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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-184

Filed: 21 August 2018

Cabarrus County, Nos. 13 CRS 54981, 13 CRS 54980, 13 CRS 54958, 13 CRS 54961

STATE OF NORTH CAROLINA,

v.

CHRISTOPHER JAMME WHITFIELD, Defendant,

And

STATE OF NORTH CAROLINA,

v.

COREY LEVI BANNER, Defendant.

Appeal by defendants from judgments entered on or about 19 May 2016 by Judge Martin B. McGee in Superior Court, Cabarrus County. Heard in the Court of Appeals 15 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd and Special Deputy Attorney General Jonathan P. Babb, for the State.

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

Leslie Rawls for defendant Banner.

STROUD, Judge.

Defendants Christopher Jamme Whitfield ("defendant Whitfield") and Corey Levi Banner ("defendant Banner") appeal from their convictions of first degree murder and discharging a firearm into occupied property resulting in serious bodily injury. Defendants each raise several issues on appeal, including that the trial court erred in denying their respective motions to sever. For reasons stated below, we vacate defendant Whitfield's conviction and remand for a new trial because he was deprived of the ability to present his duress defense through the denial of his motion to sever. As to defendant Banner, we find no error with the underlying issues raised, but hold that the trial court erred by failing to arrest judgment on his conviction for discharging a firearm into an occupied vehicle. We therefore remand for correction of this clerical error.

Background

The evidence at trial tended to show that on 13 October 2013, defendant Whitfield received a call while hanging out with defendant Banner at defendant Banner's house from Daniel,[1] a friend from high school, who wanted to buy some marijuana. Defendants agreed to meet Daniel and arrived at a McDonald's in Concord, North Carolina in a red Toyota along with defendant Banner's brother,

[1] We have used pseudonyms to protect the privacy of this witness and other witnesses or participants -- other than the victim, Mark Bostic -- who were not charged with any crime in this case.

while Daniel arrived at the McDonald's in a grey Honda with three other individuals: Shane, Mark, and Ned.

Shane got out of the Honda and approached defendants, asking to see the marijuana. An argument ensued about the marijuana, and defendant Banner "flashed" a gun in his waistband and stated something along the lines of: "'I know you all ain't out here trying to rob nobody. You all can get banged out out here.'"[2] No marijuana sale occurred, and the men all returned to their respective vehicles. The Honda pulled away. Defendants got in the Toyota and followed the Honda; shortly thereafter several shots were fired from the red Toyota at the Honda. Mark was struck and died at the hospital from the gunshot wound.

After investigating and locating the various witnesses, police took statements from Daniel, Shane, defendant Whitfield, and defendant Banner. Both defendants admitted to being at the McDonald's for a drug deal and to shooting out of a car window, but they differed in their statements about how many shots each fired and why.[3]

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[2] At trial, Shane was asked whether this phrase means that someone is going to get shot, and he replied: "It can mean that, fighting, I don't know." Daniel testified that defendant Banner said he would shoot someone. The record does not include a clear definition of "banged" as used here -- and this word has a wide variety of different meanings depending on context -- but in the context of the testimony, it was clearly a threat of bodily harm.

[3] Defendant Whitfield filed a motion to supplement the record on appeal to include defendant Whitfield's unredacted statement. We grant this motion so we may properly address the issue on appeal.

On 28 October 2013, defendants were both indicted for first-degree murder and for discharging a firearm into occupied property resulting in serious bodily injury. The trial court held hearings on 30 September 2015 and 18 March 2016 regarding joinder, and ultimately -- over objections of both defendants -- defendants' cases were joined for trial. The jury trial began 25 April 2016, and on 19 May 2016, the jury found both defendants guilty as charged. Defendants were each sentenced to life imprisonment without the possibility of parole. Defendants timely appealed to this Court.

Analysis

Defendant Whitfield and defendant Banner have each raised various issues on appeal. We have addressed each defendant and his arguments on appeal separately below.

I. Defendant Whitfield

On appeal, defendant Whitfield contends the trial court erred in denying his motion to sever, because the joinder of his trial to defendant Banner's trial deprived him of his constitutional rights to present a defense and have a fair trial. He also argues the trial court erred by denying his motion for mistrial; in overruling his *Baston* challenges to four jurors; and in failing to arrest judgment on his conviction for discharging a firearm into an occupied vehicle because the charge was the underlying felony for the felony murder conviction. Because we conclude defendant

Whitfield was prejudiced by the denial of his motion to sever, we vacate his conviction and remand for new trial, and we will not address his remaining issues since they may not recur in his new trial.

A. Motion to Sever

Defendant Whitfield argues that the trial court erred by denying his repeated motions to sever his trial from defendant Banner, because "joinder prevented [defendant] Whitfield from pursuing his duress defense, and made it impossible for him to receive a fair trial."

After the shooting, both defendants made statements to police. While those statements both acknowledged the events at McDonald's surrounding the attempted sale of marijuana and that a shooting occurred, they differed in some important details and in the stated reasons each defendant participated. Defendant Whitfield told police he fired because defendant Banner threatened to shoot him if he did not. Defendant Banner claimed he fired out the window because he saw a gun in the Toyota. After joining defendant's cases for trial, the trial court had counsel redact each defendant's statement so as not to implicate the other. The redacted statements were later admitted into evidence at trial, with the trial court noting to the jury that the statement of one could not be used as evidence against the other.

Defendant Whitfield's counsel argued the denial of defendant's motion to sever affected his defense. At the close of defendant Whitfield's presentation of evidence, defense counsel stated, outside the presence of the jury:

> And again, Your Honor, I would make a motion at the close of all the evidence. I do not wish to be heard. With regard to the defense that [defendant] Whitfield chose to present or not to present, I understand that we previously filed a notice of duress defense. [Defendant] Whitfield's decision not to pursue that defense was based in large part on the joinder issues as well as several pretrial evidentiary issues, pretrial evidentiary rulings related to 404(b) evidence.

The trial court denied the motion.

> A trial court's denial of a motion to sever will not be disturbed on appeal absent an abuse of discretion. G.S. § 15A-927(a)(2) provides that when a pre-trial motion to sever is made, failure to renew the motion before or at the close of all the evidence waives any right to severance. This Court has also held that failure to renew a motion to sever as required by G.S. 15A-927(a)(2) waives any right to severance and that on appeal the Court is limited to reviewing whether the trial court abused its discretion in ordering joinder at the time of the trial court's decision to join.

State v. McDonald, 163 N.C. App. 458, 463-64, 593 S.E.2d 793, 796-97 (2004) (citations and quotation marks omitted). We treat defense counsel's statement at the close of the evidence as a renewal of defendant Whitfield's earlier objection to the joinder of his trial to defendant Banner's trial. We review the trial court's decision for abuse of discretion. *Id. See also State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994) ("The propriety of joinder depends upon the circumstances of each

case and is within the sound discretion of the trial judge. Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. Nevertheless, under N.C.G.S. § 15A-927(c)(2) the trial court must deny a joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or the innocence of one or more defendants." (Citations and quotation marks omitted)).

Under N.C. Gen. Stat. § 15A-926(b)(2) (2017):

> (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
> 2. Were part of the same act or transaction; or
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

As the State notes, defendant Whitfield was charged under the theory of acting in concert with another -- defendant Banner -- to commit two felonies: (1) attempted sale of marijuana and (2) discharging a weapon into an occupied vehicle. To convict a defendant based on acting in concert, "the State must show that defendant was present at the scene of the crime and that he acted together with another individual who does the acts necessary to constitute the crime *pursuant to a common plan to*

commit the offense." *State v. Cotton*, 102 N.C. App. 93, 97, 401 S.E.2d 376, 379 (1991) (citation omitted) (emphasis added).

The State contends that defendant Whitfield's duress defense "would not have been successful because of acting in concert which made [d]efendant legally responsible for the acts of his other co-defendants." *See, e.g., State v. Handsome*, 300 N.C. 313, 318, 266 S.E.2d 670, 674 (1980) ("By his eleventh assignment of error, defendant contends that since he asserted the defense of duress he was at most guilty of aiding and abetting and it was error for the trial judge to charge on acting in concert with respect to all of the crimes charged. There is evidence that the defendant was present at the scene of the crimes and, pursuant to a common plan or purpose to commit those crimes, acted together with another who performed the acts necessary to constitute the crimes charged. Thus, the trial judge properly instructed on acting in concert.").

But here, defendant Whitfield contends he was deprived of his ability to present a duress defense -- which relates to what happened after the attempted sale -- and his proposed defense would tend to show he was not acting pursuant to a common plan or purpose when the shooting occurred. He argues that as to *his* actions, the events between the attempted sale of marijuana and subsequent shooting were not part of a continuous transaction or pursuant to a common plan or purpose, because he did not willingly participate in the second portion of the chain of events,

the shooting that led to Mark's death. *See, e.g., State v. Johnson,* 182 N.C. App. 63, 68, 641 S.E.2d 364, 368 (2007) ("A murder occurs during the perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction." (Citation and quotation marks omitted)). Thus, while defendant Whitfield admits that he participated in the attempted sale of marijuana, he contends he would not have participated in the shooting had he not been forced to do so. But because his motion to sever was denied, he was prevented from being able to adequately present his claimed duress defense.

While not all antagonistic defenses necessarily warrant severance, "[w]e have held that when joinder interferes with a defendant's opportunity to use a confession to his advantage because the defendants have antagonistic defenses, the trial court should grant severance." *State v. Tirado*, 358 N.C. 551, 565, 599 S.E.2d 515, 526 (2004). In *Tirado*, the North Carolina Supreme Court concluded after reviewing both the redacted and unredacted versions of one co-defendant, defendant Queen, that "the only difference between the two is that the latter contains no mention of [co-defendant] Tirado." *Id.* The Court found that the redacted statement "does not rise to the level of a severely censored statement that goes to the heart of his defense." *Id.*

Here, unlike *Tirado*, the redactions to defendant Whitfield's statement went to the heart of his defense. Defendant's defense was that he only shot under duress after defendant Banner threatened to shoot him if he did not fire his weapon at the other vehicle. The redacted version of his statement presented before the jury omitted all references to defendant Banner and simply stated, "I only shot because I was scared of someone in the car I was riding in." Being "scared" of an unidentified person in the same car is quite different from a direct threat from a person with a gun in the same car stating that he would shoot him if he did not shoot at the other car.

As related to the alleged duress defense, we must examine the evidence in the light most favorable to defendant, *see generally State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) ("For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant." (Citations, quotation marks, and brackets omitted)). If a jury believed defendant's defense, then his "participation" in the second half of events -- the shooting -- was under duress. And because of the joinder of defendant Whitfield's trial to that of his co-defendant, his ability to put on a defense was prejudicially impacted, particularly in relation to his statement, which had to be redacted to the extent that it eliminated the primary evidence of duress. *See Tirado*, 358 N.C. at 565, 599 S.E.2d at 526. Thus, we conclude

that trial court abused its discretion, as defendant Whitfield was deprived of a fair trial. *See generally State v. Boykin*, 307 N.C. 87, 92, 296 S.E.2d 258, 261 (1982) ("We believe that there was enough evidence to go to the jury in either case, but we feel that justice requires a separate trial for these two defendants under the facts of this case."). Accordingly, we remand for a new trial for defendant Whitfield[4].

II. Defendant Banner

Defendant Banner also raises several issues on appeal. He argues that the trial court erred by denying his motion to dismiss the felony murder charges and submitting the attempted marijuana sale as the underlying felony; denying his motion to dismiss the charge of discharging a firearm into occupied property and submitting felony murder to the jury on that basis; by denying his motions to sever and granting the State's motion to join the defendants for trial; and by failing to arrest judgment on his conviction for discharging a firearm into an occupied vehicle.

A. Motion to Dismiss -- Felony Murder

Defendant Banner first contends that the trial court erred by denying his motions to dismiss the felony murder charge because the attempted sale of marijuana and Mark's death "were not part of a continuous transaction[.]"

> Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a

[4] We address defendant Banner's arguments regarding his motion to sever separately below, as he did not raise any sort of a duress defense and he makes a completely different argument for severance.

> lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is relevant evidence that a reasonable person would find sufficient to support a conclusion. When reviewing a motion to dismiss based on insufficiency of the evidence, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence.

State v. Bullock, 178 N.C. App. 460, 466, 631 S.E.2d 868, 873 (2006) (citations, quotation marks, and brackets omitted).

Defendant argues that the attempted sale of marijuana and shooting were not part of a continuous transaction and that the chain of events was broken. As noted above, for the felony murder rule to apply, the two acts must be part of a single transaction:

> A murder occurs during the perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction. To prove felony murder as well as the underlying offense, the State need only demonstrate that the elements of both occurred in a time frame that can be perceived as a single transaction.

Johnson, 182 N.C. App. at 68, 641 S.E.2d at 368 (citations, quotation marks, and brackets omitted).

Defendant cites to *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), where our Supreme Court noted that if the killing "had been an isolated event, one unrelated to the [underlying felony], then the killing could not be felony murder." *Id.* at 197, 337 S.E.2d at 522. But ultimately, the Supreme Court concluded in *Fields* that "the time, place and cause of the shooting were all well within the scope of the [underlying felony of larceny]. The interconnectedness of events, indeed even their causal interrelationship, is obvious." *Id.*

Here, the State presented evidence showing defendant Banner went to McDonald's with defendant Whitfield and his brother to sell marijuana to Daniel. All parties met in the McDonald's parking lot, and an argument began. Defendant Banner raised his shirt to show he had a firearm and said, " 'You all can get banged out out here.' " Indeed, defendant Banner concedes in his appellate brief that "[a]t that point, in the light most favorable to the State, [defendant] Banner accused the purchasers of trying to rob them, displayed a gun in his waistband, and said he'd shoot someone.[5]" After Daniel, Mark, and the others in their vehicle drove away, defendant Banner got back into his vehicle with defendant Whitfield and they immediately pursued the other vehicle. A few minutes later, shots were fired from

[5] Defendant Banner also contends that "[b]ecause the jury found [defendant] Banner not guilty of premeditated murder, the statement is not relevant to this argument." The context of the statement, however, does support the conclusion that the events that occurred surrounding the felonious attempted sale of marijuana led directly to the subsequent shooting. Defendant Banner believed Daniel and the others with him were trying to rob him, he had threatened to shoot them, and he thought he saw a gun in their car.

defendants' vehicle towards the other, and Mark was hit and killed. These facts, along with additional evidence presented at trial, provided overwhelming evidence to support a "reasonable inference that the defendant is guilty of the crimes charged." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis omitted). "[T]he evidence supports the inference that the underlying felony . . . and the killing occurred pursuant to a continuous transaction." *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d 178, 192 (1998).

As to this defendant, the evidence shows a continuous transaction including the attempted marijuana sale and the shooting, because there is no argument or evidence that he was forced to shoot at the other car. For defendant Banner, there was no break in the chain of events that led to Mark's death. Defendant Banner does not claim he participated in the shooting because of any sort of duress; his claim was that he shot because he saw a gun in the other vehicle. His rationale for the shooting does not break the chain of events or take away from the continuity of the incident. *See generally Johnson*, 182 N.C. App. at 68, 641 S.E.2d at 368. Accordingly, we hold that the trial court properly denied defendant's motion to dismiss the felony murder charge.

B. Motion to Dismiss -- Discharging Firearm into Occupied Property

Next, defendant Banner argues that the trial court erred by denying his motion to dismiss the charge of discharging a firearm into occupied property and by

submitting felony murder on that basis because evidence was insufficient to show either that he was the shooter or that he was acting in concert with the shooter. Since we have concluded that the trial court acted properly in denying defendant's motion to dismiss the felony murder charge based upon the attempted marijuana sale, we need not consider whether it erred in denying defendant's motion to dismiss the charge based upon an underlying felony of discharging a firearm into occupied property. *See, e.g., State v. Barlowe*, 337 N.C. 371, 381, 446 S.E.2d 352, 358 (1994) ("Only one underlying felony is necessary to support a felony-murder conviction, and in this case the record is clear the jury found that two separate felonies supported the first-degree murder conviction."). But in the interest of justice, we will briefly address defendant's argument on this basis.

When reviewing the trial court's denial of a motion to dismiss based on insufficient evidence, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *See Bullock*, 178 N.C. App. at 466, 631 S.E.2d at 873.

Again, defendant Banner contends the trial court erred in failing to grant his motion to dismiss the felony murder charge and underlying felony of discharging a firearm into an occupied vehicle because insufficient evidence was presented during trial to establish either that he was the shooter or that he acted in concert with the shooter.

> Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan. This is true even where the other person does all the acts necessary to commit the crime.

State v. Abraham, 338 N.C. 315, 328-29, 451 S.E.2d 131, 137 (1994) (citations and quotation marks omitted). Defendant relies in part on *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984). In *Forney*, the North Carolina Supreme Court reversed a sexual assault conviction where the evidence established that the defendant was present and knew of the sexual assault, but there was insufficient evidence that the defendant and other perpetrators "were acting together in pursuance of a common plan to rape or commit a sexual assault on [the victim]." *Id.* at 134, 210 S.E.2d at 25 (emphasis omitted). Defendant also cites to *State v. Autry*, 101 N.C. App. 245, 399 S.E.2d 357 (1991). In *Autry*, the North Carolina Supreme Court reversed a conviction for trafficking in cocaine because the evidence failed to show that the defendant, though present for the transaction, was acting pursuant to any common plan or purpose with others to commit the alleged crime. *Id.* at 254, 399 S.E.2d at 363.

But the evidence here differs greatly from that in *Forney* or *Autry*. In *Forney*, the defendant was an uninvolved observer, 310 N.C. 126, 310 S.E.2d 20; In *Autry*, the defendant was a mere bystander near the individuals in possession of drugs. 101 N.C. App. 245, 399 S.E.2d 357. Here, defendant Banner was fully involved in the

events from the time of the attempted sale through the shooting. In fact, he admits he instigated the shooting because he believed he saw a gun in the other car.

This case is much more similar to the facts in *Abraham*, where two co-defendants confronted several men in a parking lot and one of the co-defendants showed a gun and pointed it toward the other men while the other co-defendant's hand was in his coat pocket. *Abraham*, 338 N.C. at 325, 451 S.E.2d at 135. The Supreme Court concluded in *Abraham* that the jury could have reasonably concluded that the co-defendants were acting in concert and

> [t]hese inferences would support the first-degree felony murder verdicts against both defendants as returned by the jury on the theory that the bullets which killed [the victim] were fired during the course of one of the felonious assaults so that the assaults and the homicide were part of a continuous transaction. Since the evidence supports the guilt of both defendants as to all of the felonious assaults, it makes no difference which of the felonious assaults is the underlying felony or which defendant actually fired the fatal shots or whether defendants intended that [the victim] be killed.

Id. at 330, 451 S.E.2d at 138. Here, as in *Abraham*, the evidence provided more than a reasonable inference of defendant's guilt of firing into an occupied vehicle and of acting in concert with his co-defendant. We hold that the trial court did not err in denying defendant's motion to dismiss on this ground.

C. Motion to Sever

Defendant Banner also argues that the trial court erred by denying his motion to sever and granting the State's motion to join his trial with defendant Whitfield's trial, because the joinder "denied [defendant] Banner his Constitutional rights." Once again, we review the trial court's denial of a motion to sever for abuse of discretion. *See McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97.

Unlike his co-defendant, defendant Banner has not demonstrated an abuse of discretion or that he was deprived of a fair trial. Defendant Banner contends that "[t]hrough joining the defendants for trial in this matter, the court deprived Banner of his right to present a defense. The joinder required sanitation of critical statements and hampered Banner's ability to fully present his case." We disagree. Defendant Banner does not contend that he was under any sort of duress during his participation of the underlying offenses. *Cf. Boykin*, 307 N.C. at 92, 296 S.E.2d at 261 (granting new trial to co-defendant under Rule 2 "in order to prevent manifest injustice" because, while co-defendant did not make a motion for severance, "in view of our action as to [the defendant], we feel justice requires the same treatment for [the co-defendant]."). He has not shown that his unredacted statement -- which is not in the record -- is substantially different than the redacted one or how the redactions would affect his defense. Here, unlike in *Boykin*, our conclusion that justice requires a separate trial for defendant Whitfield does not also apply to defendant Banner, as he was not prejudiced from presenting his defense. Defendant Banner's defense was *not*

so intricately tied to his co-defendant in the way defendant Whitfield's defense was, and we cannot say that the trial court abused its discretion in denying the motion to sever as it related to defendant Banner. Defendant Banner has not demonstrated necessary prejudicial error from the joinder of his trial with defendant Whitfield's trial. *See McDonald*, 163 N.C. App. at 463-64, 593 S.E.2d at 796-97. Accordingly, we find the trial court did not abuse its discretion in denying defendant Banner's motion to sever.

D. Arrest Judgment

Finally, defendant Banner contends that the trial court erred in failing to arrest judgment on his conviction for discharging a firearm into an occupied vehicle and by merely noting "merged" on the judgment. We review a trial court's decision on a matter of law *de novo*. *See, e.g., State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

After conviction, but prior to sentencing, the State noted to the trial court that "the underlying felonies merge with the murder charge" and noted that the court would sentence both defendants only under the felony murder convictions; defendant Banner's counsel agreed. The trial court then entered judgment for defendant's conviction of first-degree murder and noted that the additional offense was "merged with 1st murder[.]"

Our Supreme Court has explained that "[w]hen a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770 (2002). In *State v. Rush*, 196 N.C. App. 307, 314, 674 S.E.2d 764, 770 (2009), the defendant was convicted of first-degree murder, with the underlying felony of robbery with a dangerous weapon, and this Court noted that the robbery with a dangerous weapon conviction "merges with his first-degree murder conviction" and held that "[t]he trial court erred in failing to arrest judgment on robbery with a dangerous weapon as the underlying felony must be arrested under the merger rule."

Here, the trial court correctly noted that the underlying felony merged into defendant's first-degree murder conviction but did not arrest judgment on the underlying felony conviction. "This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (2015). Accordingly, we remand for entry of a new Judgment and Commitment form so the judgment will correctly reflect the trial court's action.

Conclusion

We vacate defendant Whitfield's conviction and remand for a new trial. As to defendant Banner, we find no error with the issues raised but remand for entry of a

new Judgment and Commitment form showing that the court has arrested judgment on his underlying conviction for discharging a weapon into occupied property.

VACATED AND REMANDED FOR NEW TRIAL AS TO DEFENDANT WHITFIELD; NO ERROR IN PART, REMANDED FOR CLERICAL ERROR IN PART AS TO DEFENDANT BANNER.

Judges ZACHARY and ARROWOOD CONCUR.

Report per Rule 30(e).