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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-644

No. COA20-669

Filed 16 November 2021

Lincoln County, Nos. 17CRS52083, 17CRS52087-92, 19CRS195-96

STATE OF NORTH CAROLINA

v.

TERRY LAMONT MOORE, Defendant.

Appeal by Defendant from judgment entered 27 September 2019 by Judge Gregory R. Hayes in Lincoln County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Paul F. Herzog for the Defendant.

JACKSON, Judge.

¶ 1 Defendant Terry Lamont Moore ("Defendant") appeals from judgments entered after a jury found him guilty of attempted first-degree murder, four counts of attempted robbery with a dangerous weapon, two counts of discharging a weapon into an occupied dwelling, discharging a weapon into an occupied vehicle in operation, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm

by a felon. Defendant argues that (1) defense counsel committed ineffective assistance of counsel by making unauthorized admissions of guilt during his opening statement; (2) defense counsel committed ineffective assistance of counsel by making unauthorized admissions of guilt during his closing argument; (3) the trial court erred by denying Defendant's motion to dismiss the discharging a weapon into an occupied vehicle in operation charge; and (4) a clerical error in one judgment needs correction. After careful review, we remand to the trial court for further proceedings.

I. Factual and Procedural History

¶ 2 The State's evidence tended to show the following: on 4 May 2017, M. Yarborough ("Mr. Yarborough") and V. Currence ("Ms. Currence"), who were in a dating relationship, drove from Gastonia to Raleigh, North Carolina to pick up Defendant. On the way back to Gastonia, the group stopped in Lincolnton, North Carolina in the early morning hours of 5 May 2017, where Mr. Yarborough and Defendant met with D. Duncan ("Mr. Duncan"). According to Ms. Currence, Mr. Duncan was supposed to help Mr. Yarborough identify someone to rob in the area, and Defendant was going to help Mr. Yarborough commit the robbery.

¶ 3 On 6 May 2017, D. Blackburn ("Mr. Blackburn") was at his girlfriend R. Coulter's ("Ms. Coulter") mobile home in Lincolnton. The house had two bedrooms, one bathroom, a kitchen, a living room, and a front and a back porch. Also present at the house were two friends of Mr. Blackburn, A. Watson ("Mr. Watson") and J.

Mungro ("Mr. Mungro"). Ms. Coulter's house was a known location for purchasing drugs.

¶ 4 That morning, Ms. Coulter was getting ready for work. At some point, J. Hall ("Mr. Hall"), another friend of Mr. Blackburn, came to the house. Accompanying Mr. Hall were R. Leonard ("Ms. Leonard") and his infant son. Shortly after arriving, Mr. Hall left to go buy deodorant for Mr. Blackburn, leaving his baby at the house in the care of Mr. Blackburn. After returning from the store, Mr. Hall went inside the house to pick up his son while Ms. Leonard stayed in the car. Mr. Hall buckled the baby into his car seat and then walked back in the house one more time to say goodbye. Ms. Leonard laid down in the backseat next to the baby because she was not feeling well. Mr. Hall left the car running while he went back and forth to the house.

¶ 5 While Mr. Hall was still inside the house the second time, Ms. Leonard saw a Dodge SUV pull into the driveway. A man got out of the car, went to the front door, and then motioned for a second man to get out of the car. The men then went inside the house. The two men were later identified as Defendant and Mr. Yarborough. Once Defendant and Mr. Yarborough walked into the living room, Mr. Hall yelled to Mr. Blackburn, who was in the back bedroom with Ms. Coulter, that there were men here offering to sell some guns. Mr. Blackburn walked to the living room to figure out what was going on as he had not made any arrangements to purchase guns. Mr. Blackburn did not recognize either man.

¶ 6 When Mr. Blackburn asked the men what they were doing at the house, Mr. Yarborough said they had guns for sale. Mr. Yarborough was holding a Kel-Tec shotgun and Defendant showed Mr. Blackburn two pistols inside a small bag. Mr. Yarborough tried to show Mr. Blackburn, as well as Mr. Hall and Mr. Watson, who were sitting on a couch in the living room, how the laser beam on top of the shotgun worked. Mr. Blackburn testified that he had gotten nervous at that point, so he decided to act as if he wanted to buy the guns. He went to the back bedroom to get some money and told Ms. Coulter that he thought the men were there to try and rob them. After Mr. Blackburn walked back to the living room, Ms. Coulter headed to the bathroom where she kept her handgun and extra clips in a gun box.

¶ 7 Mr. Blackburn told the men he wanted to see how the shotgun worked so he, Mr. Yarborough, and Defendant went outside to the back porch to test fire the gun. After the test fire, the group walked back inside, and Mr. Blackburn started counting out cash. He again asked Mr. Yarborough to identify himself. Mr. Yarborough replied that he was Blood (gang-affiliated) and asked Mr. Blackburn if he was Mr. Mungro. Mr. Blackburn said he was not. Mr. Mungro himself then appeared in the doorway of the front bedroom that opened into the living room. Mr. Yarborough told Mr. Mungro not to do anything and Mr. Blackburn told Mr. Mungro to take his hands out of his pockets.

¶ 8 At that moment, Mr. Yarborough ran to the front door and stood in front of it,

and Defendant put a gun to Mr. Blackburn's head and yelled for everyone to get down. Defendant pushed Mr. Blackburn to his knees and Mr. Blackburn pulled Mr. Watson to the ground with him. Mr. Blackburn testified that Defendant was screaming, "Where the f--- is the money?" Mr. Blackburn had about $700.00 in cash and offered it to the men.

¶ 9 When the yelling started in the living room, Ms. Coulter began walking down the hallway from the bathroom. As she neared the doorway of the living room, she saw Defendant pointing a handgun at Mr. Blackburn. She also saw Mr. Yarborough standing by the front door pointing the shotgun in the direction of Mr. Watson, Mr. Mungro, and Mr. Hall, who were all laying on the floor of the living room. Ms. Coulter then moved into the living room, pointed her gun at Defendant, and said, "No, you get down on the ground." Defendant looked up at Ms. Coulter in shock and then pointed his gun in her direction. Ms. Coulter thought Defendant was going to shoot so she began firing at Defendant.

¶ 10 Defendant fired back at Ms. Coulter while moving toward the front door to try and get out of the house. Mr. Yarborough also fired in Ms. Coulter's direction but hit the couch behind her. Ms. Coulter continued firing at Defendant and Mr. Yarborough as they went through the front door and into the yard. Ms. Coulter shot Mr. Yarborough at least once before he sat down in the grass to try and get the shotgun to work. Thinking he was going to try and shoot at her again, Ms. Coulter shot Mr.

Yarborough in the front yard multiple times.

¶ 11 Ms. Coulter then saw Defendant standing between the Dodge SUV and Mr. Hall's car. Defendant and Ms. Coulter fired at each other. At some point in this exchange, Ms. Leonard, who was still laying in the backseat of Mr. Hall's car next to the baby, made eye contact with Defendant who then fired into the car through the front windshield. Neither Ms. Leonard nor the baby were shot, although there was a bullet hole in the front windshield and a projectile was later pulled from the car.

¶ 12 Eventually, Defendant and Ms. Coulter both ran out of bullets. Ms. Coulter crawled back into the house to retrieve another clip. While in the house, she saw Mr. Blackburn and Mr. Watson run out the backdoor, but did not see Mr. Hall and Mr. Mungro. After reloading her gun, Ms. Coulter moved back towards the front door and saw Mr. Yarborough in the front yard turning over with the shotgun so she fired at him again. Mr. Yarborough ultimately died from his injuries. Ms. Coulter then saw Defendant drive off in the Dodge SUV with a woman who she later identified as Ms. Currence. Mr. Hall then got in his car and drove away with Ms. Leonard and finally Mr. Blackburn, Mr. Watson, and Mr. Mungro left as well. Ms. Coulter called 911, unloaded her gun, and sat on the front porch waiting for law enforcement to arrive.

¶ 13 Ms. Currence and Defendant were later arrested. Ms. Currence entered into a plea agreement with the State in which she pled guilty to two counts of aiding and abetting armed robbery and agreed to testify against Defendant in exchange for the

State dismissing six counts of attempted first-degree murder. Defendant was indicted on five counts of attempted first-degree murder, four counts of attempted robbery with a dangerous weapon, two counts of discharging a weapon into an occupied dwelling, and one count each of discharging a weapon into an occupied vehicle in operation, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. Defendant pled not guilty to all charges and went to trial in Lincoln County Superior Court on 23 September 2019.

¶ 14 The jury found Defendant guilty of one count of attempted first-degree murder, four counts of attempted robbery with a dangerous weapon, two counts of discharging a weapon into an occupied dwelling, discharging a weapon into an occupied vehicle in operation, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon.

¶ 15 Defendant gave notice of appeal in open court on 27 September 2019.

II. Analysis

¶ 16 Defendant first contends that his counsel's opening statement to the jury contained unauthorized admissions of guilt, thus violating his Sixth Amendment right to effective assistance of counsel. Defendant second contends that his counsel's closing argument to the jury also contained unauthorized admissions of guilt, thus violating his Sixth Amendment right to the effective assistance of counsel. We agree with Defendant that his counsel made admissions of guilt in the opening and closing

arguments to the jury and remand to the trial court for an evidentiary hearing on whether Defendant consented to his counsel's admissions of guilt. Because we are remanding for further proceedings, we decline to reach Defendant's third and fourth contentions.

¶ 17 We review claims of ineffective assistance of counsel *de novo*. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

¶ 18 Ordinarily, to establish ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692. Our Supreme Court previously held in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), that one such context occurs when defense counsel admits his client's guilt to charged offenses during arguments to the jury without his client's consent. *Id.* at 180, 337 S.E.2d at 507-08. There are two key components of *Harbison* error: (1) counsel's statements constitute an admission of guilt to a particular charge, and (2) defendant did not consent to the admission of guilt to the particular charge. *State v. McAllister*, 375 N.C. 455, 477, 847 S.E.2d 711, 724 (2020). We will analyze each component in turn.

A. Counsel's Admission of Guilt

¶ 19 In *Harbison*, the Court determined that prejudice is presumed "when counsel to the surprise of his client admits his client's guilt." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. In *Harbison*, defense counsel made the following statement in his closing argument:

> I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

Id. at 177-78, 337 S.E.2d at 506. The Court said the harm from counsel admitting guilt in this argument was "so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. When a defendant pleads not guilty, he preserves the right to a fair trial and the right to "hold the government to proof beyond a reasonable doubt." *Id.* Therefore, "[w]hen counsel admits his client's guilt without first obtaining the client's consent," that action "denies the client's right to have the issue of guilt or innocence decided by a jury." *Id.*

¶ 20 Recently, our Supreme Court expanded the application of *Harbison*, rejecting an "overly strict interpretation of *Harbison*" that analyzed only whether a defense counsel (1) made an express admission or (2) admitted to each element of a specific offense. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723. In *State v. McAllister*, the defendant was "indicted on charges of (1) habitual misdemeanor assault–based on

the underlying offense of assault on a female, (2) assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape." *Id.* at 458-59, 847 S.E.2d at 714. In his closing argument, defense counsel made several statements the Court found problematic. *Id.* at 473-74, 847 S.E.2d at 722-23. In reference to a videotaped interview of the defendant by law enforcement, counsel stated: "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." *Id.* at 473, 847 S.E.2d at 722. Counsel commented that the defendant was "being honest" in the interview. *Id.* Additionally, counsel stated, "Jury, what I'm asking you to do is you may dislike Mr. McAllister for injuring [the victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did." *Id.* at 473-74, 847 S.E.2d at 722. Lastly, at the very end of the closing argument, counsel stated: "Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty." *Id.* at 474, 847 S.E.2d at 722.

¶ 21 The *McAllister* court held that "defense counsel's statements here . . . amounted to an implied admission of defendant's guilt of the crime of assault on a female." *Id.* at 473, 847 S.E.2d at 722. The Court noted the "unique circumstances contained in the record" in reaching this result, *id.* at 476, 847 S.E.2d at 724, highlighting the combination of counsel's statements to the jury and his omission of assault on a female as the reasons for determining counsel conceded guilt,

id. at 474, 847 S.E.2d at 722. By referencing the honesty of the defendant, counsel eliminated the responsibility of the jury to question the validity of defendant's statements to law enforcement. *Id.* at 474, 847 S.E.2d at 722-23. The Court also explained that

> [b]y virtue of defense counsel not overtly seeking a not guilty verdict as to the three more serious charges against defendant, yet conspicuously omitting mention of the assault on a female charge—indeed, by not expressly mentioning that charge at all during the entire closing argument—the only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge.

Id. at 474, 847 S.E.2d at 723. Ultimately the Court stated: "Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur." *Id.* at 475, 847 S.E.2d at 723. Implied admissions prejudice a defendant "in the same manner and to the same degree as if the admission of guilt had been overtly made." *Id.*

1. Opening Statement Admissions

¶ 22 In the case at bar, Defendant argues that his counsel expressly admitted his guilt to attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon in his opening statement to the jury. Defendant also argues that his counsel impliedly admitted his guilt to possession of a firearm by

a felon and discharging a firearm into occupied dwelling. We agree that Defendant's counsel made admissions of guilt to attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon in his opening statement.

¶ 23 In his brief opening statement, Defendant's counsel stated the following:

> Think about, you know, the safe [sic] case, the known fact that [Defendant] and Mr. Yarborough they're there to rob these people, and they both have this – You'll see the shotgun. It's a tough looking shotgun. It's a Kel-Tec shotgun. It's basically an assault rifle that's a shotgun. And a Glock .40 caliber. And [Ms. Coulter], however she finds out or gets on to what's going on, comes out with her one pistol. And rather than try to take her out in the house, both these guys head for the door. And Mr. Yarborough is shot and ultimately dies. He's in the front yard. And [Defendant] is discharging his weapon. He's in the front yard. Just think about this. And listen to everybody's story about what happened that day. That's what I'm asking you to do.

During voir dire, the trial court listed all of Defendant's charges for the prospective jurors. Consequently, by the time the empaneled jury heard counsel's opening statement, the jurors were aware that Defendant was accused of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. The jury knew they were to decide his guilt or innocence on these charges. Additionally, the jury had also heard the State's opening statement prior to Defendant's, which specifically highlighted the aforementioned

charges:

> So when the evidence has been presented, you're going to have more than enough information to put this together so that you know beyond a reasonable doubt that Mr. Moore and Mr. Yarborough were intending to kill all the occupants of the house. You're also going to know that they conspired together to commit robbery with a dangerous weapon, and you're going to know that they attempted to do it by the gun battle in and of itself.

¶ 24 Therefore, when counsel stated, "the known fact that [Defendant] and Mr. Yarborough they're there to rob these people and they both have this . . . tough looking shotgun . . . [a]nd a Glock .40 caliber[,]" he conceded his client's guilt to attempted robbery with a dangerous weapon. Counsel's plain statements that "[Defendant] and Mr. Yarborough they're there to rob these people" and "they both have this . . . tough looking shotgun" cannot be interpreted as a summary of the State's argument in light of the addition of the phrase "the known fact." Next, by saying "[Defendant] and Mr. Yarborough they're there to rob these people" and naming the types of guns Defendant and Mr. Yarborough had with them that day, counsel conceded his client's guilt to conspiracy to commit robbery with a dangerous weapon. Lastly, when counsel stated, "[Defendant] is discharging his weapon[,]" he conceded his client's guilt to possession of a firearm by a felon.

¶ 25 In essence, counsel's opening statement answered the question of guilt as to these specific charges. Counsel prejudiced the filter through which the jury would

hear the evidence and testimony throughout the trial, thus reducing the State's burden of proving these charges beyond a reasonable doubt and denying Defendant his right to have the jury decide his guilt or innocence.

2. Closing Argument Admissions

¶ 26 At various points in his closing argument, Defendant's counsel stated the following:

> You know, the plan is that Mr. Yarborough -- or [M.] Yarborough and [Defendant] they come in and start doing the place, but then [Ms. Coulter] comes out of the back and blows it up.
>
> . . .
>
> What happened when Ms. Coulter started shooting these guys, whatever they were doing, was done. The deal was off. You know, this is no longer the plan there. It is escape and evade. And they head for the door.
>
> . . .
>
> So either way this carries out into the yard. And she comes out. She's still -- Well, she's still shooting out in the yard. And she comes out -- Like [the prosecutor] said, she pops a couple more off when she gets out on the porch. And at this point [Defendant] is over at his car returning fire like -- well, he's -- he's returning fire with his gun.
>
> . . .
>
> Listen hard to that and think of how this was described by the evidence and the account -- By any account [Defendant] was outside of the trailer shooting back as he was moving by or had at his car shooting at a trailer. Not inside, but he was within feet of somebody, you know, presumably

> much closer, much easier to hit. He's reacting. He's reacting. He's being shot at. He's shooting back.

¶ 27 Defendant argues that phrases such as "doing the place," "blows it up," and "whatever they are doing" are euphemisms meant to disguise implied admissions of guilt to attempted robbery with a dangerous weapon. Additionally, Defendant contends that the descriptions "[Defendant] is over at his car returning fire like . . . he's returning fire with his gun[]" and "[Defendant] was outside of the trailer shooting back as he was moving by or had at his car shooting at a trailer[]" are implied admissions of guilt to discharging a weapon into an occupied dwelling because the jury had been told Ms. Coulter was standing on or near the porch as she shot back.

¶ 28 Additionally, at the end of his closing argument, Defendant's counsel stated the following:

> But you have to be satisfied that these elements that he's going to read to you, the intent, the premeditation, the deliberation, the knowing the cars were empty, knowing, you know, houses were occupied, things you have to be convinced beyond a reasonable doubt as to each one of those elements. And there's simply doubt as to so many particulars of attempted murder and anything involving these three guys that didn't come. You can't -- You can't be convinced beyond a reasonable doubt what happened to three guys if they're not willing to come tell you themselves. You can't be convinced beyond a reasonable doubt about that.
>
> So I'd ask you to return not guilty verdicts, particularly to the attempted murders and particularly the six charges involving [Mr. Hall], [Mr. Mungro], and [Mr. Watson]. You

> just simply cannot be convinced beyond a reasonable doubt without hearing from these men.

¶ 29 We agree that Defendant's counsel admitted guilt to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling in his closing argument. A combination of the phrases "doing the place" and "whatever they were doing," the acknowledgement Defendant had a gun, and counsel's statement that the jury should find Defendant not guilty, particularly of the charges involving Mr. Hall, Mr. Mungro, and Mr. Watson, equates to an implied admission of guilt to attempted robbery with a dangerous weapon. This unique combination mirrors counsel's closing argument in *McAllister* which our Supreme Court held to be an implied admission. By not including Mr. Blackburn in that list of victims[1] or by not saying that Defendant was not guilty of all the attempted robbery charges, counsel impliedly conceded that Defendant was indeed attempting a robbery with a dangerous weapon on 6 May 2017. The same reasoning applies for discharging a weapon into an occupied dwelling. A combination of the statements that Defendant was shooting at the trailer and returning fire to where Ms. Coulter stood on the porch of the trailer and counsel's request that the jury return not guilty verdicts, particularly for certain charges while omitting discharging a weapon into an occupied dwelling, equates to an implied

[1] Defendant was charged with four counts of attempted robbery with a dangerous weapon; one count each for Mr. Blackburn, Mr. Hall, Mr. Mungro, and Mr. Watson.

admission of that charge.

B. Defendant's Consent to Admissions

¶ 30 After determining whether counsel's statements to a jury constitute an admission of guilt, the next step in the *Harbison* error analysis is determining whether a defendant consented to the admission of guilt or if counsel made the admission without authorization. *McAllister*, 375 N.C. at 477, 847 S.E.2d at 724. Our Supreme Court in *McAllister* indicated that an "on-the-record exchange between the trial court and the defendant is the preferred method" for determining the client's consent to an admission of guilt, but it is not "the sole measurement of consent." *Id.* (quoting *State v. Thompson*, 359 N.C. 77, 119-20, 604 S.E.2d 850, 879 (2004)). The Court also explained that "the absence of any indication in the record of defendant's consent to his counsel's admission will not—by itself—lead us to presume defendant's lack of consent." *Id.* at 477, 847 S.E.2d at 725 (internal marks and citation omitted). "For us to conclude that a defendant permitted his counsel to concede his guilt . . . the facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession." *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004). In a case where the record is silent or ambiguous on the issue of consent, "the appropriate remedy is to remand [the] case . . . for an evidentiary hearing to be held . . . for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt[.]" *McAllister*, 375 N.C. at 477, 847

S.E.2d at 725.

¶ 31 Having determined that Defendant's counsel made admissions of guilt in his opening and closing statements, we next determine whether Defendant consented to these admissions. Regarding the opening statement, Defendant asserts that he did not make a clear statement of his consent to counsel's admissions on the record. The trial court did not conduct an on-the-record exchange related to counsel's admissions with Defendant either before or after counsel's opening statement; nor did Defendant's counsel or the prosecutor raise any *Harbison*-related concerns about the opening statement. Regarding the closing argument, Defendant argues that he did not consent to the admissions to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling. Prior to closing arguments, Defendant's counsel did alert the trial court he was going to make concessions in his closing. Accordingly, the trial court conducted the following *Harbison* colloquy on the record:

> THE COURT: Okay. [Defendant], would you stand up please. This is an issue, once again, where you control what your lawyer argues to the jury. He's indicating that he's going to admit some things, some of the elements that I'm going to instruct the jury that they have to find beyond a reasonable doubt. He's going to – on some of the charges – apparently the ones you all discussed – he's going to admit some of the elements. And do you understand that?
>
> THE DEFENDANT: Yes, sir.

> THE COURT: You have a right to tell him not to do that.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And your decision would control. If you tell him not to admit anything in his closing, he would not be able – he would not be able to do so. Do you understand?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Does he have your permission, and do you understand that it is your permission that he's admitting some of the – that you committed some element of some of the offense during his closing argument?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: That's okay?
>
> THE DEFENDANT: Yes, sir.

The State requested that the trial court ask counsel which elements specifically he was going to admit to, and the following exchange occurred:

> [STATE]: Your Honor, I don't know if – for purposes of appellate review, I don't want him to say that I admitted – "I told him he could admit this, but I didn't tell him he could admit that one." So I'm not fishing. I'm arguing first. But it may be appropriate – What elements are we talking about that they've agreed to admit? That's my concern.
>
> THE COURT: Okay.
>
> [STATE]: Because –
>
> THE COURT: Do you want to put that on the record, [Counsel]?
>
> [COUNSEL]: Yes, sir. I don't have a problem with that, Your Honor.

> [THE COURT]: Okay.
>
> [COUNSEL]: The possession of a firearm by a felon charge and conspiracy charge we do not plan to contest that in my argument.
>
> [THE COURT]: Okay.

There was no mention of admissions to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling during the colloquy with Defendant or by counsel.

¶ 32 First, regarding the admissions by counsel to attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon in the opening statement, we are unable to determine whether Defendant consented based on the information currently present in the record. The closing argument colloquy cannot be extrapolated to the opening statement and used as evidence that Defendant consented to the admissions therein as the inquiry was specifically conducted for the closing argument. There is nothing in the record specifically about an admission of guilt in the opening statement. Therefore, in accordance with the admonition from *McAllister* against presuming that a silent record means Defendant did not consent, we remand for an evidentiary hearing on whether Defendant consented to counsel's admission of guilt in his opening statement to attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon.

¶ 33 Second, regarding the admissions by counsel to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling in the closing argument, we are unable to determine whether Defendant consented based on the information currently present in the record. The *Harbison* colloquy prior to closing arguments only addressed counsel making concessions generally. When prompted, counsel stated he was going to admit to conspiracy to commit robbery with a dangerous weapon and possession of a firearm by a felon. The facts on the record before us therefore do not permit us to conclude that Defendant knew his counsel was going to impliedly concede guilt to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling. The additional admissions in the closing argument may have been a part of counsel's overall strategy in the face of numerous charges but ensuring that Defendant consented to this strategy and that his consent was documented on the record is of critical importance in preserving Defendant's rights. *McAllister*, 375 N.C. at 475, 847 S.E.2d at 723-24. Therefore, we remand for an evidentiary hearing on whether Defendant consented to counsel's admission of guilt in his closing argument to attempted robbery with a dangerous weapon and discharging a weapon into an occupied dwelling.

III. Conclusion

¶ 34 For the foregoing reasons, we remand to the trial court for an evidentiary hearing on whether Defendant consented to counsel's admissions of guilt in the

opening statement and in the closing argument.

REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).