

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-364

Filed: 3 December 2019

Johnston County, No. 16 CRS 56785

STATE OF NORTH CAROLINA

v.

DATREL K'CHAUN LYONS, Defendant

Appeal by Defendant from judgments entered 24 September 2018 by Judge Imelda Pate in Johnston County Superior Court. Heard in the Court of Appeals 29 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

James R. Parish for Defendant-Appellant.

INMAN, Judge.

Datrel K'Chaun Lyons ("Defendant") appeals from judgments entered following a jury's verdict finding him guilty of attempted first degree murder and conspiracy to commit attempted first degree murder. Defendant argues that: (1) the conspiracy charge as set forth in the indictment is invalid, as it alleges a non-existent crime; (2) the trial court erred in denying his motion to dismiss both charges for insufficiency of the evidence; and (3) the trial court erred in finding duplicative aggravating circumstances at sentencing. After careful review, we hold that the

indictment for conspiracy is valid and the trial court did not commit error in denying Defendant's motion to dismiss. We dismiss the portion of Defendant's appeal pertaining to his sentencing for lack of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented at trial tended to show the following:

On 24 October 2016, at approximately 9:30 p.m., two men robbed a Hardee's restaurant in Princeton, North Carolina as the employees were cleaning up and closing for the night. Ms. Ricks, the manager, was in her office doing bookkeeping for the day when she heard the alarm go off; suddenly, an unknown man appeared beside her, pointed a gun at her, and demanded she give him money. Ms. Ricks complied with his demand.

Ms. Ricks also observed a second man demanding that one of the cashiers open a cash drawer. Ms. Ricks explained to the robbers that the cashier could not open the cash drawer, but that she could. She then walked over and opened the drawer for them. Inside the drawer were rolls of coins and a burgundy BB&T bank cash bag containing approximately \$500. One man took the BB&T bag and several rolls of coins and threw them into a "bookbag." The men then left the Hardee's and drove away in a Chevrolet Sonic vehicle. Ms. Ricks locked the doors and called the police.

At the time of the robbery, Johnston County Sheriff's Deputy Adriane Stone was driving a patrol car throughout the county. Sometime after the armed robbery

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was reported, Deputy Stone was driving on Cleveland Road when a car careened toward her at 78 to 79 miles per hour in a 55 mile per hour zone. Deputy Stone slowed to a stop and turned her emergency lights on, hopeful that the other car would slow down or stop. When the speeding car did not stop, Deputy Stone turned her vehicle around to give chase. Deputy Stone called dispatch and provided the license plate number of the vehicle, later identified as a Chevrolet Sonic, and reported she was making a traffic stop. She had no idea at that time that the vehicle was connected with the armed robbery at the Hardee's.

At one point during the pursuit, the Sonic slowed down suddenly and pulled over onto the shoulder of the road. Deputy Stone rolled to a stop behind the Sonic and exited her vehicle. After she did so, the Sonic sped away. Deputy Stone resumed the chase and called on the radio for back up. As the pursuit continued, the Sonic made a sudden stop a second time. Deputy Stone again stopped close behind.

After she had stopped, Deputy Stone observed a man, later identified as Defendant, lean his torso out of the back window of the Sonic and point a gun directly at her face. Deputy Stone immediately ducked behind her dashboard, heard a gunshot, and shifted her car into reverse. The driver of the Sonic then fled the scene. Deputy Stone, meanwhile, called dispatch to report shots fired, gathered her resolve, and resumed the chase.

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Deputy Stone caught up to the fleeing Sonic and watched as it came to a stop at the end of a cul-de-sac. She parked her patrol car behind the Sonic, drawing her service pistol as she stepped out of the vehicle. The driver of the Sonic then turned around and drove the vehicle towards her. Deputy Stone fired 3-5 shots, striking the car. After the Sonic passed, Deputy Stone got back into her vehicle and heard another officer, Deputy Michael Savage, announce over the radio that the Sonic had crashed.

Deputy Savage arrived on the scene shortly after Deputy Stone had discharged her weapon, and observed that the Sonic had crashed into a mailbox off the side of the road. He saw three men jump out of the car and run into nearby woods. He called for help and Deputy Stone arrived a short time later. The two officers discussed what to do next and began to search inside the Sonic for firearms. They discovered a pellet gun in the backseat and a black Berretta pistol on the floorboard of the front passenger seat.

Clayton Police K-9 Officer Justin Vause arrived at the crash site. As he was approaching the site, he observed a man running into the woods. Officer Vause exited his vehicle and loudly warned the fleeing man that he was preparing to release his dog, Major, to find and subdue him. That man, later identified as Defendant, replied, "I'm over here, sir[.]" and surrendered, at which time Officer Vause arrested him. Officer Vause and Major then began to track a scent from the crashed Sonic, which

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eventually led them back to the woods where Defendant was arrested. Major searched the area and discovered a brown BB&T bank bag filled with money.

Believing the remaining suspects were in the nearby wooded area, law enforcement officers established a perimeter and deployed another tracking canine and a thermal imaging camera. They soon located another suspect, later identified as Gerald Holmes. Mr. Holmes did not initially cooperate with the police, but was quickly subdued by Major. Law enforcement later identified Antonio Pratt as the third suspect and arrested him several weeks after the chase.

Defendant was indicted on 7 November 2016 on charges of attempted first degree murder and conspiracy to commit attempted first degree murder.

At trial, Deputy Stone, Deputy Savage, Officer Vause, and Mr. Pratt testified to the events of the evening in detail. Describing the police chase, Mr. Pratt testified that when he first saw Deputy Stone's car, he began to panic because he was speeding and did not have a driver's license. He further testified that, at one point during the chase, Mr. Holmes told him to pull over; when he did, he heard Mr. Holmes yell to Defendant, "Shoot, bro. Shoot." Mr. Pratt testified that he then heard a loud boom, which he identified as a gunshot.

At the close of the State's evidence, Defendant moved to dismiss all claims for insufficiency of the evidence. That motion was denied. Defendant offered no evidence, and the jury found Defendant guilty on both charges. After the verdict was

announced, Defendant admitted to the existence of three aggravating factors as part of a plea bargain. The trial court sentenced Defendant to 157 to 201 months imprisonment for attempted first degree murder and a consecutive sentence of 73 to 100 months imprisonment for conspiracy to commit attempted first degree murder. Both sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. *Standard of Review*

We review challenges to the validity of indictments *de novo*. *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011). To be valid, “an indictment must allege every essential element of the criminal offense it purports to charge.” *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958). An indictment that falls short of this standard fails to confer subject-matter jurisdiction on the trial court. *Billinger*, 213 N.C. App. at 255, 714 S.E.2d at 206.

The *de novo* standard also applies to our review of a trial court’s denial of a motion to dismiss for insufficiency of the evidence. *Id.* at 253, 714 S.E.2d at 205. We “determine whether the State has presented substantial evidence (1) of each essential element of the offense, and (2) of the defendant’s being the perpetrator.” *Id.* at 252-53, 714 S.E.2d at 204-05 (citations omitted). We view the evidence “in the light most favorable to the State, giving the State the benefit of every reasonable inference and

resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).¹

B. Conspiracy to Commit Attempted Murder

Defendant contends that the indictment charging him with conspiracy “to commit the felony of Attempted First Degree Murder, [N.C. Gen. Stat. §] 14-17 against Adriane Stone” is invalid, as it alleges he conspired to commit a crime that does not exist. Whether conspiracy to commit attempted first degree murder is a crime is an issue of first impression for this Court, and presents, Defendant argues, “an illogical impossibility and a legal absurdity[.]” insofar as it would criminalize agreements *not* to commit murder. Though this argument does appear convincing at first blush, a full examination of the common law surrounding both conspiracy and attempted first degree murder lead us to hold that the indictment is valid.

At the outset, we note that the indictment alleges the elements of criminal conspiracy as a technical matter. “A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.” *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citations omitted). Attempted first degree murder is most certainly a crime. *State*

¹ At oral argument, Defendant conceded that he could not appeal his sentence as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal.

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v. Collins, 334 N.C. 54, 59, 431 S.E.2d 188, 191 (1993). Thus, from a purely formulaic perspective, the indictment alleges both elements of conspiracy: (1) an agreement between Mr. Holmes and Defendant; (2) to commit an unlawful act, *i.e.*, attempted first degree murder. *Cf. United States v. Clay*, 495 F.2d 700, 710 (7th Cir. 1974) (holding an indictment alleging conspiracy to attempt to break into a bank was valid because the general federal criminal conspiracy statute required “the object alleged . . . be an offense against the United States” and a specific criminal statute recognized attempted bank robbery as just such an offense).

To ultimately convict a defendant of conspiracy, however, “the State must prove there was an agreement to perform every element of the underlying offense[.]” *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (citation omitted), and the “elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.” *State v. Melton*, ___ N.C. ___, ___, 821 S.E.2d 424, 428 (2018).² The phrase “conspiracy to commit attempted first degree murder” sounds discordant to the lawyerly ear because it suggests the conspirators must have intended to fail to commit a crime. While two

² We note that decisions by our Supreme Court do not consistently identify failure as a discrete third element of attempt. *See, e.g., State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (“The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.” (emphasis added) (citations omitted)).

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or more people who collude to “make an attempt on” another’s life or agree to “try” and kill someone have engaged in a criminal conspiracy, an indictment alleging a conspiracy “to commit the felony of Attempted First Degree Murder” strikes a less natural tone.

The State argues intent to fail is not in actuality an essential element of conspiracy to commit attempted first degree murder, contending that if the implication of an intent to fail is removed, so too is any disharmony in the indictment.

Crucially, conspiracy is a common law crime in North Carolina, *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991), as is attempted first degree murder. *Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing, apparently for the first time outside of *dicta*, the existence of the crime). We may hold failure is not an essential element of conspiracy to commit attempted first degree murder—as a species of the common law crime of conspiracy—if our Supreme Court’s precedents so indicate. *Cf. State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) (holding the Supreme Court “possesses the authority to alter judicially created common law when it deems it necessary”); *State v. Lane*, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994) (observing that this Court lacks the authority to modify or abandon the accepted common law).

Numerous decisions from our Supreme Court support the conclusion that failure is not strictly necessary to complete the crime of attempt.³ In *State v. Baker*, 369 N.C. 586, 799 S.E.2d 816 (2017), a defendant was tried and convicted of attempted rape, even though the substantial evidence introduced at trial showed that the rape was completed. 369 N.C. at 592-93, 799 S.E.2d at 820. This Court held that the trial court erred in denying the defendant's motion to dismiss that charge, reasoning that "while there may have been substantial evidence for the jury to find defendant guilty of rape . . . there was insufficient evidence to support his conviction for attempted rape." *State v. Baker*, 245 N.C. App. 94, 99, 781 S.E.2d 851, 855 (2016). Our Supreme Court reversed that decision and held that "evidence of a completed rape is sufficient to support an attempted rape conviction." *Baker*, 369 N.C. at 597, 799 S.E.2d at 823.

Although the Supreme Court recited the elements of attempt as including failure, it also favorably cited *State v. Primus*, 227 N.C. App. 428, 430-32, 742 S.E.2d 310, 312-13 (2013), in which we "rejected the defendant's argument that guilt of the crime of attempted larceny requires that the defendant's act supporting the attempt charge fall short of the completed offense in order to be sufficient to support an attempt conviction, a conclusion that accords with the modern view concerning

³ Stated differently, the cases discussed *infra* suggest that a successful premeditated killing of a human being is a necessary element of first degree murder, but not for attempted first degree murder.

criminal liability for attempt.” *Baker*, 369 N.C. at 596-97, 799 S.E.2d at 823 (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5, at 230 (2d ed. 2003)).

It also favorably quoted this Court’s statement in *State v. Canup*, 117 N.C. App. 424, 451 S.E.2d 9 (1994), that “ ‘nothing in the philosophy of juridicial [sic] science requires that an attempt must fail in order to receive recognition.’ ” *Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11). Thus, *Baker* suggests that while failure precludes a conviction for a completed crime, it is not *necessary* to support a conviction for criminal attempt of that same crime.

Such an understanding is consistent with the common law’s treatment of attempted first degree murder as a lesser included offense of first degree murder. *See Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing attempted murder as a lesser included offense of murder). Our Supreme Court has long employed “a definitional test for determining whether one crime is a lesser included offense of another crime.” *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011) (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 377 (1982)). “[T]he test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense.” *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847. “In other words, *all* of the essential elements of the

lesser crime must also be essential elements included in the greater crime.” *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379 (emphasis added), *overruled in part on other grounds by Collins*, 334 N.C. at 61, 431 S.E.2d at 193.

Thus, a conclusion that failure to kill is an essential and necessary element of attempted first degree murder cannot be squared with the definition of a lesser included offense, as failure is most certainly not an element of the greater offense of a completed first degree murder. *Cf. State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (reciting the elements of both first degree murder and the lesser included offense of attempted first degree murder).

Other states have held conspiracy to commit an attempted crime is a cognizable offense where the common law crime of attempt does not require failure as an essential element. As pointed out by Defendant,⁴ Maryland recognizes the existence of the crime of conspiracy to attempt first degree murder. *Stevenson v. State*, 423 Md. 42, 52 (2011) (“[C]onspiracy to attempt a first degree murder’ is a cognizable offense.” (citing *Townes v. State*, 314 Md. 71 (1988))). In *Townes*, Maryland’s highest appellate court reviewed an indictment for “conspiracy to attempt to commit the crime of obtaining money by false pretenses[,]” which it held charged a

⁴ Defendant cites to an unpublished decision of Maryland’s intermediate appellate court, *Knuckles v. State*, 2018 WL 2113969 (Md. Ct. Spec. App. May 8, 2018), for this proposition. *Knuckles*, however, relied exclusively on published cases from Maryland’s highest court. Our discussion, therefore, focuses on those published cases rather than on *Knuckles* itself.

valid crime. 314 Md. at 75. The court in *Townes* first recognized that the indictment was technically sufficient to allege conspiracy:

If we mechanically assemble the building blocks of the crime of conspiracy in the context of this case, it would seem that the crime of conspiracy to attempt to commit the crime of obtaining money by false pretenses fits the established mold. Obtaining money by false pretenses is a crime. Attempting to obtain money by false pretenses is a separate, self-standing crime. Accordingly, if a criminal conspiracy consists of an agreement to commit a crime, and an attempt to obtain money by false pretenses is a crime, it follows that the crime of conspiracy to attempt to obtain money by false pretenses fits the legal definition of conspiracy.

Id. at 75-76 (citations omitted). The court in *Townes* then went on to address and reject as inapplicable the argument—also presented in this case—that one cannot criminally intend not to complete a crime:

Townes' argument fails to take into consideration an established principle of Maryland law. In this State, unlike a minority of other states, failure to consummate the intended crime is *not* an essential element of an attempt.

....

The logical inconsistency postulated by Townes simply does not exist in this State. A person intending to commit a crime intends also to attempt to commit that crime. The intent to attempt is viewed as correlative to and included within the intent to consummate. Accordingly, one who conspires to commit a crime concurrently conspires to attempt to commit that crime.

Id. at 76-77 (citations omitted).

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Our Supreme Court’s decisions recounted *supra* align with the reasoning espoused in *Townes*. *Cf. Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (holding evidence of a completed rape is sufficient to support a conviction for attempted rape in part because “[t]he completed commission of a crime must of necessity include an attempt to commit the crime’ ” (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11) (alteration in original)).

Although Defendant relies on several decisions by other courts that have reached the opposite result, those decisions all arose in jurisdictions where either the crimes in question were statutorily delineated or failure was considered by the deciding court to be a necessary element of conspiracy to attempt. *See, e.g., People v. Iniguez*, 96 Cal. App. 4th 75, 79 (2002) (holding conspiracy to commit attempted murder was not a crime where the attempt statute provided “ ‘[e]very person who attempts to commit any crime, but fails, . . . ’ is guilty of a crime” (citation omitted)); *Wilhoite v. State*, 7 N.E.3d 350, 353 (Ind. Ct. App. 2014) (relying on *Iniguez* to hold that conspiracy to commit attempted robbery was not a cognizable crime because “colloquially speaking, to ‘attempt’ a crime is to ‘try’ without actually completing the crime” (citation omitted)); *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (distinguishing *Clay*, holding that Congress did not intend to create a crime of conspiracy to attempt to commit federal drug crimes under 21 U.S.C. §§ 846 & 963, and observing that conspiracy to attempt to fail is “the height of absurdity”).

In short, given that failure need not actually be shown or proven to convict a defendant of attempt, *Baker*, 369 N.C. at 596, 799 S.E.2d at 822, and that attempted first degree murder is a lesser included offense of first degree murder, *Collins*, 334 N.C. at 59, 431 S.E.2d at 191, the charge of conspiracy to commit attempted first degree murder does not require the state to prove defendant intended to fail to commit the attempted crime itself. As a result, we hold that conspiracy to commit attempted first degree murder is a cognizable offense and, with all other elements of conspiracy appearing in the indictment, was adequately charged in this case.

C. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss all charges for insufficiency of the evidence, contending that the evidence shows only that he fired a pellet gun in an attempt to scare Deputy Stone away. Such evidence, Defendant contends, defeats every element of attempted first degree murder. Defendant also applies that same argument to the conspiracy charge and reasserts that the State was required to—and could not—prove an intent to fail.

Defendant is incorrect in his claim that the evidence shows only that he fired a pellet gun with an intent to scare off Deputy Stone. Deputy Stone testified that she saw Defendant point a gun at her face and that she heard a gunshot after ducking behind her dashboard. Though it is true that she did not directly observe where the gun was pointed at the time it was fired, she further testified that this series of events

happened “fast[,]” and testified on cross-examination that “once I saw the gun at my face, I yelled out, ‘Oh, s--t,’ and I started to go down. . . . [A]s I’m going down, I hear the gunshot.”

While it is possible that the gun was not pointed at Deputy Stone when Defendant pulled the trigger, the jury could draw a reasonable inference from Deputy Stone’s testimony to find the gun remained pointed at her when she heard it seconds later. Contrary to Defendant’s argument, such an inference is no less reasonable because Deputy Stone took quick evasive action in the interest of self-preservation. Mr. Pratt, who was the getaway driver during the chase, also provided the following testimony indicating that Defendant discharged a firearm rather than a pellet gun: “I heard [Mr. Holmes] say ‘Shoot, bro. Shoot.’ . . . He had to be talking to [Defendant]. . . . I just looked at Holmes. I heard [a] boom. . . . I want to say [Defendant] fired the shot.”

Further, Mr. Pratt was unequivocal in his testimony that Mr. Holmes did not have a gun in his hand when the shot rang out. Our standard of review on a motion to dismiss compels us to adopt the reasonable inference most favorable to the State from this evidence, *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, which, in this case, is an inference that Defendant aimed and fired a gun at Deputy Stone following instruction from Mr. Holmes. Defendant’s argument is overruled.

We likewise hold that the trial court did not err in denying the motion to dismiss as to the conspiracy charge. The jury could reasonably infer Defendant, in a conspiracy with Mr. Holmes, attempted to kill Deputy Stone by firing a gun at her. Because intentional failure is not necessary to a charge of conspiracy to commit attempted murder, as explained *supra*, the State was not required to demonstrate Defendant intended to fail in his attempt to take Deputy Stone's life. Defendant's argument on this point is likewise overruled.

D. Sentencing

At oral argument, Defendant conceded that he could not appeal his sentences as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal. *See State v. Daniels*, 203 N.C. App. 350, 354-55, 691 S.E.2d 78, 81-82 (2010) (dismissing a defendant's appeal from sentencing under N.C. Gen. Stat. § 15A-1444(a1) when defendant's sentence in the presumptive range nonetheless overlapped with the aggravated range).

III. CONCLUSION

We hold the indictment in this case validly charged Defendant with a criminal conspiracy. The evidence introduced at trial was sufficient to submit both charges of

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attempted murder and conspiracy to the jury. Defendant's appeal from sentencing is dismissed for want of jurisdiction. We find no error in the jury's verdicts or in the judgments entered thereon.

DISMISSED IN PART; NO ERROR IN PART.

Judge TYSON concurs.

Judge BERGER concurs by separate opinion.

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BERGER, Judge, concurring in separate opinion.

I concur with the majority. However, I write separately because I would reach the same result through different reasoning.

“[T]he primary purpose of an indictment is to enable the accused to prepare for trial.” *State v. Silas*, 360 N.C. 377, 382, 627 S.E.2d 604, 607 (2006) (citation and quotation marks omitted). “The indictment must also enable the court to know what judgment to pronounce in case of conviction.” *State v. Nicholson*, 78 N.C. App. 398, 401, 337 S.E.2d 654, 657 (1985) (citation and quotation marks omitted). It is well-settled in North Carolina that any allegations in an indictment beyond those essential to the crime sought to be charged “are irrelevant and may be treated as mere surplusage.” *State v. Bowens*, 140 N.C. App. 217, 224, 535 S.E.2d 870, 875 (2000). So long as surplusage contained within an indictment does not prejudice the defendant, such language can properly be ignored. *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 745-46 (1985).

“A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means.” *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). Notably, “a conspiracy indictment need not describe

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the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime.” *Nicholson*, 78 N.C. App. at 401, 337 S.E.2d at 657. To convict a defendant of conspiracy, the State must prove beyond a reasonable doubt that the defendant was member to an agreement to perform every element of the underlying offense. *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

The offense of first-degree murder is established and defined by Section 14-17 of the North Carolina General Statutes. N.C. Gen. Stat. § 14-17 (2017). In the present case, Defendant was indicted for “conspir[ing] with Gerald Holmes to commit the felony of Attempted First Degree Murder, N.C.G.S. 14-17.” Accordingly, the indictment was sufficient to allow Defendant to prepare for trial because it contained the two essential elements of the crime of conspiracy: (1) an agreement with Gerald Holmes, and (2) to commit the unlawful act of first-degree murder pursuant to Section 14-17. The inclusion of the word “attempted” is irrelevant to the indictment and may be treated as surplusage. Moreover, so long as the inclusion of the word “attempted” in the indictment did not prejudice Defendant at trial, which it did not, this surplusage can properly be ignored.

For a defendant to be found guilty of the common law offense of attempted first-degree murder, the State must prove the following elements beyond a reasonable doubt “(1) the intent to commit [first-degree murder], and (2) an overt act done for

that purpose which goes beyond mere preparation, but (3) falls short of the completed offense.” *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citation and quotation marks omitted). At trial, following the conclusion of the State’s case-in-chief, Defendant did not present any evidence in his own defense. Relying on the charging indictment, the trial court subsequently instructed the jury on felonious conspiracy to attempt first-degree murder.

As noted by the majority, the State presented sufficient evidence by which a reasonable juror could conclude that Defendant satisfied the first element of conspiracy to commit attempted first-degree murder. For Defendant to satisfy this first element, the jury was required to find, beyond a reasonable doubt, that Defendant was member to an agreement with “the intent to commit first-degree murder.” By necessity, then, the jury must also have found, beyond a reasonable doubt, that Defendant participated in an agreement with the intent to perform every element of first-degree murder. Therefore, the State satisfied its burden of proving that Defendant was member to a conspiracy to commit first-degree murder.

As a result of Defendant being found guilty of conspiracy to commit attempted first-degree murder, he was sentenced for a Class C felony instead of a B2 felony. N.C. Gen. Stat. §§ 14-2.4; 14-2.5; 14-7 (2017). Thus, Defendant is not entitled to relief on appeal based upon the inclusion of the word “attempted” in his indictment because

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the word's inclusion did not prejudice Defendant at trial. Any error stemming from this surplusage in the indictment was in Defendant's favor.