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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-600

Filed 21 March 2023

Robeson County, Nos. 14 CRS 57477–79

STATE OF NORTH CAROLINA

v.

ANTONIO PURCELL

Appeal by defendant by writ of certiorari from judgments entered 28 October 2021 by Judge Jason C. Disbrow in Robeson County Superior Court. Heard in the Court of Appeals 24 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

ZACHARY, Judge.

Defendant Antonio Purcell appeals by writ of certiorari from judgments entered upon a jury's verdicts finding him guilty of first-degree murder pursuant to the felony murder rule; conspiracy to commit robbery with a dangerous weapon; two counts of robbery with a dangerous weapon; and possession of a firearm by a felon.

On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the conspiracy to commit robbery charge for insufficient evidence. Defendant further argues, in the alternative, that the trial court erroneously instructed the jury regarding the conspiracy charge. Finally, Defendant maintains that the trial court erred by sentencing him for the robbery convictions because the court had already sentenced him for the first-degree felony murder conviction, for which robbery was the predicate felony. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error. However, we remand the judgment entered in 14 CRS 57477 to the trial court with instructions to arrest judgment on Offense 53, robbery with a dangerous weapon concerning Bo Junior Locklear.

Background

On the morning of 8 December 2014, Bo Junior Locklear received a phone call from Marcell McCoy “wanting to know if he could buy some pills[.]” Mr. McCoy informed Mr. Locklear during this phone call that “he had his homeboy with him”—who was later identified as Defendant—and that they both wanted to purchase pills from Mr. Locklear. According to Dana Hunt, Mr. Locklear’s longtime girlfriend, although Mr. McCoy “was known . . . for robbing people[.]” Mr. Locklear believed that he could safely sell pills to Mr. McCoy because the two men had been friends since childhood.

Rashawn Strong and Justin Maynor, friends of Mr. Locklear, accompanied Mr. Locklear to the drug deal with Mr. McCoy and Defendant. Mr. Locklear parked his

vehicle on a dirt road and informed Mr. Strong and Mr. Maynor that “he trusted his homeboy, he just didn’t trust the boy that was with him.” Mr. Locklear asked Mr. Maynor to hand him a gun, and Mr. Maynor complied. Upon realizing that the gun was unloaded, Mr. Locklear said, “I can’t do nothing with a[n un]loaded gun.” Mr. Maynor then handed him the bullets for the firearm. Mr. Locklear exited the car and went to the trunk to count his inventory of pills, then returned to the driver’s seat.

Shortly thereafter, Mr. McCoy and Defendant arrived in “an older model white . . . car with big chrome rims and a square[-]looking front end.” Mr. McCoy parked his car behind Mr. Locklear’s; Mr. McCoy exited his vehicle and began discussing the selling price of the pills with Mr. Locklear. According to Mr. Strong, Mr. McCoy “was asking could he get the pills for only 9 dollars and [Mr. Locklear] told him he couldn’t[,] and he kept asking[.]” Mr. McCoy then “looked back to the vehicle[,] and that’s when [Mr. Strong] heard another person get out.” Defendant approached Mr. Locklear’s car where Mr. McCoy and Mr. Locklear were talking, and asked Mr. Locklear if he could purchase the pills for eight dollars. Mr. Locklear rejected Defendant’s offer, but Defendant asked again. Mr. Locklear then started “getting frustrated” because Defendant “was messing with him counting” the pills.

Defendant “looked in the rearview mirror at [Mr. Strong] and said ‘you ever been in jail little n*****?’ ” He next “snatched the door open and put a gun in [Mr. Strong’s] face[,]” saying, “it weren’t no game.” Defendant demanded, “give me everything you got[,]” and took Mr. Strong’s cell phone and \$1.50 in cash. Defendant

then relieved Mr. Locklear of his possessions, including Mr. Locklear's pills, which he passed to Mr. McCoy. Mr. McCoy instructed the group "to give [Defendant] everything [they] got because he ain't playing[.]" and told them that Defendant would kill them.

Defendant then ordered the group out of the car and onto the ground. Mr. Strong and Mr. Maynor complied, but Mr. Locklear refused. In response, Defendant shot Mr. Locklear in the left thigh, close to his groin. The bullet went through the front of Mr. Locklear's thigh and exited out of the back. Mr. Locklear returned to the driver's seat in his car, and Defendant followed him. Mr. Locklear "threw his shoulder" into Defendant, and Defendant shot Mr. Locklear again, twice. One bullet left "a deep graze wound" from left to right on Mr. Locklear's head, but the other bullet directly hit the left back of his scalp.

While Defendant was focused on Mr. Locklear, Mr. Strong and Mr. Maynor escaped into the nearby woods on foot. Mr. Strong eventually returned to the scene, and he observed that Mr. Locklear's body had been dragged out of the car and that his pockets had been turned inside out. Mr. Locklear died later that day from the multiple gunshot wounds.

Meanwhile, a passerby called 9-1-1, and law enforcement officers from the Robeson County Sheriff's Office narcotics enforcement division began searching for a car matching the description of Mr. McCoy's vehicle. Officers quickly spotted the car. While Sergeant Jeremy Ammons pursued Mr. McCoy and Defendant, he observed "the passenger door open up on the vehicle and . . . [i]t appeared that some objects

had come flying out of the window.” The items later recovered from the side of the road and from Mr. McCoy’s car included: a firearm broken into several parts, a Glock pistol, a small-caliber pistol, Mr. Locklear’s wallet, “a clear plastic bag” containing Mr. Locklear’s pills, and Mr. Strong’s cell phone. Shortly thereafter, officers stopped the vehicle and arrested Mr. McCoy and Defendant. Mr. McCoy had been driving and Defendant had been riding in the passenger seat at the time of the arrest.

On 7 December 2015, a Robeson County grand jury returned true bills of indictment charging Defendant with first-degree murder; conspiracy to commit robbery with a dangerous weapon; two counts of robbery with a dangerous weapon (one pertaining to Mr. Locklear and the other pertaining to Mr. Strong); and possession of a firearm by a felon. Regarding the charge of conspiracy to commit robbery with a dangerous weapon, the indictment alleged that Defendant “unlawfully, willfully and feloniously did conspire with Marcell Martice McCoy to commit the felony of robbery with a dangerous weapon against Bo Junior Locklear[.]”

The matter came on for trial in Robeson County Superior Court on 25 October 2021. Shortly before trial, Mr. Strong admitted to the prosecutor’s office that he had witnessed the shooting, and he testified as a witness for the State during Defendant’s trial.

At the close of the State’s evidence, and again at the close of all evidence, Defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion on both occasions. After the charge conference, during which

Defendant made no objections, the trial court instructed the jury on each of the charges against Defendant. Regarding the offense of conspiracy to commit robbery with a dangerous weapon, the court instructed the jury:

[D]efendant has been charged with feloniously conspiring to commit robbery with a firearm. For you to find [D]efendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that [D]efendant and Marcell McCoy entered into an agreement. Second, that the agreement was to commit robbery with a firearm. Robbery with a firearm is defined as taking and carrying away the personal property of another from his person or in his presence without his consent by endangering or threatening a person's life with a firearm the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently. And third, that [D]efendant and Marcell McCoy intended that the agreement be carried out at the time it was made.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date [D]efendant agreed with Marcell McCoy to commit robbery with a firearm and that [D]efendant and that person intended at the time the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

On 28 October 2021, the jury returned its verdicts finding Defendant guilty on all counts. Concerning the first-degree murder charge, the jury found Defendant guilty pursuant to the felony murder rule. The same day, the trial court entered judgments upon the jury's verdicts and sentenced Defendant to consecutive terms of imprisonment in the custody of the North Carolina Division of Adult Correction: life

imprisonment without parole for the murder conviction, followed by 111 to 146 months for the remaining convictions, which the court consolidated into one judgment. Defendant filed written notice of appeal on 9 November 2021.

Grounds for Appellate Review

As a preliminary matter, we address our jurisdiction to consider the merits of Defendant's appeal. Although Defendant filed a written notice of appeal, his notice was not sufficient to confer jurisdiction on this Court because it did not comply with the requirements of Rule 4 of the North Carolina Rules of Appellate Procedure. Although the notice properly identified the judgments being appealed and specified the court to which the appeal was directed, it did not include the requisite proof of service of the notice on the State. *See* N.C.R. App. P. 4(a)(2).

In light of this defective notice of appeal, Defendant filed a petition for writ of certiorari with this Court on 23 September 2022. Pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, this Court possesses the authority to allow a petition for writ of certiorari and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). The State does not contend that it was misled by Defendant's failure to serve the notice of appeal. Accordingly, the State correctly acknowledges that "it is within this Court's discretion whether to allow [Defendant]'s appeal." *See State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016) ("[A] defect in a notice of appeal should not result in loss of the appeal as long as the

intent to appeal can be fairly inferred from the notice and the appellee is not misled by the mistake.” (citation and internal quotation marks omitted)).

Therefore, in our discretion, we allow Defendant’s petition for writ of certiorari and proceed to address the merits of his arguments. *See, e.g., State v. Rowe*, 231 N.C. App. 462, 465–66, 752 S.E.2d 223, 225–26 (2013) (allowing the defendant’s petition for writ of certiorari where he failed to designate the court to which the appeal was directed and did not serve notice of appeal on the State).

Discussion

On appeal, Defendant contends that (1) the trial court erred by denying Defendant’s motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon due to insufficient evidence; (2) the trial court plainly erred when instructing the jury regarding the offense of conspiracy to commit robbery with a dangerous weapon; and (3) the trial court erred by failing to arrest judgment on Defendant’s robbery convictions.

I. Motion to Dismiss

Defendant first argues that the trial court erroneously denied his motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon because “the State did not offer substantial evidence of an advance agreement to commit armed robbery.” We disagree.

A. Standard of Review

This Court reviews a trial court’s denial of a motion to dismiss de novo. *State v. McClaude*, 237 N.C. App. 350, 352, 765 S.E.2d 104, 107 (2014). Upon a defendant’s motion to dismiss, the trial court must determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *Id.* at 352–53, 765 S.E.2d at 107 (citation omitted). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *Id.* at 353, 765 S.E.2d at 107 (citation omitted).

The jury then determines “the weight and credibility of such evidence[.]” *State v. Cox*, 375 N.C. 165, 169, 846 S.E.2d 482, 485 (2020) (citation omitted). “In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.” *State v. Glisson*, 251 N.C. App. 844, 848, 796 S.E.2d 124, 128 (2017) (citation omitted).

B. Analysis

In the case at bar, Defendant challenges the trial court’s denial of his motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. A person commits the offense of robbery with a dangerous weapon “if he or she (1) takes or attempts to take personal property from another, (2) while possessing, using, or

threatening to use a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened.” *State v. Oldroyd*, 380 N.C. 613, 618, 869 S.E.2d 193, 197 (2022) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 14-87(a) (2021).

“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.” *Cox*, 375 N.C. at 169, 846 S.E.2d at 485. “To constitute a conspiracy[,] it is not necessary that the parties should have come together and agreed in express terms to unite for a common object; rather, a mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.” *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 384 (1978).

As our Supreme Court has explained, the existence of a conspiracy may be established by direct or circumstantial evidence; direct proof of the conspiracy “is not essential, for such is rarely obtainable.” *Id.* at 165, 244 S.E.2d at 384 (citation omitted). Instead, conspiracy “may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.” *Id.* (citation omitted). Put another way, “the State need not prove an express agreement” to establish the crime of conspiracy; rather, presenting “evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991).

“The execution of an attack in a coordinated manner and joint flight after the attack have been held sufficient evidence to survive a motion to dismiss a conspiracy charge.” *State v. Glenn*, 274 N.C. App. 325, 332, 852 S.E.2d 436, 442 (2020); *see, e.g., id.* at 333, 852 S.E.2d 432–33 (affirming the trial court’s denial of the defendant’s motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon where the State presented evidence that the defendant shot the victims and fled the scene with two others in the same vehicle); *State v. Lamb*, 342 N.C. 151, 155–56, 463 S.E.2d 189, 191 (1995) (concluding that substantial evidence supported the conspiracy to commit robbery with a dangerous weapon charge where the “defendant met with two other men, one of whom was armed” and “the three men drove to the home of the victim[,] . . . left the vehicle and entered the victim’s home, robbed the victim, and shot him”); *State v. Reid*, 175 N.C. App. 613, 622–23, 625 S.E.2d 575, 584 (2006) (concluding that the evidence was sufficient to support the charge of conspiracy to commit robbery with a dangerous weapon where the victim identified one of his three assailants as the defendant, the assailants dragged the victim out of his home, at least two of the assailants entered the victim’s home “looking to steal drugs and money[,]” and the three assailants left the scene together).

In the instant case, Defendant argues that the State failed to meet its burden to present substantial evidence showing that Defendant and Mr. McCoy agreed to commit each element of robbery with a dangerous weapon against Mr. Locklear because “[t]here was no direct or express evidence of an advance plan[.]” According to

Defendant, without this direct evidence, “the State had to rely on inferences which ‘unerringly’ point to the existence of a conspiracy, and there were none.” However, a review of the evidence offered at trial reflects that the State presented substantial evidence of a conspiracy between Defendant and Mr. McCoy to commit the crime of robbery with a dangerous weapon.

Here, as in *Glenn*, “the State has introduced sufficient evidence of a conspiracy to commit robbery with a dangerous weapon.” 274 N.C. App. at 333, 852 S.E.2d at 442. Viewing 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[.]” *McClaude*, 237 N.C. App. at 353, 765 S.E.2d at 107 (citation omitted), a reasonable juror could conclude that Defendant acted in coordination with Mr. McCoy to rob Mr. Locklear with a dangerous weapon. The State’s evidence showed that Defendant and Mr. McCoy had arranged to meet with Mr. Locklear; Mr. McCoy, who had a reputation “for robbing people[.]” informed Mr. Locklear over the phone earlier that morning that “he had his homeboy”—Defendant—with him, and that they wanted to purchase pills from Mr. Locklear. Defendant and Mr. McCoy then carried out the robbery “in a coordinated manner[.]” *Glenn*, 274 N.C. App. at 332, 852 S.E.2d at 442: While Defendant brandished his firearm and ordered Mr. Locklear, Mr. Strong, and Mr. Maynor to give him their possessions, Mr. McCoy instructed the group “to give [Defendant] everything [they] had” and told them that Defendant would kill them if they did not cooperate. Additionally, Defendant gave the drugs he

seized from Mr. Locklear to Mr. McCoy to safeguard while he continued to rob the group. Defendant and Mr. McCoy then fled the scene together in Mr. McCoy's car, with Mr. McCoy driving and Defendant riding in the front passenger's seat. Each of these acts "might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Abernathy*, 295 N.C. at 165, 244 S.E.2d at 384 (citation omitted).

Therefore, as in *Glenn*, *Lamb*, and *Reid*, the State's evidence demonstrated "[t]he execution of an attack in a coordinated manner and joint flight after the attack[.]" which was "sufficient evidence to survive [the] motion to dismiss [the] conspiracy charge." *Glenn*, 274 N.C. App. at 332, 852 S.E.2d at 442; *see, e.g., id.* at 333, 852 S.E.2d at 432–33; *Lamb*, 342 N.C. at 155–56, 463 S.E.2d at 191; *Reid*, 175 N.C. App. at 622–23, 625 S.E.2d at 584.

In addition, Defendant's emphasis upon the absence of direct evidence that he and Mr. McCoy had entered into an agreement to rob Mr. Locklear with a dangerous weapon "is inconsistent with the principle that the agreement necessary to support a conspiracy conviction can be established by either direct or circumstantial evidence, or both." *State v. Winkler*, 368 N.C. 572, 582, 780 S.E.2d 824, 831 (2015); *see also Abernathy*, 295 N.C. at 165, 244 S.E.2d at 384. Similarly, Defendant's reference to appellate decisions requiring that the circumstantial evidence presented establish that an unlawful conspiracy points "unerringly" to a defendant's guilt "overlooks the fact that . . . circumstantial evidence can establish the existence of a conspiracy

despite the defendant's explicit denial that such an agreement ever existed[.]" *Winkler*, 368 N.C. at 582–83, 780 S.E.2d at 831. Finally, although Defendant correctly cites our Supreme Court's decision in *State v. Mylett*, 374 N.C. 376, ___ S.E.2d ___ (2020), for the principle that the existence of a relationship between two individuals, without more, is insufficient to establish a conspiracy, the evidence here demonstrates much more than just a relationship between Defendant and Mr. McCoy.

Accordingly, we conclude that the trial court did not err by denying Defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon.

II. Jury Instruction

Defendant argues in the alternative that the trial court plainly erred when instructing the jury on the charge of conspiracy to commit robbery with a dangerous weapon, in that the court's instruction "allowed the jury to convict on an unindicted set of facts, constituting both a variance and a violation of the right to a unanimous jury verdict." Again, we disagree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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). "Thus, because

Defendant failed to object to the jury instruction at trial, he must show plain error by establishing that the trial court committed error, and that absent that error, the jury probably would have reached a different result.” *State v. Dove*, 274 N.C. App. 417, 420, 852 S.E.2d 681, 684 (2020) (citation and internal quotation marks omitted), *disc. review denied*, 376 N.C. 666, 853 S.E.2d 151 (2021).

Error constitutes plain error when a defendant can “demonstrate that a fundamental error occurred at trial. To show that an error was 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.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). “[B]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings” *Id.* (citations and internal quotation marks omitted). Further, “it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005) (citation omitted).

Accordingly, “even when the plain error rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citations and internal quotation marks omitted); *see, e.g., State v. Chavez*, 378

N.C. 265, 271, 861 S.E.2d 469, 473 (2021) (concluding that there was no plain error in the trial court’s jury instruction regarding conspiracy to commit first-degree murder where the court did not identify the defendant’s co-conspirator “[g]iven the overwhelming evidence of a conspiracy”).

B. Analysis

Defendant contends that the trial court committed plain error by “failing to give an instruction that conformed to the indictment[.]” Specifically, Defendant claims that because the “instruction did not specify that the sole robbery underlying the conspiracy was the robbery of [Mr.] Locklear[.]” the trial court created an ambiguity that “constituted a fatal variance” from the indictment. Defendant further contends that he suffered prejudice because “the jury would probably not have convicted absent the ambiguous instruction.” We disagree.

“In giving jury instructions, . . . the court is not required to follow any particular form, as long as the instruction adequately explains each essential element of the offense.” *State v. Fletcher*, 370 N.C. 313, 325, 807 S.E.2d 528, 537 (2017) (citation and internal quotation marks omitted).

As described above, the elements of robbery with a dangerous weapon are (1) the taking or attempted taking of the personal property from another (2) by the possession, use, or threatened use of a firearm or other dangerous weapon (3) that endangers or threatens the life of a person. N.C. Gen. Stat. § 14-87(a). The victim’s identity, however, is not an essential element of robbery with a dangerous weapon.

See Oldroyd, 380 N.C. at 618, 869 S.E.2d at 197 (concluding that the robbery indictment, which did not allege the name of the victim, was nevertheless sufficient because it contained “the essential elements of the crime of robbery with a dangerous weapon as set forth in” N.C. Gen. Stat. § 14-87(a)).

The elements of a criminal conspiracy are (1) an agreement between two or more people (2) to do an unlawful act or to do a lawful act in an unlawful manner. *See Winkler*, 368 N.C. at 575, 780 S.E.2d at 826–27. Because “the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime[.]” *State v. Young*, 248 N.C. App. 815, 821, 790 S.E.2d 182, 187 (2016) (citation omitted), the State need not identify the victim of the intended object of the conspiracy to prove its existence, *see, e.g., State v. Roberts*, 176 N.C. App. 159, 167, 625 S.E.2d 846, 852 (2006) (upholding the defendant’s conviction of conspiracy to commit robbery with a dangerous weapon where “[t]here was no evidence that the agreement . . . consisted of more than that of robbing *someone* on that night” (emphasis added)).

“[A] defendant must be convicted, if at all, of the particular offense charged in the indictment and . . . the State’s proof must conform to the specific allegations contained therein.” *State v. Henry*, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014) (citations and internal quotation marks omitted), *disc. review denied*, 368 N.C. 277, 775 S.E.2d 852 (2015). This rule regarding variances between the indictment and the State’s evidence ensures “that the defendant is able to prepare his defense against

the crime with which he is charged, and to protect the defendant from another prosecution for the same incident.” *Id.* (citation omitted).

However, “the fatal variance rule was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments[.]” *Id.* at 323, 765 S.E.2d at 103 (citation omitted). As such, “[n]ot every variance between the indictment and the proof is a material variance.” *State v. Furr*, 292 N.C. 711, 721, 235 S.E.2d 193, 200, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). A variance becomes material if it “fundamentally alter[s] the nature of the offense charged[.]” *Henry*, 237 N.C. App. at 324, 765 S.E.2d at 103.

In the instant case, the trial court’s failure to specify that Mr. Locklear was the intended victim of Defendant’s conspiracy with Mr. McCoy to commit robbery with a dangerous weapon does not constitute a fatal variance from the indictment. The indictment alleged that Defendant “unlawfully, willfully and feloniously did conspire with Marcell Martice McCoy to commit the felony of robbery with a dangerous weapon against Bo Junior Locklear[.]” and the trial court instructed the jury on Defendant’s conspiracy to commit robbery charge as follows:

[D]efendant has been charged with feloniously conspiring to commit robbery with a firearm. For you to find [D]efendant guilty of this offense the State must prove three things beyond a reasonable doubt. First, that [D]efendant and Marcell McCoy entered into an agreement. Second, that the agreement was to commit robbery with a firearm. Robbery with a firearm is defined as taking and carrying away the personal property of another from his person or in his presence without his

consent by endangering or threatening a person's life with a firearm the taker knowing that he was not entitled to take the property and intending to deprive another of its use permanently. And third, that [D]efendant and Marcell McCoy intended that the agreement be carried out at the time it was made.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date [D]efendant agreed with Marcell McCoy to commit robbery with a firearm and that [D]efendant and that person intended at the time the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.¹

Thus, the court's conspiracy instruction varied from the indictment, in that it did not name Mr. Locklear as the intended victim of the co-conspirators' common goal of committing armed robbery. Nonetheless, because "the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime[.]" *Young*, 248 N.C. App. at 821, 790 S.E.2d at 187 (citation omitted), the identity of the intended victim is not an essential element of the crime of conspiracy to commit robbery with a dangerous weapon, *see Roberts*, 176 N.C. App. at 167, 625 S.E.2d at 852. Therefore, the variance between the indictment and court's instruction was not

¹ We note that this instruction is nearly identical to the North Carolina Pattern Jury Instructions, *see* N.C.P.I.–Crim. 202.80, which this Court has recognized as "[t]he preferred method of instructing the jury[.]" *State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995).

material, as it did not “fundamentally alter[] the nature of the offense charged[.]” *Henry*, 237 N.C. App. at 324, 765 S.E.2d at 103.

Further, it is well settled that “[a]llegations [contained in indictments] beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.” *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). The trial court’s conspiracy “instruction adequately explain[ed] each essential element of the offense[.]” *Fletcher*, 370 N.C. at 325, 807 S.E.2d at 537 (citation and internal quotation marks omitted), and Mr. Locklear’s name in the indictment simply served “as surplusage[.]” *Taylor*, 280 N.C. at 276, 185 S.E.2d at 680. Accordingly, the trial court’s omission of Mr. Locklear’s name when instructing the jury concerning the charge of conspiracy to commit robbery with a dangerous weapon did not constitute a fatal variance from the indictment of the same charge.

Moreover, even if such instruction were error, it does not amount to plain error. The State presented ample evidence that Defendant and Mr. McCoy conspired to commit robbery with a dangerous weapon. Prior to the fatal altercation, Mr. McCoy contacted Mr. Locklear by phone seeking to purchase pills for himself and “his homeboy[.]” Ms. Hunt, Mr. Locklear’s girlfriend, knew of Mr. McCoy’s reputation for “robbing people[.]” Mr. Locklear “didn’t trust the boy that was with” Mr. McCoy, and he wanted to have a firearm ready and available when Defendant and Mr. McCoy arrived for the drug deal. Defendant and Mr. McCoy drove to the prearranged rendezvous point together—a secluded, wooded area where there would be few

witnesses to the drug deal and robbery. Defendant initiated the robbery by opening Mr. Locklear's car door and aiming his firearm at Mr. Strong's face, saying, "it weren't no game." Mr. McCoy then instructed Mr. Locklear, Mr. Strong, and Mr. Maynor to comply with Defendant's commands, and he safeguarded the pills that Defendant seized from Mr. Locklear while Defendant continued to hold the group at gunpoint. Substantial evidence certainly supported the State's theory that Defendant and Mr. McCoy drove to the woods with a common plan to rob Mr. Locklear, especially in light of Defendant and Mr. McCoy's coordinated attack and joint flight from the scene in Mr. McCoy's car. *See Glenn*, 274 N.C. App. at 332, 852 S.E.2d at 442.

Whether Defendant and Mr. McCoy's scheme accounted for the potential presence of additional passengers in Mr. Locklear's car is, in this case, immaterial. The object of Defendant and Mr. McCoy's conspiracy—to commit robbery with a dangerous weapon—remained the same, regardless of whether Defendant and Mr. McCoy robbed one person or three; "the degree of coordination associated with" their actions of using threats and brandishing a firearm to dispossess the victims of their property, as well as escaping in Mr. McCoy's car, "renders an inference of mutual, implied understanding between [Defendant and Mr. McCoy] . . . reasonable." *Mylett*, 374 N.C. at 384, ___ S.E.2d at ___ (citation and internal quotation marks omitted). Furthermore, Defendant cannot demonstrate that the alleged instructional "error had a probable impact on the jury's finding that . . . [D]efendant was guilty" of the conspiracy charge because the jury convicted Defendant of *two counts* of robbery with

a dangerous weapon, one involving Mr. Locklear and one involving Mr. Strong. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted). Thus, Defendant's contention that absent the allegedly ambiguous instruction, the jury probably would have acquitted him of conspiracy, is unpersuasive.

"Given the overwhelming evidence of a conspiracy" between Defendant and Mr. McCoy, "we conclude there is not a reasonable probability that the jury would have returned a different verdict had [Mr. Locklear] been identified in the jury instructions" as the intended robbery victim. *Chavez*, 378 N.C. at 271, 861 S.E.2d at 473. Defendant's argument therefore fails.

Finally, Defendant maintains that the trial court erred in its conspiracy instruction because the "instruction allowed the jury to convict [Defendant] of conspiracy based on one of two different victims, in violation of the unanimity requirement" for jury verdicts. This argument is also inapt.

Our State Constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982). A "disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous

because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.” *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991). However, “if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.” *Id.* at 303, 412 S.E.2d at 312.

Here, the trial court’s instructions allowed the jury to find Defendant guilty of conspiracy to commit robbery with a dangerous weapon if it found that he conspired to rob either Mr. Locklear or Mr. Strong with a dangerous weapon. Because either of these alternative acts established the elements of a conspiracy—that 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[,]” *Cox*, 375 N.C. at 169, 846 S.E.2d at 485—the requirement of jury unanimity was satisfied, *see Lyons*, 330 N.C. at 303, 412 S.E.2d at 312. In that the jury was able to return a unanimous guilty verdict regarding “each and every essential element of the [conspiracy] charged[,]” *Jordan*, 305 N.C. at 279, 287 S.E.2d at 831, this argument is overruled.

III. Sentencing

Lastly, Defendant argues that “judgment must be arrested on the robbery charges because robbery was the felony underlying” the felony murder conviction.

A. Standard of Review

As a preliminary matter, we note that generally “[i]n order to preserve a question for appellate review, a party must have presented the trial court with a

timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C.R. App. P. 10(a)(1). Here, Defendant concedes that he did not object to the trial court entering judgments and commitment for the felony murder and robbery convictions.

Nevertheless, despite Defendant’s failure to object to his sentence below, we may review this issue. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (permitting appellate review of whether a “sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law” regardless of whether the defendant objected to the sentence at trial); *see, e.g., State v. Meadows*, 371 N.C. 742, 747, 821 S.E.2d 402, 406 (2018). “Accordingly, [D]efendant need not have voiced a contemporaneous objection to preserve h[is] nonconstitutional sentencing issues for appellate review.” *Meadows*, 371 N.C. at 747, 821 S.E.2d at 406.

“Issues of statutory construction are questions of law, reviewed de novo on appeal.” *State v. Robinson*, 275 N.C. App. 330, 333, 852 S.E.2d 915, 918 (2020) (citation omitted), *aff’d as modified*, 381 N.C. 207, 872 S.E.2d 28 (2022). Under de novo review, “the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

B. Analysis

“[W]hen a defendant has been convicted of murder in the first degree based upon a finding that the murder was committed in the perpetration of a felony, separate punishment may not be imposed for the underlying felony.” *State v. Avery*, 315 N.C. 1, 38, 337 S.E.2d 786, 807 (1985); *see, e.g., State v. White*, 291 N.C. 118, 127, 229 S.E.2d 152, 157–58 (1976) (concluding that the trial court erred by sentencing the defendant for his arson conviction and his felony-murder conviction because “[p]roof of the arson charge was an essential and indispensable element in the State’s proof of felony-murder and as such affords no basis for additional punishment”). Nonetheless, “separate punishment may be imposed for any offense which arose out of the same transaction but was not the underlying felony for the felony murder conviction.” *Avery*, 315 N.C. at 38, 337 S.E.2d at 807.

Defendant maintains that the trial court erred by sentencing him for both counts of robbery with a dangerous weapon because robbery constituted the underlying offense for Defendant’s felony murder conviction. He further maintains that because “the jury could have used” Defendant’s robbery of either Mr. Locklear or Mr. Strong in finding Defendant guilty of felony murder, judgment should be arrested on both robbery convictions. The State concedes that “one conviction of robbery with a [dangerous] weapon should merge with the felony murder conviction[,]” but argues that the “remaining convictions and sentences” should remain undisturbed.

It is manifest that Defendant’s conviction for the murder of Mr. Locklear was predicated upon his commission of a robbery, as demonstrated by the indictment for

those offenses. *See* N.C. Gen. Stat. § 14-17(a) (“A murder . . . which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . .”). However, the trial court entered a consolidated judgment and imposed a consecutive sentence of 111 to 146 months for *both* of Defendant’s robbery convictions, as well as his convictions of conspiracy to commit robbery and the possession of a firearm by a felon. In that “separate punishment may not be imposed for the underlying felony” where a defendant “has been convicted of murder in the first degree based upon a finding that the murder was committed in the perpetration of a felony,” we conclude that the trial court should have arrested judgment for one of Defendant’s robbery convictions as the underlying felony for the murder conviction. *Avery*, 315 N.C. at 38, 337 S.E.2d at 807.

However, because “separate punishment may be imposed for any offense which arose out of the same transaction but was not the underlying felony for the felony murder conviction[,]” *id.*, we conclude that the court appropriately sentenced Defendant for his other robbery conviction, as only one robbery conviction may serve as the underlying felony for a felony-murder conviction, *see* N.C. Gen. Stat. § 14-17(a).

Accordingly, we must remand to the trial court to arrest judgment on the conviction for robbery with a dangerous weapon that served as the predicate for the felony-murder conviction. Judgment for the remaining conviction for robbery with a dangerous weapon should not be arrested.

Conclusion

For the foregoing reasons, we conclude that Defendant received a fair trial, free from prejudicial error. Nevertheless, because the trial court erroneously sentenced Defendant for both robbery convictions, we remand the judgment entered in 14 CRS 57477 with instructions to arrest judgment on Offense 53, robbery with a dangerous weapon with regard to Mr. Locklear; the trial court shall resentence Defendant on the remaining charges, consistent with this opinion. We affirm the remaining judgment.

NO PREJUDICIAL ERROR; REMANDED FOR RESENTENCING.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).