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NO. COA12-2  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Pasquotank County  
Nos. 09 CRS 52286-89

DOMINICK JAMES JORDAN

Appeal by defendant from judgments entered 28 July 2011 by Judge Milton F. Fitch, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 25 April 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.*

*Marilyn G. Ozer for defendant-appellant.*

ERVIN, Judge.

Defendant Dominick James Jordan appeals from judgments sentencing him to a term of 207 to 258 months imprisonment based upon his conviction for attempted first degree murder; a consolidated term of 96 to 125 months based upon his convictions for first degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury; a term of 84 to

110 months based upon his conviction for robbery with a dangerous weapon; a term of 17 to 21 months based upon his conviction for possession of a firearm by a felon; and a term of 10 to 12 months based upon his convictions for felonious larceny of a motor vehicle and felonious fleeing to elude arrest, all of which were to be served consecutively. On appeal, Defendant contends that the trial court erred by (1) failing to instruct the jury that evidence of Defendant's prior felony conviction could only be used to support the charge of possession of a firearm by a felon and allowing the State to use Defendant's prior felony conviction for the purpose of arguing that Defendant was guilty as charged; (2) allowing the admission of highly prejudicial testimony relating to the impact of the crimes upon the alleged victim and his family, Defendant's character, and his own religious beliefs and by failing to deliver appropriate curative instructions after sustaining Defendant's objections to certain portions of the alleged victim's testimony; (3) denying Defendant's request for an instruction concerning the statutory requirements for a valid photographic lineup; and (4) denying Defendant's motion to suppress the alleged victim's pre-trial identification of the Defendant as the perpetrator of the alleged offenses. After careful consideration of Defendant's challenges to the trial

court's judgments in light of the record and the applicable law, we conclude that Defendant has not established that any prejudicial or plain error occurred during the trial and that the trial court's judgments should remain undisturbed.

### I. Factual Background

#### A. Substantive Facts

In 2009, Richard Powell traveled from New Jersey to Elizabeth City for the purpose of visiting his family. On the night of 30 November 2009, Mr. Powell drove his rental car, a red Toyota Yaris, to a local motel where he planned on visiting with a friend. Mr. Powell checked into the motel, unloaded the car, showered, and took a nap. Around midnight, Mr. Powell began loading his belongings into the car in preparation for taking an early morning flight.

As Mr. Powell was loading the car, Defendant approached and engaged him in casual conversation. As the two men talked, Defendant mentioned that he was going to the store. At that point, Mr. Powell stated that he was going to the store as well and offered Defendant a ride. After getting into the front passenger seat of Mr. Powell's car, Defendant pulled a gun and pointed it at Mr. Powell's face. When Mr. Powell inquired if Defendant wanted the car or money, Defendant responded that he wanted money. Since Mr. Powell only had twenty dollars and some

change on his person, Defendant accepted Mr. Powell's offer to drive him to an ATM for the purpose of getting a larger amount of cash.

After the two men arrived at the ATM, Mr. Powell's cell phone began to ring, causing Defendant to take it from him. At that point, Defendant took the contents of Mr. Powell's pants pockets, including the money in Mr. Powell's possession, his keys, and his driver's license and registration. Acting pursuant to Defendant's instructions, Mr. Powell withdrew \$400 from the ATM and gave it to Defendant. After obtaining the money that Mr. Powell had received from the ATM, Defendant ordered Mr. Powell to drive behind a nearby shopping mall and park the car.

Once Mr. Powell had parked the car, Defendant removed the car keys from the ignition, instructed Mr. Powell to walk to the back of the car, opened the trunk, and told Mr. Powell to get inside. Although Mr. Powell refused to enter the trunk and closed the lid, Defendant reopened the trunk and reiterated his order that Mr. Powell get inside. Once again, Mr. Powell refused, closed the trunk and told Defendant to "just take the car, take the money, [and] go." Upon opening the trunk for a third time, Defendant told Mr. Powell that, if he did not get into the trunk, Defendant would shoot him. Although Mr. Powell

said, "please don't shoot me," Defendant raised the gun, pressed it against Mr. Powell's navel, and shot him.

After Defendant shot Mr. Powell, the two men began a struggle for control of the gun, during which Defendant shot Mr. Powell in the right leg, causing Mr. Powell to fall face down onto the ground. As Mr. Powell lay on the ground, Defendant shot him in the back. After remaining motionless and quiet in an effort to appear "dead or almost dead" for some time, Mr. Powell heard Defendant drive away, at which point he began screaming for help.<sup>1</sup>

In the early morning hours of 1 December 2009, Mariann Warren, who lived in a home near the mall parking lot, was awakened by the sounds of an argument and gunshots. As Mrs. Warren looked out of her kitchen window, she observed a red vehicle speeding away from the mall parking lot. Upon making this observation, Mrs. Warren woke her husband and called the police. After arriving on the scene, discovering Mr. Powell, and talking with the Warrens, investigating officers determined that they needed to be on the lookout for a "small, red to burgundy car." A short time later, Mr. Powell's sisters told

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<sup>1</sup>Mr. Powell sustained gunshot wounds to his abdomen, back and right thigh and suffered damage to his liver, a hematoma around one of his kidneys, a hole in the right side of his colon, a blood clot in his right leg, the presence of bullet fragments in his lumbar spine, and a fractured rib.

investigating officers that Mr. Powell had been operating a rental vehicle, resulting in the dissemination of this information to the law enforcement community as well.

At around 2:52 a.m., Sergeant Ed Kirby of the Elizabeth City Police Department observed a car with rental plates matching the description provided in the earlier report. As a result, Sergeant Kirby activated his blue lights in an attempt to stop the car. However, the car, which was a red Toyota Yaris, did not stop, and Sergeant Kirby and other officers began pursuing the vehicle. When the pursuing officers attempted to form a "running roadblock," during which Sergeant Kirby planned to pull his vehicle in front of the car while other officers planned to position their vehicles to its left and rear, the car moved to the left, forcing the officer on the left to move his vehicle, and then accelerated in a forward direction, clipping the front bumper of Sergeant Kirby's vehicle as it passed.

After failing to stop the car, the officers continued the chase at approximately 85 to 90 miles per hour. Upon hitting a bump in the road, the car started fish-tailing, travelled across the road, hit a curb, and began to flip and roll. As it rolled, the car struck two vehicles that were sitting in a nearby car dealership lot and became airborne, clipping a telephone pole

and hitting the top of a nearby business before falling to the ground.

As Sergeant Kirby approached the car, he observed Defendant crawling out of the driver's side door. At that point, the officers arrested Defendant, searched him incident to arrest, and found fifteen .38 caliber bullets, Mr. Powell's driver's license, \$423 in currency, and some change in Defendant's pocket. While searching the interior of the car and the vicinity in which the car had come to rest, the officers found various items of Mr. Powell's property, including his laptop, camcorder, clothing, keys and mail. In addition, the officers recovered eight .38 caliber bullets from the floorboard of the car and five .38 caliber bullets from the ground around the site of the wrecked vehicle. While examining the area adjacent to the crash site, the officers recovered a Dan Wesson Arms .357 magnum revolver, which was loaded with six .38 caliber bullets.

On 1 February 2009, Mr. Powell traveled to the Elizabeth City Police station to meet with Officer Barbara Morgan for the purpose of giving a statement concerning the events that occurred on 30 November and 1 December 2009. At that meeting, Officer Morgan and Mr. Powell had a "small conversation," during which Mr. Powell mentioned that he had read a newspaper article about the incident in which he had been involved, that he had

seen Defendant's "picture in the newspaper [article,]" and that the picture in the news article was of "[the] person that actually shot and robbed him." As a result of the fact that she had a copy of the article taped to the inside of her case file, Officer Morgan showed it to Mr. Powell, who responded by stating that he had "the same newspaper article" and identifying Defendant's picture as "the subject that shot and robbed him." Subsequently, as Officer Morgan searched through her case file for a victim witness volunteer statement form, Mr. Powell observed two photos of Defendant and stated that those pictures also depicted the man who had shot him. Officer Morgan denied having shown Mr. Powell a "photographic lineup" or "other photos of anyone else" given that Mr. Powell had previously reviewed the newspaper article containing Defendant's picture and identified Defendant as his assailant.

#### B. Procedural History

On 1 December 2009, warrants for arrest were issued charging Defendant with felonious fleeing to elude arrest, attempted first degree murder, first degree kidnapping, robbery with a dangerous weapon, possession of a firearm by a felon, felonious larceny of a motor vehicle, and possession of a stolen motor vehicle. On 14 December 2009, the Pasquotank County Grand Jury returned bills of indictment charging Defendant with



felonious fleeing to elude arrest, misdemeanor assault with a deadly weapon, attempted first degree murder, assault with a deadly weapon with the intent to kill inflicting serious injury, first degree kidnapping, possession of a firearm by a felon, robbery with a dangerous weapon, felonious larceny of a motor vehicle, and possession of a stolen vehicle.

On 25 July 2011, Defendant filed a motion seeking to have certain evidence suppressed based upon the alleged use of unlawful pretrial identification procedures. In his suppression motion, Defendant alleged that, at the meeting with Officer Morgan, Mr. Powell had identified Defendant at a "picture show up [which] did not have other people in the array" and that the procedures that led to Mr. Powell's identification of Defendant as his assailant violated Defendant's due process rights and N.C. Gen. Stat. § 14A-284.50 *et. seq.* As a result, Defendant contended that any identification evidence stemming from the meeting between Officer Morgan and Mr. Powell should be suppressed.

The charges against Defendant came on for trial before the trial court and a jury at the 25 July 2011 criminal session of the Pasquotank County Superior Court. Prior to trial, the trial court denied Defendant's suppression motion; however, the trial court also stated that a *voir dire* examination would be allowed

in the event that any issue concerning the admissibility of Mr. Powell's identification testimony arose during the trial. At trial, Defendant objected when Mr. Powell attempted to identify Defendant as his assailant and was allowed to conduct a *voir dire* examination of Mr. Powell concerning that issue. At the conclusion of this proceeding, during which Defendant reiterated the contentions that had been advanced in his suppression motion, the trial court orally denied Defendant's motion.

At the conclusion of all of the evidence, the State voluntarily dismissed the misdemeanor assault with a deadly weapon charge. On 28 July 2011, the jury returned verdicts convicting Defendant of each of the offenses with which he had been charged. Based upon these verdicts, the trial court sentenced Defendant to 207 to 258 months imprisonment based upon his conviction for attempted first degree murder and to consecutive terms of 96 to 125 months for first degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury, 84 to 110 months for robbery with a dangerous weapon, 17 to 21 months for possession of a firearm by a felon and 10 to 12 months for felonious larceny of a motor vehicle and felonious fleeing to elude arrest. Defendant noted an appeal to this Court from the trial court's judgments.

## II. Legal Analysis

### A. Defendant's Prior Conviction

In his first challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by failing to instruct the jury that evidence of Defendant's prior felony conviction for malicious conduct by a prisoner could only be used to support the possession of a firearm by a felon charge and that the State's use of evidence concerning Defendant's prior conviction in the course of arguing that Defendant was guilty on all of the charges that had been lodged against him violated his rights to due process and a fair trial. Defendant's arguments lack merit.

At Defendant's trial, a certified copy of a judgment relating to Defendant's previous conviction for malicious conduct by a prisoner was admitted into evidence. During closing arguments, the prosecutor stated, in pertinent part, that:

So the question is, is there any reasonable doubt, reasonable doubt now, but that this defendant, this convicted felon at age 22, he's a convicted felon, who has already been to prison at least incarcerated on two occasions, because you saw the conviction for malicious conduct by a prisoner. And that conviction sent him to prison for more time, which you saw on that sheet right here. He didn't get probation on this one. He got an active sentence of 16 to 20 months in the North Carolina

Department of Correction. For malicious conduct that occurred while he was a prisoner. Malicious conduct towards another individual, violence. He got active prison time. If he served that minimum sentence of 16 months he would have been out somewhere in July of 2009, interesting timing. He's just gotten out of prison in the summer of 2009. Is there any reasonable doubt but that this defendant is guilty of every crime that he's charged with?

The trial court did not intervene to stop this argument on its own motion or instruct the jury that the evidence concerning Defendant's prior conviction could only be considered for the purpose of determining his guilt of possession of a firearm by a felon.

#### 1. Limiting Instruction

As he candidly concedes in his brief, Defendant failed to request that the trial court deliver a limiting instruction relating to the evidence concerning Defendant's prior conviction at any point during the trial or to lodge any objection to the trial court's instructions relating to this issue. For that reason, we must review Defendant's challenge to the trial court's instructions using a plain error standard of review. *State v. Wood*, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). "Plain error with respect to jury instructions requires the error be 'so fundamental that (i) absent the error, the jury

probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.'" *Id.* (quoting *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998)). "'In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt.'" *Id.* (quoting *State v. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005)).

Assuming, without in any way deciding, that the trial court erred by failing to deliver a limiting instruction concerning the purposes for which the jury was entitled to consider Defendant's prior felony conviction, we conclude that Defendant has not shown that he is entitled to relief on plain error grounds. Put another way, Defendant has failed to show that, in the absence of the alleged error, the jury would probably have reached a different verdict or that the trial court's failure to deliver a limiting instruction resulted in a miscarriage of justice. The evidence presented at Defendant's trial established that Mr. Powell had been forced at gunpoint to drive to an ATM and to withdraw \$400, which Mr. Powell gave to his

assailant; that the assailant took Mr. Powell's driver's license, cell phone, and pocket change before shooting him multiple times and driving away in his rental car; that investigating officers subsequently spotted a vehicle matching the description of Mr. Powell's rental car, attempted to stop it, and became involved in a high speed chase; that Defendant was apprehended after the car that he had been operating crashed and he attempted to escape from the wreckage; that a loaded handgun and multiple rounds of ammunition, as well as personal items belonging to Mr. Powell, were seized from Defendant's person, the car, and the area in which the car came to rest; and that Defendant had been previously convicted of malicious conduct by a prisoner. Simply put, the evidence admitted at trial provides almost conclusive proof of Defendant's guilt of each of the offenses with which he had been charged. Although Defendant has attempted to persuade us that there were reasons to doubt the credibility of Mr. Powell's testimony, we do not find this argument persuasive given the overwhelming strength of the State's case. As a result, we conclude that the trial court did not commit plain error by failing to deliver a limiting instruction delineating the purposes for which the jury was entitled to consider Defendant's previous felony conviction.

2. Jury Argument

Aside from failing to request the delivery of a limiting instruction concerning the purposes for which the jury was entitled to consider the evidence of Defendant's prior conviction for malicious conduct by a prisoner, Defendant also failed to object to the argument advanced by the State in which reference was made to Defendant's prior conviction. As a result, given the absence of a timely objection, our task on appeal is to determine "whether the [challenged] remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 117 S. Ct. 229, 136 L. Ed. 2d 160 (1996). "Such [unobjected-to] remarks constitute reversible error only when they render the proceeding fundamentally unfair." *State v. Phillips*, 365 N.C. 103, 144, 711 S.E.2d 122, 150 (2011) (citation omitted), *cert. denied*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012).

Assuming, without deciding, that the challenged comments were improper, we are unable to conclude that "any impropriety in [the State's] closing argument . . . render[ed] [the] trial fundamentally unfair." *State v. Privette*, \_\_ N.C. App. \_\_, \_\_, 721 S.E.2d 299, 308 (2012) (holding that, while the prosecutor would have "been better advised to have refrained from making some of the [challenged] comments" during its closing argument, any impropriety in the closing argument did not render the trial fundamentally unfair given that there was ample evidentiary support for the defendant's conviction). In light of the overwhelming evidence of Defendant's guilt outlined above, we conclude that the record contains "ample support for [Defendant's convictions] despite [any] improper remarks [that may have been made during the State's closing argument,]" *State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984) (holding that the prosecutor's comments did not merit *ex mero motu* intervention and, alternatively, that any alleged impropriety was not prejudicial given that the record contained ample support for the jury's verdict), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985); *State v. Rush*, 196 N.C. App. 307, 311, 674 S.E.2d 764, 768 (stating that, even if "the prosecutor's argument was grossly improper, given the amount of evidence against defendant, it could not have been



prejudicial"), *disc. review denied*, 363 N.C. 587, 683 S.E.2d 706 (2009), and that Defendant is not entitled to relief from his convictions as a result of the prosecutor's decision to make the challenged comments.

B. Mr. Powell's Testimony

Secondly, Defendant contends that the trial court erred or committed plain error by allowing Mr. Powell to provide highly prejudicial testimony and by failing to deliver curative instructions intended to address Mr. Powell's comments on its own motion. More specifically, Defendant contends that the trial court erroneously allowed Mr. Powell to testify concerning "Defendant's character, a prediction that . . . Defendant would be violent again and a request to convict because [Mr. Powell's] family had suffered." Moreover, Defendant argues that, even after sustaining Defendant's objections to certain portions of the challenged testimony, the trial court erred by failing to deliver curative instructions given "the cumulative impact of inadmissible, grossly prejudicial evidence presented to the jurors with no limiting instructions."<sup>2</sup> Once again, we conclude that Defendant's argument lacks merit.

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<sup>2</sup>To the extent that Defendant is attempting to raise issues arising under the state or federal constitution as part of his challenge to the admission of the testimony discussed in the text of this opinion (except on a plain error basis), we hold that Defendant waived any such argument by failing to advance a

At Defendant's trial, Mr. Powell testified that he "suffered tremendously" and that his "family suffered" as a result of Defendant's actions. In addition, Mr. Powell asserted that Defendant "had no respect for the fact that [Mr. Powell] was praying to God . . . [;]" that "[Defendant] had no emotion;" that Mr. Powell had "prayed . . . please don't let [Defendant] kill me;" and that Mr. Powell thought that he was still alive "because Jehovah did not let [Defendant] kill [him]." The trial court overruled Defendant's objection to Mr. Powell's testimony that Defendant "had no compassion;" that "[h]e did the ultimate tragedy to somebody that he didn't know, had never seen;" that "for somebody to be able to do such a thing is horrific;" and that, "if they do it once, they will do it again." Finally, Mr. Powell testified that he "could not imagine how somebody could be so incompassionate for another human life" and that "[i]t wasn't like I was a horse, or a dog or a cat." The trial court sustained Defendant's objection to Mr. Powell's testimony that he "had no control [and] just fell forward [and afterward] [t]he coward [shot him] in the back" and that Defendant's "hair today

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constitutionally-based objection to the admission of that testimony at trial. *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004) (stating that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal" (citation omitted)), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

is a little bit different" because "[t]hey cleaned him up today."

According to Defendant, the effect of the admission of this testimony was to allow Mr. Powell to provide impermissible victim impact evidence, attack Defendant's character, and assert his own religious beliefs in violation of N.C. Gen. Stat. § 8C-1, Rules 402, 403, 404(a) and 610. A careful review of the record indicates that, in this section of his brief, Defendant is challenging testimony that (1) he failed to object to; (2) to which he unsuccessfully objected to; and (3) to which the trial court, after sustaining his objections, failed to deliver a curative instruction. In order to obtain appellate relief on the basis of these arguments, Defendant must demonstrate both that the trial court erred in admitting the challenged testimony or failing to deliver a proper curative instruction and that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." N.C. Gen. Stat. § 15A-1443(a). "The burden is on the defendant to show both the error and its prejudicial effect." *State v. Thaggard*, 168 N.C. App. 263, 274, 608 S.E.2d 774, 782 (2005) (citations omitted).

Assuming, without in any way deciding, that the trial court erred by admitting any portion of the challenged testimony

or by failing to deliver a proper curative instruction,<sup>3</sup> Defendant has failed to demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court acted differently.<sup>4</sup> As we have previously discussed, the record contains overwhelming evidence tending to establish Defendant's guilt and little basis to question the credibility of the evidence offered by the State. As a result, Defendant is not entitled to relief based upon his challenges to Mr. Powell's testimony. *State v. Jennings*, \_\_ N.C. App. \_\_, \_\_, 704 S.E.2d 556, 560 (holding that, even if the admission of the challenged testimony was error, the defendant failed to demonstrate prejudice in light of the other overwhelming evidence establishing the defendant's guilt), *disc. review denied*, 365 N.C. 197, 710 S.E.2d 35 (2011); *Thaggard*, 168 N.C.

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<sup>3</sup>An additional problem with Defendant's argument is the well-established principle that, "where a trial court sustains [a] defendant's objection, he has no grounds to except, and there is no prejudice," and a defendant "cannot complain that no curative instruction was given where he did not request one." *State v. Robinson*, 355 N.C. 320, 341-42, 561 S.E.2d 245, 259, *cert. denied*, 537 U.S. 1006, 123 S. Ct. 488, 154 L. Ed. 2d 404 (2002). As a result, given that Defendant never requested the delivery of a curative instruction after the trial court sustained one of his objections, Defendant is not entitled to relief based upon either the posing of the challenged question or the trial court's failure to deliver an appropriate curative instruction relating to that question.

<sup>4</sup>In light of this determination, we need not examine Defendant's alternative contention that the trial court's actions and failures to act constituted plain error.

App. at 274-75, 608 S.E.2d at 782-83 (holding that, even though the admission of certain challenged testimony constituted error, the defendant failed to demonstrate prejudice given the overwhelming evidence of defendant's guilt).

C. Instruction Concerning Photographic Lineups

Thirdly, Defendant contends that the trial court erred by denying his request for a jury instruction concerning the law governing the proper conduct of photographic lineups. We do not find Defendant's argument persuasive.

At the jury instruction conference, Defendant requested that the trial court instruct the jury in accordance with N.C.P.I-Crim. 104.98, which addresses issues relating to the manner in which photographic lineups should be conducted. In support of this request, Defendant argued, as he had during the consideration of his motion to suppress Mr. Powell's identification testimony, that the record contained evidence tending to show that Mr. Powell had identified Defendant during a photographic lineup which had not been conducted in compliance with applicable constitutional and statutory requirements. The trial court denied Defendant's request, stating, in pertinent part, that:

The Court recalls the testimony in this particular matter that Mr. Powell indicated that he went to the police station, told the officer that he knew who it was because he

had read the newspaper and seen the picture in the newspaper. Further, the evidence revealed on behalf of Detective Morgan that in Detective Morgan's case file were two sets of photos that she did not show, that [Mr. Powell] saw those photos. That she further indicated that those photos in no way at all influenced his decision, he knew who shot him, was conscious at all times, he was able to observe and therefore the Court will conclude that no lineup or show up existed in the identification of Mr. Jordan as perpetrator of the crime on December 1st, 2009. The Court, based on its recollection of the facts in this case as indicated denies the defendant's motion for 104.98.

N.C. Gen. Stat. § 15A-284.52(d)(3) provides, in pertinent part, that, "[w]hen evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications." "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (citation omitted), *disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). However "a trial court's failure to submit a requested instruction to the jury is harmless unless [the] defendant can show he was prejudiced thereby." *State v. Muhammad*, 186 N.C. App. 355, 361, 651 S.E.2d 569, 574 (2007) (citing *State v. Riddick*, 340 N.C. 338, 343, 457 S.E.2d 728, 732 (1995)), *appeal dismissed*, 362

N.C. 242, 660 S.E.2d 537 (2008). As we previously recognized, "[a] defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a).

Assuming, without in any way deciding, that the trial court erred by failing to give the requested jury instruction, Defendant has failed to show that he suffered any prejudice as a result of the trial court's action. In seeking to persuade us of the merits of his argument, Defendant contends that the fact that Mr. Powell identified him as the perpetrator of the offenses at issue in this case stemmed from having seen the newspaper article containing Defendant's photograph and the photographs contained in Officer Morgan's file and that these facts cast doubt upon "the accuracy of Mr. Powell's identification of his assailant." However, as we have previously discussed, the record contains overwhelming evidence, independent of Mr. Powell's identification testimony, tending to establish Defendant's guilt, including the fact that he was driving Mr. Powell's car shortly after the assault and robbery and the fact that Defendant had numerous items of Mr. Powell's property in his actual or constructive possession at the time he was taken into custody. As a result, we simply do not believe

that there is any reasonable possibility that the jury would have reached a different result had the trial court given the requested instruction. See *State v. Shaw*, 322 N.C. 797, 803-05, 370 S.E.2d 546, 549-51 (1988) (holding that, even though the trial court erred by refusing to give a requested instruction, the defendant was not prejudiced in light of the very strong, albeit circumstantial, evidence pointing to defendant as the perpetrator of the crime and the trial court's repeated instruction that the jury must be satisfied beyond a reasonable doubt that the defendant committed the crime with which he had been charged before returning a guilty verdict). As a result, Defendant is not entitled to relief from the trial court's judgments based upon the trial court's refusal to deliver the requested instruction.

D. Denial of Defendant's Suppression Motion

Finally, Defendant contends that the trial court erred by denying his motions to suppress Mr. Powell's identification of Defendant as his assailant. In support of this assertion, Defendant argues that (1) the trial court erred by failing to make findings of fact and conclusions of law in the course of denying Defendant's motions; (2) Mr. Powell's identification of Defendant during his meeting with Officer Morgan violated N.C. Gen. Stat. § 15A-284.50 *et. seq.*; and (3) the procedures



employed by Officer Morgan violated Defendant's constitutional rights to due process and a fair trial. Once again, we conclude that Defendant's contentions lack merit.

N.C. Gen. Stat. § 15A-1443(b) provides that "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." "Overwhelming evidence of [a] defendant's guilt of the crimes charged may . . . render a constitutional error harmless." *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988) (citation omitted). Even if we were to conclude that Defendant's challenges to the trial court's decisions to deny his suppression motion had merit, we further conclude that the State has proven that any such errors were harmless beyond a reasonable doubt. As we have previously demonstrated, the State presented overwhelming evidence of Defendant's guilt, independent of Mr. Powell's identification testimony. *State v. Ash*, 169 N.C. App. 715, 724, 611 S.E.2d 855, 861-62 (recognizing that, even if this Court were to accept the defendant's argument that the trial court had erred by denying his suppression motion and admitting statements that had been obtained in violation of his *Miranda* rights, the State had proven that such error was

harmless beyond a reasonable doubt given the overwhelming evidence of the defendant's guilt), *appeal dismissed and disc. review denied*, 360 N.C. 66, 621 S.E.2d 878 (2005); *State v. Rhodes*, 151 N.C. App. 208, 218, 565 S.E.2d 266, 272 (holding that, even though the trial court erred by denying the defendant's suppression motion, that error was harmless beyond a reasonable doubt given the overwhelming evidence of the defendant's guilt), *disc. review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002). As a result, Defendant is not entitled to relief from the trial court's judgments based upon the denial of his suppression motion.

### III. Conclusion

Thus, for the reasons set forth above, Defendant is not entitled to relief from the trial court's judgments on the basis of any of the contentions that he has advanced before this Court. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO PREJUDICIAL ERROR.

JUDGES ROBERT C. HUNTER and STROUD concur.

Report per Rule 30(e).