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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-969

Filed: 15 December 2020

Guilford County, Nos. 15 CRS 93186-88, 19 CRS 25103-07

STATE OF NORTH CAROLINA

v.

CHAUNCEY JAMAL SLADE, Defendant

Appeal by Defendant from judgments entered 31 January 2019 by Judge David Hall in Superior Court, Guilford County. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Kimberly P. Hoppin, for Defendant-Appellant.

McGEE, Chief Judge.

Chauncey Jamal Slade (“Defendant”) appeals from judgment entered upon his convictions on two counts of first-degree murder, five counts of discharging a firearm into an occupied dwelling, and one count of discharging a weapon into an occupied vehicle. Defendant contends that the trial court erred in: (1) “entering judgment and conviction” on an offense not alleged in the indictment; (2) failing to arrest judgment

on one of the felony charges underlying the felony murder convictions; (3) admitting evidence that Defendant invoked his right to remain silent during a custodial interrogation; and (4) imposing a *de facto* life sentence without parole (“LWOP”). We hold that the trial court erred in entering judgment on an offense not alleged in the indictment and in failing to arrest judgment on the felony charges underlying the felony murder convictions, and we remand for resentencing.

I. Factual and Procedural History

Defendant was indicted for two counts of first-degree murder, four counts of discharging a weapon into an occupied dwelling, and two counts of discharging a weapon into an occupied motor vehicle on 18 April 2016. Defendant was tried non-capitally during the 21 January 2019 term of Superior Court, Guilford County. At trial, Kenyatta Hampton (“Ms. Hampton”), testified for the State and said she and her cousins, Jeffrey Hampton (“Mr. Hampton”), and Ernest Cuthbertson (“Mr. Cuthbertson”), were sitting in a Nissan Sentra parked on the street in front of Ms. Hampton’s home in Greensboro, during the evening of 2 December 2015. According to Ms. Hampton, she was sitting in the front passenger seat, Mr. Hampton was sitting in the driver’s seat, and Mr. Cuthbertson was sitting in the back seat behind the driver. Ms. Hampton was asked why they were sitting in the car and she testified that they “usually sit in the car sometimes in case a sale walk up the street. To sit

there relax, to talk. Could be smoking some weed, smoking cigarettes, just sitting there observing the street, observing where I live. I felt safe there.”

Ms. Hampton testified that Mr. Cuthbertson, who was a member of the Bloods gang in Greensboro, said he was concerned about his safety because he had lost a gun given to him by a fellow gang member after an argument earlier that day. The gun had been taken by a person Mr. Cuthbertson knew, known as Lil Rodney. While they were sitting in the car, Mr. Cuthbertson spoke on the phone with fellow gang members and Ms. Hampton said he told “whoever was on the other end that the gun had gotten taken and he was gonna get it back.”

Three men approached the Nissan and Mr. Cuthbertson said “[o]h, that look like [Defendant]. That is [Defendant].” When the three men reached the car, Ms. Hampton also recognized Defendant, who leaned in to the driver’s side window and began speaking to the people in the car. Ms. Hampton did not recognize the other two men who were outside of the car with Defendant. Ms. Hampton testified that Defendant was also a member of the Bloods gang, and Mr. Cuthbertson was Defendant’s “Big Homie”—his mentor—within the gang. Defendant was 16 years old at the time.

Ms. Hampton testified that Defendant leaned into the driver’s side window and said “[w]e looking for [Mr. Cuthbertson]. We heard he in trouble.” Mr. Hampton turned on an interior light so that Defendant could see Mr. Cuthbertson in the back

seat. Defendant asked Ms. Hampton if “[her] homeboy got the gun[,]” referring to Lil Rodney, who had been seen “at the store earlier[.]” Ms. Hampton testified that Defendant began talking with Mr. Cuthbertson, who “was in and out of the car,” talking with the men outside the car. During the encounter, Mr. Cuthbertson acted anxious and upset, and while conversing with the men outside the car Mr. Cuthbertson said “you-all can’t help me.” Defendant asked Mr. Cuthbertson “[s]o you don’t—you don’t have the strap? You ain’t got it with you? You ain’t got the strap?” After Mr. Cuthbertson told Defendant that he did not have the gun, the men outside the car “started shooting.” Ms. Hampton testified that she felt Mr. Hampton “slump[] over on [her],” and when she realized what had happened, she jumped out of the car screaming and ran to her next-door neighbor’s house. Ms. Hampton testified that when she saw police coming down the street, she left her neighbor’s house to check on Mr. Hampton, and saw Mr. Cuthbertson “just laying there with his feet sticking straight up” on Ms. Hampton’s front porch. Mr. Hampton still had vital signs when the police arrived, but was pronounced dead at the scene; an autopsy showed that he died from a gunshot wound to his pelvis. Mr. Cuthbertson had been shot multiple times in the chest, abdomen, and both arms.

Investigator Leslie Popik testified that she responded to the scene and observed a bullet hole in the driver’s side door of the Nissan, the rear passenger window was broken out, and there were two spent projectiles and a bullet fragment

on the passenger side rear seat and floorboard of the car. Investigator Popik also observed damage to Ms. Hampton's residence. She found one bullet hole in the left frame of the front door of the house, one in the bottom of the front door, two in the siding to the right of the door, and one through a window on the front of the house. Investigator Popik testified that projectiles also struck the interior of the house, including the walls in the living room, dining room, kitchen, and a bathroom mirror. Ms. Hampton's brother testified that he and his niece were inside the residence at the time of the shooting. Investigator Popik collected a total of thirteen shell casings from the scene.

Investigator J.D. McNeal testified he spoke with Ms. Hampton at the scene where she described two people who had walked up and began firing into the car, stating one was short and named Chauncey, and the other had dreads. Ms. Hampton was taken to the police station, where she was interviewed by Corporal Sherod Hairston. Ms. Hampton explained that she knew that Defendant was outside of the car before the shooting because she recognized him from meeting him earlier in the summer and from seeing him earlier on the day of the shooting. During a follow-up interview on 7 December 2015 with Detective Mary Nero, Ms. Hampton said she was 100 percent sure that Defendant was beside the Nissan car door at the time of the shooting.

Detective Nero testified that she located Defendant at the Guilford County Jail on 16 December 2015 and she and Corporal Mike Matthews conducted an interview with him. Detective Nero read Defendant his *Miranda* rights, and Defendant indicated that he understood them and agreed to talk to the officers. The interview was video recorded. When Detective Nero asked Defendant about Mr. Cuthbertson, Defendant stated “I heard he got shot on Facebook.” Detective Nero testified she told Defendant that she was investigating the deaths of Mr. Cuthbertson and Mr. Hampton, and Defendant had been identified as a suspect in the investigation. Defendant told Detective Nero that the last time he had seen Mr. Cuthbertson was at a store the night before Mr. Cuthbertson’s death. When Detective Nero asked how often Defendant usually saw Mr. Cuthbertson, Defendant said that he saw Mr. Cuthbertson almost daily because of their mentor-mentee relationship in the gang. Despite this close relationship, Detective Nero testified Defendant claimed to have minimal knowledge about what had happened to Mr. Cuthbertson.

Detective Nero asked Defendant if he ever carried a gun. Defendant “laughed and shook his head no,” to which Detective Nero replied by asking Defendant about a photo from his Facebook page where he was posing with a gun, posted about a week before the shooting and captioned “[t]his brand new Glock, I’m ready to test this b-.” Detective Nero testified Defendant replied that it was “just a BB gun.” After Detective Nero informed Defendant that an eyewitness had placed him at the scene

of the shooting and that the Nissan at the scene had been fingerprinted, Defendant again denied being there. When Detective Nero asked why Defendant would be implicated if “big homies and little homies [were] supposed to have a bond[,]” Defendant stated that regarding the bond, “[y]ou ride together, you die together.” Detective Nero said that after a few more questions, Defendant stated that he did not want to speak anymore because he thought Detective Nero and Corporal Matthews were “getting mad with him,” and the interview concluded.

Detective Nero testified she later accessed the jail’s Pay Tel telephone recording system and listened to a phone call Defendant made to his mother about two and a half hours after the interview. Detective Nero testified Defendant’s mother made a three-way phone call to another male, and during the call she noted that Defendant stated that he was being investigated, and that “[w]hat they saying is accurate. They got fingerprints on [the] car. I ain’t sleeping too well.”

Detective Nero testified warrants were served on Defendant at the jail on 18 December 2015. Later that day, Detective Nero listened to another recorded phone call between Defendant and his mother, during which Defendant asked his mother to make a three-way phone call with Mark Henderson, also known as “Sparks.” Detective Nero recognized the phone number Defendant provided for “Sparks” as the last number appearing in Mr. Cuthbertson’s call log history on the

night of the shooting. During the three-way phone call, Defendant discussed his bond, and stated that if he was bonded out of jail, he would leave the area.

Defendant moved to dismiss all charges for insufficient evidence at the close of the State's evidence. Defendant did not present evidence and again moved to dismiss at the close of all the evidence. The trial court denied both motions to dismiss.

The jury returned guilty verdicts on two counts of first-degree murder, five counts of discharging a firearm into an occupied dwelling, and one count of discharging a weapon into an occupied vehicle. The trial court sentenced Defendant to two consecutive terms of life with the possibility of parole for the first-degree murder convictions, followed by two consecutive terms of 66 to 91 months imprisonment for five counts of discharging a weapon into an occupied dwelling, and a fifth consecutive term of 24 to 41 months imprisonment on one count of discharging a weapon into a motor vehicle. Defendant gave oral notice of appeal at the 31 January 2019 sentencing hearing.

II. Analysis

Defendant contends that the trial court erred in: (1) "entering judgment and conviction" "where the jury was instructed on and [Defendant] was convicted of, an offense not alleged in the indictment"; (2) failing to arrest judgment on felony charges underlying the felony murder convictions; (3) admitting evidence that Defendant

invoked his right to remain silent; and (4) imposing a *de facto* life sentence without parole.

A. Offense Not Alleged in Indictment

Defendant argues that the trial court erred by entering judgment and sentencing him in 19 CRS 25103 because he was convicted of an offense not alleged in the indictment. At trial, Defendant did not specifically raise the issue of fatal variance between the indictment and the proof presented by the State. Defendant also did not object to the jury instructions in 19 CRS 25103 for including an offense not alleged in the indictment.

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, *cert. dismissed*, 366 N.C. 405, 735 S.E.2d 329 (2012) (citing *State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981)). “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). Defendant has specifically requested this Court to review this issue for plain error.

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723

S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). For an error to be fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted). In order to constitute plain error justifying a new trial, the error must “be so fundamental that [the] defendant, in light of the evidence, the issues and the instructional error, could not have received a fair trial.” *State v. Abraham*, 338 N.C. 315, 345, 451 S.E.2d 131,147 (1994). “It is generally prejudicial error for the trial court to instruct the jury on a theory of [the] defendant’s guilt that is not supported by the evidence.” *State v. Poag*, 159 N.C. App. 312, 322; 583 S.E.2d 661,668, *disc. review denied*, 357 N.C. 661,590 S.E.2d 857 (2003).

It is well established that in North Carolina, “a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment.” *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979) (citations omitted). “It is also settled that a fatal variance between the indictment and proof is properly raised by . . . a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment.” *Id.* A fatal variance is “a variance regarding an essential element of the offense.” *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). When an averment in an indictment is not

necessary in charging the offense, it will be “deemed to be surplusage.” *Id.* (quoting *State v. Stallings*, 267 N.C. 405, 407, 148 S.E.2d 252, 253 (1966)).

In *Pickens*, the defendant challenged an indictment alleging that the defendant “did discharge a shotgun, *a firearm*, into the dwelling house . . . while it was actually occupied[,]” when the evidence established that a fatal shot had come from a handgun, not a shotgun. *Id.* (emphasis in original). Our Supreme Court overruled Defendant’s assignment of error because the essential element of discharging a firearm was alleged, the averment to the shotgun was not necessary and was mere surplusage. *Id.*

In *State v. Curry*, this Court considered a similar challenge, where the defendant was indicted for “[d]ischarging a firearm into occupied property,” and although the indictment identified the crime charged as a Class E felony, the defendant was ultimately convicted of a Class D felony. *State v. Curry*, 203 N.C. App. 375, 380, 692 S.E.2d 129, 135 (2010) (referencing charges pursuant to N.C. Gen. Stat. § 14-34.1). The defendant argued that he was entitled to resentencing upon a Class E felony because the indictment alleged that he discharged the weapon into an occupied “residence” rather than a “dwelling.” This Court disagreed, and concluded that the term “residence” as used in the indictment was synonymous with “dwelling” as used in N.C. Gen. Stat. § 14-34.1(b), and that the specific description of the crime

put defendant on notice that the crime charged was actually a Class D felony under N.C. Gen. Stat. § 14-34.1(b). *Id.* at 382, 692 S.E.2d at 136.

In the present case, the indictment for 19 CRS 25103 charged an offense of discharging a firearm into an occupied motor *vehicle*. N.C. Gen. Stat. § 14-34.1(a) (2019) (emphasis added). The jury, however, was instructed that “in case number 25103, the defendant has been charged with discharging a firearm into an occupied *dwelling*.” (emphasis added). An essential element of the offense charged in the indictment—shooting into an occupied motor vehicle—was missing from the offense for which Defendant was convicted. This case can be distinguished from *Pickens* because the indictment did not include any unnecessary surplusage that affected the conviction, but instead charged a wholly different offense. This case is also distinct from *Curry* because the variance is not between two synonymous terms identifying an occupied property—the variance is between the terms “occupied motor vehicle” and “occupied dwelling,” which are not synonymous. Accordingly, Defendant was convicted of an offense that was not charged in the bill of indictment, with a fatal variance regarding an essential element of the offense. Based on this fatal variance, we reverse Defendant’s conviction in 19 CRS 25103.

B. Arresting Judgment on Underlying Felony Charge

Defendant argues that the trial court erred by “failing to arrest judgment on one of the felony charges underlying the felony murder conviction, in violation of the

merger rule and the state and federal prohibitions against double jeopardy.” Defendant did not object or otherwise argue this issue before the trial court, and requests that this Court exercise its discretion to invoke Rule 2 of the N.C. Rules of Appellate Procedure to reach the merits of his argument. “Whether to arrest judgment is a question of law and questions of law are reviewed *de novo* on appeal.” *Curry*, 203 N.C. App. at 378, 692 S.E.2d at 134 (citation and internal quotation marks omitted).

Our Supreme Court has firmly established that “a defendant may not be punished both for felony murder and for the underlying, ‘predicate’ felony, even in a single prosecution.” *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). “The underlying felony supporting a conviction for felony murder merges into the murder conviction[,]” and any judgment on the underlying felony must be arrested. *State v. Barlowe*, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994) (citation omitted). The merger rule requires the trial court to arrest judgment on “at least one of the underlying felony murder convictions if two separate convictions supported the conviction for felony murder.” *State v. Dudley*, 151 N.C. App. 711, 716, 566 S.E.2d 843, 847 (2002) (remanding with instructions to arrest judgment in one of the two felonies supporting the felony murder conviction).

Where the trial court's jury instructions did not specify which of the multiple felonies were to be considered as the underlying felony for purposes of the felony

murder conviction, it was within the trial court's discretion to select which felony conviction would serve as the underlying felony. *State v. Ridgeway*, 185 N.C. App. 423, 436–37, 648 S.E.2d 886, 896 (2007) (citation omitted). The consolidation of multiple offenses “does not put to rest double jeopardy issues, because the separate convictions may still give rise to adverse collateral consequences.” *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

“By failing to move in the trial court to arrest judgment on either conviction or otherwise to object to the convictions or sentences on double jeopardy grounds,” Defendant has waived his right to raise this issue on appeal. *State v. Coleman*, 161 N.C. App. 224, 234, 587 S.E.2d 889, 896 (2003) (quoting *State v. McLaughlin*, 321 N.C. 267, 272, 362 S.E.2d 280, 283 (1987)). In *Coleman*, the defendant was convicted for one count of first-degree felony murder, three counts of armed robbery, and one count of attempted armed robbery, but failed to object to the trial court’s decision to arrest judgment on only the attempted armed robbery conviction. *Id.* Although the issue was not preserved, this Court considered the merits of the defendant’s argument pursuant to Rule 2, holding that it was in the discretion of the trial court to choose which felony would serve as the underlying felony for sentencing purposes, and the trial court did not err in arresting judgment on the defendant’s attempted armed robbery conviction. *Id.* at 236, 587 S.E.2d at 897. We consider the merits of Defendant’s argument pursuant to Rule 2, as this Court did in *Coleman*.

In the present case, unlike in *Coleman*, the trial court did not merge *any* underlying felony into either felony murder conviction and did not arrest judgment on any underlying felony. This was error. The State concedes that should this Court consider the merits of Defendant's argument pursuant to Rule 2, it would be appropriate to remand this issue to the trial court with instructions to arrest judgment on an underlying felony for each of the two felony murder convictions. We remand to the trial court to arrest judgment on an underlying felony for each of the murder convictions and for resentencing.

C. Evidence of Invoking Right to Remain Silent

Defendant next contends that the trial court erred in allowing the jury to consider evidence that Defendant invoked his right to remain silent, specifically allowing the jury to view a video portion of the interview with Detective Nero, when Defendant stated that he did not want to talk anymore. Defendant did not object to this line of testimony when the evidence was admitted at trial and requests that this Court review this issue for plain error.

An issue not preserved by objection noted at trial and not deemed preserved by rule or law may be reviewed for plain error. N.C. R. App. P. 10(a)(4). "In deciding whether a defect in a jury instruction constitutes 'plain error,' [this Court] must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d

375, 378-79 (1983) (citation omitted). To reach the level of “plain error” contemplated in *Odom*, the error in the trial court’s jury instructions must be “so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

“It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution.” *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001). “A defendant's exercise of this right may not be used against him, and any reference by the State to a defendant's [silence] violates that defendant's constitutional rights.” *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840 (2001).

“Consideration of the way in which the evidence was presented or the prosecutor's use of the evidence is relevant to whether admission of the testimony at issue constituted plain error[.]” *State v. Richardson*, 226 N.C. App. 292, 301, 741 S.E.2d 434, 441 (2013) (quoting *State v. Moore*, 366 N.C. 100, 105, 726 S.E.2d 168, 173 (2012)). Introduction of a defendant’s invocation of the right to remain silent may be mitigated if the prosecutor does not emphasize, capitalize on, or directly elicit prohibited responses. *See State v. Elmore*, 337 N.C. 789, 792-93, 448 S.E.2d 501, 502-03 (1994) (holding error harmless beyond a reasonable doubt where a federal agent

testified that the defendant said he wanted to consult with an attorney before talking about the matter; and noting that the violation, if any, was *de minimis*, that the statement was not solicited by the prosecutor, and that the prosecutor did not cross-examine the defendant about exercising his right to remain silent, nor did he refer to the statement in closing arguments); *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (holding no plain error where the prosecutor asked a police officer if the defendant spoke or talked to him, and noting that the officer's comments were "relatively benign" and that the prosecutor did not emphasize that the defendant did not speak with law enforcement after his arrest). Where the evidence is brief and passing in nature in the context of the entire trial, "the evidence is not likely to have 'tilted the scales' in the jury's determination of defendant's guilt or innocence." *State v. Moore*, 366 N.C. 100, 107, 726 S.E.2d 168, 174 (2012) (citation omitted).

In the present case, Defendant originally agreed to speak with law enforcement, and changed his mind after having been interviewed for 45 minutes. The only evidence that Defendant invoked his right to silence that was admitted at trial was Defendant's statement made at the very end of the interview video. The State did not introduce any additional evidence emphasizing Defendant's decision to end the interview and Detective Nero's testimony merely explained the sequence of events by which the interview began and ended. The State did not ask further questions about Defendant's decision to end the interview. The trial court ruled that

all statements made by Defendant after his statement ending the interview were inadmissible and issued a limiting instruction before playing the interview video. Additionally, the portion of video evidence and Detective Nero's testimony were *de minimis* in the context of the entire trial and are not likely to have "tilted the scales" in the jury's deliberation. For these reasons, we hold that the trial court did not plainly err in admitting the video evidence of Defendant ending the interview and Detective Nero's descriptive testimony.

D. *De Facto Life Without Parole Sentence*

Defendant contends that the consecutive sentences entered in his case constitute a disproportionate *de facto* punishment of life without parole in violation of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution. Defendant further contends that the combined effect of N.C. Gen. Stat. §§ 15A-1340.19A and 19B(a)(1) ("the *Miller*-fix statute") operates to impose a *de facto* life without parole sentence as applied to him without the constitutionally required individualized sentencing consideration.

In viewing the particular facts and issues determined in this case, and because we are (1) reversing Defendant's conviction in 19 CRS 25103, (2) remanding to the trial court with instructions that it arrest judgment on an underlying felony for each of the two felony murder convictions and (3) for resentencing, we need not address Defendant's final argument as a new sentence may be imposed. *See State v.*

Santillan, 259 N.C. App. 394, 403, 815 S.E.2d 690, 696 (2018); *State v. Edwards*, 209 N.C. App. 206, 707 S.E.2d 263, 2011 WL 43468, *2 (2011) (unpublished) ("Defendant next argues that the habitual felon statute, as applied to him, constitutes cruel and unusual punishment. However, because the matter is being remanded for resentencing, we do not address this issue at this time.").

III. Conclusion

For the foregoing reasons, we affirm the trial court's admission of Detective Nero's descriptive testimony and the interview video evidence. We hold that Defendant was convicted of an offense that was not charged in the bill of indictment, with a fatal variance regarding an essential element of the offense and we reverse Defendant's conviction in 19 CRS 25103. Also, we remand to the trial court and instruct that it arrest judgment on an underlying felony for each of the two felony murder convictions and for resentencing in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).