defined as willfully or wantonly discharging a barreled weapon into a vehicle while it was occupied by one or more persons knowing it was occupied by one or more persons."

After the trial court instructed the jury and dismissed the jury to begin its deliberations, the trial court asked the State's and Defendant's counsels for "[y]our requests for additions, deletions or corrections to the charge." The State then responded for "accessory before the fact to murder, the State didn't request discharge weapon into occupied property because that was the agreement to discharge weapon into the house. This says specifically that it's discharging a weapon into a vehicle." The trial court re-instructed the jury in accord with the State's recommendation.

On 20 November 2015, the jury returned a guilty verdict as to all counts. The trial court then stated:

> I understand that some of you are, may be concerned about where the Defendant is and I will tell you that we don't know. He has waived his right to be here for the

> remainder of this trial and so, therefore, we will not be sentencing him at this time but when he again is within our confines he will be sentenced.

The parties reconvened on 12 August 2016. Counsel for Defendant made a "Motion to Dismiss prior to entry of judgment after the verdicts, dismiss based upon insufficiency of the evidence[.]" The Defendant addressed the court:

> I ran from the courtroom but I didn't run because I was guilty. I ran because I was getting lied on by my co-defendants and by Detective Hendricks and I'm not happy with my lawyer, how he handled my case and I do want to appeal, and any judgment against me today will not prosper.

The trial court then sentenced Defendant as a class I felony offender to two class A felonies, four class C felonies and two class F felonies. All sentences were to run consecutively. In cases 12 CRS 53186 and 12 CRS 53187, the two accessory before the fact to murder charges, Defendant received two life sentences. In cases 13 CRS 82 and 13 CRS 83, for the class F felonies of accessory after the fact to discharging a weapon into occupied property, Defendant received sentences of 16 to 20 months' imprisonment. In the last four cases for accessory after the fact to murder, Defendant received sentences of 73 to 97 months. Defendant appealed in open court.

II. Standard of Review

This Court "review[s] the sufficiency of an indictment *de novo*." *State v. McKoy,* 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). Under a *de novo* review, the

Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010).

This Court "reviews the denial of a motion to dismiss for insufficient evidence *de novo*." *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 763 (2010) (citation and quotation marks omitted). "Upon a defendant's motion for dismissal, the question for this 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. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

Under our Rules of Appellate Procedure, "[a] party may not make any portion of the jury charge or omissions therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires." N.C. R. App. P. 10(a)(2) (2016). Nonetheless, our State Supreme Court "has elected to review un-preserved issues for plain error when they involve . . . alleged error in the judge's instructions to the jury[.]" *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under plain error review, a defendant must demonstrate that the trial court committed 'a fundamental error.'" *State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015). Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.

1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

III. Analysis

In his first assignment of error, Defendant contends the trial court lacked jurisdiction to convict Defendant for accessory before the fact for first-degree murder. Specifically, Defendant argues the indictments for those charges were facially invalid because they insufficiently presented the elements of murder. "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Brice*, ___ N.C. ___, 806 S.E.2d 32, 36 (2017) (quoting *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000)). "As to other less serious defects, objection must be made by motion to quash the indictment or, in proper cases, a bill of particulars may be demanded." *Brice* at ___, 806 S.E.2d at 36 (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)). Because Defendant's challenge is a facial challenge, Defendant did not have to move to quash the indictment at trial so no preservation issue is present here.

Under our state Constitution, "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22 (2017). Our case law defines an indictment as "a written accusation of a crime drawn

up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill." *State v. Hunt,* 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) (quoting *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952). Our General Statutes provide:

> A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2015). In *State v. Greer*, our State Supreme Court held an indictment is constitutionally sufficient if it alleges "lucidly and accurately all the essential elements of the offense endeavored to be charged." 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Furthermore the purpose of a valid indictment serves:

> (1) [to give] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial[;] and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty[,] to pronounce sentence according to the rights of the case.

Hunt at 267, 582 S.E.2d at 600 (quoting *Greer* at 327, 77 S.E.2d at 919). Recently, the North Carolina Supreme Court reaffirmed "a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment." *State*

v. Brice ___ N.C. App. ___, ___, 806 S.E.2d 32, 36 (2017) (quoting *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968)). "A criminal pleading . . . is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty." *Brice* at ___, 806 S.E.2d 32, 36 (2017) (quoting *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (internal quotation marks and citations omitted)).

Here, Defendant was charged with accessory before the fact to murder under N.C. Gen. Stat. § 14-5.2. That statute provides in relevant part, "[a]ll distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." N.C. Gen. Stat. § 14-5.2 (2017).

By enacting N.C. Gen. Stat. § 14-5.2, the General Assembly abandoned the distinction between accessory before the fact to murder and murder. "The statute did not abolish the theory of accessory before the fact, but merely abolished the distinction between an accessory before the fact and a principal, meaning that a person who is found guilty as an accessory before the fact should be convicted as a principal to the crime." *State v. Surrett*, 217 N.C. App. 89, 98, 719 S.E.2d 120, 126-27 (2011).

One of the two superseding indictments, by which the Grand Jury charged

defendant with violating N.C. Gen. Stat. § 14-5.2 alleged:[1]

> [T]he defendant named above, unlawfully, willfully and feloniously did be and become an accessory before the fact and thereby a principal under G.S. 14-5.2 to the felony of Murder, N.C.G.S. 14-17, by counseling, procuring, and commanding David Lee Applewhite and Tresvon Alexander Jones to commit Murder of Shadimond Littleton; and in confirmation of such counseling, procuring, and commanding by the defendant, David Lee Applewhite and Tresvon Alexander Jones unlawfully, willfully, and feloniously did murder Shadimond Littleton. In furtherance of this, on November 8, 2011 the defendant did purchase 9 millimeter ammunition that David Lee Applewhite and Tresvon Alexander Moody used in the commission of this crime. The defendant was not present when the murder of Shadimond Littleton was committed. This act was in violation of the above referenced statute.

Defendant correctly contends an indictment for first-degree murder must contain the term "malice aforethought." *See* N.C. Gen. Stat. § 15-144 (2017). However, the indictment in the present case does not charge Defendant with murder, but rather accessory before the fact to murder. Our State Supreme Court held:

> To justify the conviction of one as an accessory before the fact, three elements must concur, namely, that (1) defendant counseled, procured, commanded, or encouraged the principal to commit the crime, (2) defendant was not present when the crime was committed, and (3) the principal committed the crime.

State v. Saults, 294 N.C. 722, 725, 242 S.E.2d 801, 804 (1978). "Malice aforethought"

[1] The charge in the other superseding indictment contains identical language to the one provided above, with the exception of naming the victim "Shikia Denise Hall."

is not an element of the crime of accessory before the fact, therefore, it is not necessary to allege it in the indictment. *See id.* at 725, 242 S.E.2d at 804-05 (holding that an indictment for accessory before the fact to felony arson need only state the elements for the accessory charge, and none of the elements of arson). In *Saults*, the defendant argued because the indictment did not require a finding of malice (an element of arson), it was insufficient on its face. *Id.* at 724, 242 S.E.2d at 804. The North Carolina Supreme Court held the indictment was valid because it "charged the offense of accessory before the fact to arson with sufficient certainty to identify the offense; to protect the accused from being twice put in jeopardy for the same offense; to enable the accused to prepare for trial, and to enable the court, upon conviction, to pronounce sentence." *Id.* at 726, 242 S.E.2d at 805.

More recently, in an unpublished decision, this Court held an indictment for accessory after the fact to second-degree murder was sufficient even though it did not contain the elements of second-degree murder. *State v. Mowery* (COA06-947, unpublished opinion filed 3 July 2007), 184 N.C. App. 379, 646 S.E.2d 442 (2007). This Court stated:

> North Carolina does not require that an indictment state the elements of the underlying felony that forms the base of the crime with which a defendant is charged. The indictment must only state the elements of the actual offense being charged. Our Supreme Court has stated that the underlying felony "need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. It is enough to state the

> offense generally and to designate it by name." *State v. Norwood*, 289 N.C. 424, 429-30, 222 S.E.2d 253, 257 (1976).

Mowery at *2.

In the instant case, the indictment charged Defendant was an accessory before the fact, and thereby a principal under N.C. Gen. Stat. § 14-5.2, to the felony of murder. The indictment further sets out specifically the facts which made Defendant an accessory before the fact; that is, defendant committed said offense by "counseling, procuring and commanding" Applewhite and Jones to commit "Murder," and as a result Applewhite and Jones "unlawfully, willfully and feloniously did murder" the victim. Such allegations were sufficient to put Defendant on notice he was to be tried as accessory before the fact to the crime of *murder*. The word "murder" has a definite and legal meaning. *See* N.C. Gen. Stat. § 14-17(a) (2017). Since the indictment alleged Defendant procured Applewhite and Jones to commit murder, defendant received notice of the offense on which he was to be tried and sentenced. This assignment of error is overruled.

In his second assignment of error, Defendant contends the trial court erred in denying Defendant's motion to dismiss the two charges of accessory before the fact to first-degree murder because (1) the State presented insufficient evidence Defendant caused Applewhite and Jones to murder the two victims and (2) there was a fatal variance between the indictments and the evidence.

The trial court submitted the charges of accessory before the fact to murder to

the jury on the theory of felony murder, with the underlying felony being discharging a weapon into an occupied property. The elements of discharging a gun into occupied property under N.C. Gen. Stat. § 14-34 are "(1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied." *State v. Jones,* 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991).

The State's evidence tended to show Applewhite fired several rounds from his scoped .9mm high point carbine rifle in the direction of Lulu's apartments. Evans, a next-door neighbor, testified a bullet came through one of his walls, into a second room and then lodged into his couch, while he was inside his property. The State also presented evidence showing at the time of the shooting, two females were shot and killed while sitting in a parked car outside of Lulu's.

Additionally, a jury could infer from the State's evidence Applewhite had reasonable grounds to believe Lulu's apartments and the neighboring home at 1009 Wilson Street were occupied. The Neighborhood Crips knew 8 Trey members "hung out" both inside and outside of Lulu's apartments at 1011 Wilson Street. Additionally Long, who drove Applewhite and Jones on 11 November 2011, testified Applewhite saw members of 8 Trey in front of Lulu's immediately prior to the shooting. Applewhite's shooting position had a direct line of sight to Lulu's apartments. The shooting occurred around 11:00 p.m., a time when Evans, who lived at 1009 Wilson Street, would likely be home. The State presented sufficient evidence for a jury to

conclude Applewhite had reasonable grounds to believe one or both of the properties were occupied.

The State also presented sufficient evidence to establish Defendant directed Applewhite and Jones to fire at the occupied property. "The essential elements of accessory before the fact to murder are (i) the defendant must have counseled, procured, commanded, encouraged, or aided the principal in the commission of the murder; (ii) the principal must have committed the murder; and (iii) the defendant must not have been present when the murder was committed." *State v. Westbrooks*, 345 N.C. 43, 56, 478 S.E.2d 483, 491 (1996).

The State's evidence tended to show on 8 November 2011, at approximately 3:50 p.m., Defendant bought the Tulammo .9mm ammunition at Walmart for Applewhite to use for the shooting. This was the same ammunition Applewhite loaded in his gun prior to executing the shootings. Also, the State presented evidence at trial showing Defendant personally planned the retaliatory attack against 8 Trey. On the afternoon of 9 November 2011, Defendant gave Neighborhood Crips member Applewhite permission to retaliate against 8 Trey for the shooting up of their hang-out. Specifically, Defendant called Applewhite and told him he wanted Applewhite to shoot up the 8 Trey house that night. Defendant then used his influence over Long and ordered Long to pick up Applewhite so Applewhite would have transportation for the retaliatory shooting.

As discussed *supra*, the State presented undisputed evidence Applewhite shot and killed the two victims in the course of firing into the car in front of 1011 Wilson Street.

Finally, during trial, the State presented evidence the only individuals participating in the actual shooting were Applewhite and Jones. Long was in close proximity as the driver. No one else, including Defendant, was present.

We conclude the State presented sufficient evidence to support each and every element of the crimes and relevant theories of the State's case. We also conclude no fatal variance exists between the indictments and the State's evidence. As discussed *supra*, the State's evidence supports each and every element of both the State's charged offense and the theory associated with the charged offense. This assignment of error is overruled.

In his third assignment of error, Defendant contends the trial court committed plain error by instructing the jury on the theory of felony murder instead of the theory of premeditation and deliberation. We disagree.

Defendant bases his contention upon the erroneous conclusion the State was committed to proceeding on the theory of premeditation and deliberation based on the language contained in the indictments. However, the terms "premeditation" and "deliberation" are not present in the indictments and those mental states are not attributed to Defendant in the indictments. The relevant portion of the indictments

state Defendant was an accessory before the fact to the "felony of Murder, N.C.G.S. [§] 14-17." The indictments then continue to describe how Defendant was an accessory before the fact to Murder.

"[T]he State is not required to elect between theories of prosecution [for first-degree murder] prior to trial." *State v. Garcia*, 358 N.C. 382, 389, 597 S.E.2d 724, 732 (2004). When the State pleads the factual basis of the prosecution, "a defendant must be prepared to defend against any and all legal theories which [the] facts may support." *State v. Holden*, 321 N.C. 125, 135, 362 S.E.2d 513, 522 (1987). North Carolina does not require an indictment to allege a murder was committed in the perpetration of another felony for that indictment to sufficiently support a verdict of felony murder. *State v. Frazier*, 280 N.C. 181, 201, 185 S.E.2d 652, 665 (1972). Here, the indictments did not articulate a specific theory of murder, and the State was not limited to present a specific theory to the jury. This contention is without merit.

By this same assignment of error, Defendant also contends the trial court committed plain error by failing to provide the jury with a special instruction for Accessory Before the Fact under N.C. Gen. Stat. § 14-5.2. We find no plain error.

The trial court instructed the jury on the two charges of accessory before the fact to murder using the pattern jury instructions for accessory before the fact to murder (N.C.P.I.–Crim. 202.30), felony murder (N.C.P.I.–Crim. 206.15), and discharging a firearm into occupied property (N.C.P.I.–Crim. 208.90). Defendant

claims the trial court committed plain error when it failed to give the additional special instruction, N.C.P.I.–Crim. 206.10A, which states, "If you find the defendant guilty of murder in the first degree, you must then determine whether his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators, or accessories to this crime."

Section 14-5.2 of the North Carolina General Statutes states, in pertinent part:

> [I]f a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a *capital felony*, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-5.2 (2017) (emphasis added). The plain language of this statute shows the legislature intended for defendants who are accessories before the fact to a capital crime should not receive the death penalty where the sole evidence against them was the uncorroborated testimony of a co-conspirator. Put another way, this statute prevents defendants, who were at most accessories before the fact to a capital crime, from receiving the death penalty when their conviction was based solely on uncorroborated testimony.

The record in this case indicates the District Attorney elected not to try Defendant capitally. N.C. Gen. Stat. § 15A-1241 requires all capital proceedings to be recorded in full. This did not occur here. Both parties made their opening statements off the record. Additionally, the State did not seek any sentencing

enhancements, and the jury did not receive a corresponding sentencing instruction. Because Defendant in this case was not capitally tried or convicted, it was not necessary for the trial court to instruct the jury to determine whether or not Defendant's conviction was based solely on the uncorroborated testimony of another principal, coconspirator or accessory to the crime. This assignment of error is overruled.

In his fourth assignment of error, Defendant contends the trial court committed plain error when it failed to instruct the jury Defendant could not be both a principal and an accessory to murder. In its brief to this Court, the State "concedes this claim as it relates only to case numbers 13 CRS 85, 13 CRS 86, 13 CRS 88 and 13 CRS 89." A defendant cannot be a principal and an accessory after the fact for the same crime. *See State v. McIntosh*, 206 N.C. 749, 753, 133 S.E.2d 652, 655. (1963). We therefore vacate Defendant's convictions in those cases.

In his brief, Defendant also contends this Court should vacate Defendant's convictions in the two cases where the jury convicted Defendant as accessory before the fact to murder (12 CRS 53186 and 12 CRS 53187). Defendant appears to believe accessory before the fact to murder and murder are mutually exclusive crimes, and therefore the trial court erred by not so instructing the jury. We disagree. As discussed *supra,* Defendant was not convicted and sentenced for both accessory before

the fact to murder and murder, but only sentenced for murder under N.C. Gen. Stat. § 14-5.2. This assignment of error is overruled.

Defendant next contends the trial court committed plain error when it denied Defendant's motion to dismiss the charge of accessory after the fact to the felony of discharging a weapon into occupied property committed by the principal Applewhite. We agree.

Here, the State stipulates if a principal is acquitted at trial of an offense, the State cannot proceed against another on the charge of accessory after the fact for the very same crime. *State v. Robey*, 91 N.C. App. 198, 208, 371 S.E.2d 711, 717 (1988) (stating N.C. Gen. Stat. § 14-7 does not permit the conviction of an accessory after the fact to a felony committed by a named principal if that named principal is acquitted). On 17 September 2015, Applewhite was acquitted of the crime of discharging a firearm into an occupied vehicle. *See State v. Applewhite* (COA16-335, unpublished opinion filed 15 November 2016), ___ N.C. App. ___, 792 S.E.2d 217 (2016), *disc. review denied*, ___ N.C. ___, 798 S.E.2d 526 (2017). Here, the jury convicted Defendant of accessory after the fact to discharging a weapon into an occupied property by Applewhite in 13 CRS 83. This is the same crime of which Applewhite was previously acquitted. The trial court erred when it subsequently entered a judgment and sentence against Defendant. We therefore vacate Defendant's conviction in 13 CRS 83.

In his final assignment of error, Defendant contends the trial court erred when it entered judgments on the felonies in 13 CRS 82 and 13 CRS 83. Here, the State concedes the trial court erred in treating those two offenses as class F felonies for sentencing. Defendant was convicted of accessory after the fact to the felony of discharging a weapon into an occupied property. The crime of discharging a weapon into occupied property is a class E offense unless enhancements to the crime are alleged and found by the jury. N.C. Gen. Stat. § 14-34.1. The indictments in this case failed to identify a specific offense level or allege facts associated with enhancement. Additionally, the trial court did not so instruct the jurors, and the jury did not find, enhancements or related facts. Accessory after the fact carries a class of punishment two classes lower than the principal felony. N.C. Gen. Stat. § 14-7 (2017). Defendant was therefore convicted of accessory after the fact to the crime of discharging a firearm into an occupied property, a class G offense. We remand 13 CRS 82 to the trial court to correct this issue by resentencing Defendant accordingly.

VACATED IN PART AND REMANDED IN PART.

Judges INMAN and BERGER concur.

Report per Rule 30(e).