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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-806

Filed: 7 April 2020

Sampson County, No. 16CRS051643

STATE OF NORTH CAROLINA

v.

JONATHAN CONLANGES BOYKIN, Defendant.

Appeal by Defendant from judgment entered 7 December 2018 and order entered 19 December 2018 by Judge Thomas D. Haigwood in Sampson County Superior Court. Heard in the Court of Appeals 4 March 2020.

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

*Gilda C. Rodriguez for Defendant.*

BROOK, Judge.

Jonathan Conlanges Boykin (“Defendant”) appeals from a judgment entered upon jury verdicts for felonious operation of a motor vehicle to elude arrest and attaining the status of habitual felon. Defendant argues the trial court committed plain error by admitting photographs of Defendant, “mug shots,” into evidence. Defendant further argues he received ineffective assistance of counsel because his

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trial counsel failed to object to the admission of these photographs, to certain hearsay statements, and elicited impermissible testimony. Finally, Defendant claims the trial court erred by entering a civil judgment against him for attorney's fees incurred by his court-appointed counsel without providing him notice and an opportunity to be heard.

For the reasons stated below, we hold that Defendant has not demonstrated that the trial court committed plain error by admitting his mug shots into evidence nor has he made the requisite showing of prejudice for an ineffective assistance of counsel claim. However, we agree that the trial court did not provide Defendant notice and opportunity to be heard on the issue of attorney's fees and therefore vacate the money judgment and remand for further proceedings.

I. Background

Around 11:50 p.m. on 19 June 2016, Corporal Christopher Hardison of Sampson County was on patrol duty when a grey Nissan a couple of intersections ahead of him caught his eye. Corporal Hardison turned right to get behind the vehicle, and while the two were stopped at a stop sign, Corporal Hardison recognized the driver to be Defendant, with whom he had prior interactions and who he knew did not have a valid driver's license. As Defendant turned right, he drove left-of-center, at which point Corporal Hardison activated his blue lights and sirens.

Defendant did not stop for several intersections, and Corporal Hardison testified at trial that after Defendant turned onto an adjacent street, he “reached speeds of over one hundred miles per hour.” A high-speed chase ensued, and at some point during the pursuit, Corporal Hardison’s and Defendant’s cars collided. Defendant sped away, and Corporal Hardison, after checking his vehicle for damage, continued to pursue Defendant. Defendant eventually crashed into a tree, abandoned the car, and fled on foot. Corporal Hardison arrived after the crash and radioed for canine support to help locate Defendant. Though he eluded arrest that evening, Defendant was arrested the following day.

Defendant was indicted on 29 January 2018 for felony fleeing to elude arrest by a motor vehicle, misdemeanor injury to personal property, and having attained the status of habitual felon. Defendant’s first trial ended in a hung jury on 18 July 2018. The State re-tried Defendant on 6 December 2018 and elected to proceed only on the charges of felony fleeing to elude arrest by a motor vehicle and having attained the status of habitual felon. Corporal Hardison was the sole witness for the State.

Corporal Hardison testified that the driver of the vehicle had a thin, light beard, and was wearing a white t-shirt and a black ball cap that covered most of his hair save for small, short braids. He testified he first recognized the driver was Defendant when he was sitting behind the grey Nissan at the stop sign, and Defendant looked over his right shoulder before turning right. Corporal Hardison

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testified he was clearly able to see Defendant again during the collision with Defendant's car, where the front of his car ran into Defendant's driver side door, which turned Defendant's car toward Corporal Hardison's so that they "were technically driver door to driver door."

The jury was shown a video recording of the car chase, which came from Corporal Hardison's patrol car. The State introduced still shots from the video from before the collision that showed the driver's side of the vehicle with the driver wearing a white t-shirt and black ball cap. The State also introduced photographs of Defendant, which Corporal Hardison testified fairly depicted the way Defendant looked in June 2016.

During cross-examination, defense counsel asked Corporal Hardison how he knew Defendant and determined that Defendant was the driver of the vehicle on 19 June 2016.

[DEFENSE COUNSEL]: And how did you first encounter [Defendant] [] as someone you knew?

[CORPORAL HARDISON]: How did I encounter --

[DEFENSE COUNSEL]: Yeah. Where? When? What made you know that's [Defendant]?

[CORPORAL HARDISON]: On a previous felony flee to elude case.

[DEFENSE COUNSEL]: How long ago had that been?

[CORPORAL HARDISON]: A year.

Corporal Hardison testified how he later learned who the owner of the grey Nissan was in the following exchange:

[THE STATE]: Corporal Hardison, did you come into contact with a Ms. Brianna Graham later that night?

[CORPORAL HARDISON]: Yes, ma'am. I did.

...

[THE STATE]: And were you familiar with her relationship to [ ] [D]efendant?

[CORPORAL HARDISON]: Yes, that was [Defendant]'s girlfriend.

[THE STATE]: And where did you come into contact with her?

[CORPORAL HARDISON]: I had other officers staged up on Garland Airport Road to be on the lookout for the subject on foot. Ms. Graham actually approached one of those officers asking --

[THE STATE]: And is that where -- did you then travel to those officers?

[CORPORAL HARDISON]: Yes, I did.

[THE STATE]: And is that where you came into contact with her?

[CORPORAL HARDISON]: Yes, I did.

[THE STATE]: What road was that?

[CORPORAL HARDISON]: That was on Garland Airport Road.

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[THE STATE]: Did you determine who owned the vehicle [Defendant] was driving?

[CORPORAL HARDISON]: Yes, Ms. Boykin -- Ms. Graham. I'm sorry.

Defense counsel also questioned Corporal Hardison about his interactions with Ms. Graham.

[DEFENSE COUNSEL]: . . . [W]ere you aware of who owned the vehicle once it -- once you were in the woods where the car was?

[CORPORAL HARDISON]: Yes.

[DEFENSE COUNSEL]: You called the tags in then again?

[CORPORAL HARDISON]: No. No, they had given me the read back on the tags.

[DEFENSE COUNSEL]: Okay. And what read back did they give you, sir?

[CORPORAL HARDISON]: That the vehicle belonged to Brianna Graham.

[DEFENSE COUNSEL]: You didn't know Ms. Graham, did you?

[CORPORAL HARDISON]: Yes, I did.

[DEFENSE COUNSEL]: Okay. And at that point, what did you do after you found out who the car belonged to?

[CORPORAL HARDISON]: At that point, I contacted a canine officer to come try to track the subject with a canine.

[DEFENSE COUNSEL]: Did you contact Brianna Graham about the vehicle?

[CORPORAL HARDISON]: No, I didn't.

[DEFENSE COUNSEL]: Okay. How did you come into contact with Brianna Graham?

[CORPORAL HARDISON]: She -- as I stated before, I had officers stationed on Garland Airport Road looking for the subject that had jumped and ran from me. We had a [perimeter] set up. Ms. Graham actually approached one of those officers and asked about her car, where her car was.

Corporal Hardison testified that he then drove Ms. Graham back to her residence and as he arrived, he saw a person run out the back door and “jump[] a fence, a little, small, four-foot chain link fence.” Corporal Hardison testified he attempted to follow, but “the chain link grabbed hold of the pants that [he] was wearing . . . and [he] had to rip [his] pants off . . . to get loose from the fence.” Corporal Hardison testified that that the person who ran out of the house was “[p]robably five-five, five-eight, about 230, 240 pounds” and wearing “dark colored jeans, a white t-shirt, and a black ball cap.” Corporal Hardison testified he recognized that person to be Defendant.

On 7 December 2018, the jury found Defendant guilty of felony fleeing to elude arrest by a motor vehicle and of having attained the status of habitual felon, and Judge Haigwood sentenced Defendant to 112 months' to 147 months' active

imprisonment. Defendant gave oral notice of appeal after entry of the criminal judgment.

On 19 December 2018, Judge Haigwood entered a civil judgment for attorney's fees in the amount of \$1,567.25.

## II. Analysis

On appeal, Defendant makes three arguments. First, he argues that that the trial court committed plain error in admitting photographs, “mug shots,” of Defendant into evidence. Next, Defendant argues that he received ineffective assistance of counsel because his trial counsel (1) elicited impermissible Rule 404(b) evidence and improper hearsay statements and (2) failed to object to the admission of certain hearsay statements and Defendant's mug shots. Finally, Defendant argues the trial court improperly imposed a civil judgment for attorney's fees against him. We consider each argument in turn.

### A. Mug Shots

#### i. Standard of Review

As is the case here, an issue that was not preserved by objection at trial and is not deemed preserved by rule or law will be reviewed for plain error. N.C. R. App. P. 10(a)(4). To find plain error, we must conclude, “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) (internal citations and marks omitted).

ii. Merits

“In this State photographs are admissible to illustrate the testimony of a witness.” *State v. Hatcher*, 277 N.C. 380, 388, 177 S.E.2d 892, 898 (1970), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 593, 359 S.E.2d 776, 778-79 (1987). When the “portions which might have been prejudicial to him[,]” namely the name of the law enforcement agency, the date, and the inmate number, are removed or hidden, a defendant’s mug shot is “only an ordinary photograph . . . offered and admitted for illustrative purposes bearing upon identification of [a] defendant.” *Hatcher*, 277 N.C. at 389, 177 S.E.2d at 898.

During the State’s direct examination of Corporal Hardison, the State introduced two photographs of Defendant. Corporal Hardison testified as follows regarding the photographs:

[THE STATE]: Corporal Hardison, I’m going to hand you what’s been marked for identification as State’s Exhibit Number 4, and ask you to take a look at it. . . . [W]hat is that a photograph of?

[CORPORAL HARDISON]: That is a photograph of [Defendant].

[THE STATE]: And does that photograph fairly and accurately show the way he looked in June of 2016?

[CORPORAL HARDISON]: Yes ma’am, it has the beard as

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well as the short braids.

[THE STATE]: [I]s that a little different from how he looks now?

[CORPORAL HARDISON]: Yes, ma'am. The braids are a lot longer now . . . and the beard is a lot thicker as well.

. . .

[THE STATE]: I'm going to hand you what's been marked for identification as State's Exhibit Number 5, and ask you to take a look at it. And what is that a photograph of?

[CORPORAL HARDISON]: Another photograph of [Defendant]'s side.

[THE STATE]: And can you see that side beard a little better?

[CORPORAL HARDISON]: Yeah, on his right side you can see the thin beard and you can see the short braids.

[THE STATE]: Does that photograph fairly and accurately represent the way [Defendant] appeared in June of 2016?

[CORPORAL HARDISON]: Yes, it does.

Defendant argues that the introduction of his mug shots was unduly prejudicial and unfairly suggestive. We first note that neither photograph contained the name of the police department, the date, nor any other written material. Moreover, the record reveals that identity was at issue during Defendant's trial; specifically, Corporal Hardison's identification of Defendant as the driver of the vehicle on 19 June 2016. Consistent with *Hatcher*, we conclude that the admission

of Defendant’s “photograph [mug shot], with inscription and date deleted, was properly admitted for illustrative purposes on the question of identity.” 277 N.C. at 389, 177 S.E.2d at 899. We therefore hold Defendant has failed to show error, much less that the admission of the photograph had a probable impact on the jury’s finding of guilt.

B. Ineffective Assistance of Counsel

i. Standard of Review

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted). “Under a *de novo* review, th[is] [C]ourt 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) (citations and internal marks omitted).

ii. Merits

“[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required[.]” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). If the reviewing court determines that the claim has been prematurely asserted, “it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent [Motion for Appropriate Relief] proceeding.” *Id.* at 167, 557

S.E.2d at 525. Because we can determine from the “cold record” whether defense counsel denied Defendant effective assistance of counsel, we proceed to the merits of Defendant’s claim.

In order to establish ineffective assistance of counsel, the defendant must first “show that counsel’s performance was deficient” and then that counsel’s deficient performance prejudiced his defense. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). Where we conclude that counsel’s performance did not prejudice the defendant, we need not analyze whether counsel’s performance was actually deficient. *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 123, 138 (2011). In reviewing for prejudice, “[t]he question becomes whether a reasonable probability exists that, absent counsel’s deficient performance, the result of the proceeding would have been different.” *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (citations omitted).

Defendant argues the following conduct by his trial counsel denied him his right to effective assistance of counsel: first, during direct examination of Corporal Hardison, defense counsel (1) failed to object to the State’s eliciting of inadmissible hearsay testimony regarding the registered ownership of the vehicle involved in the incident and the relationship of the owner to Defendant, and (2) failed to object to the admission of Defendant’s mug shots; and second, during cross-examination of

Corporal Hardison, Defendant's trial counsel (1) elicited testimony that Corporal Hardison was familiar with Defendant from a prior felony flee to elude case, and (2) elicited improper hearsay testimony about the registered ownership of the vehicle involved in the incident and the relationship of Ms. Graham to Defendant. Assuming without deciding that defense counsel's conduct was deficient for these reasons, we conclude that Defendant has not made the requisite showing of prejudice.

At trial, the State introduced competent evidence that tended to show Defendant was feloniously "fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5 (2019). This included evidence that when the driver of the grey Nissan was stopped at the stop sign, Corporal Hardison recognized Defendant and knew he did not have a valid driver's license. Corporal Hardison testified that he then confirmed Defendant's license was revoked indefinitely. Corporal Hardison further testified that when Defendant turned right, he drove left-of-center in violation of traffic laws, and then Corporal Hardison activated his blue lights and sirens and attempted to stop Defendant. Defendant then drove away at speeds greater than 100 miles per hour in a 55 mile-per-hour zone. Corporal Hardison also testified that he identified the driver again after their vehicles had collided and their cars were "driver side door to driver side door." Corporal Hardison testified that the driver was wearing a white shirt, a

black ball cap, and had a thin beard.<sup>1</sup> Corporal Hardison testified that when he arrived at Ms. Graham’s residence, someone ran out the back door and that person was wearing “dark colored jeans, a white t-shirt, and a black ball cap.” Corporal Hardison testified that person was Defendant.

In light of this evidence, we do not believe there is a reasonable possibility the jury’s verdict would have differed had the testimony referenced above not been elicited nor had it been excluded, as he argues would have been proper. We therefore conclude that Defendant has failed to make the required showing that the alleged deficiencies in his counsel’s performance resulted in prejudice.

### C. Attorney’s Fees

Before we reach the merits of Defendant’s appeal of the trial court’s imposition of a civil judgment for attorney’s fees, we first turn to Defendant’s motion to amend the record on appeal. Then, we address his petition for writ of certiorari.

#### i. Motion to Amend the Record on Appeal

The record on appeal was settled on 9 September 2019, but it did not include the order imposing attorney’s fees. The order needed to be included in the record on appeal in order to confer appellate jurisdiction to this Court. *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (holding where “there is no civil judgment

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<sup>1</sup> Video from Corporal Hardison’s patrol car corroborated his version of events recounted above and still shots from that video, which were introduced to the jury, showed the driver was wearing a white t-shirt, a black ball cap, and had a thin beard.

in the record ordering [the] defendant to pay attorney fees, the Court of Appeals ha[s] no subject matter jurisdiction on this issue.”) (citations omitted).

On 14 November 2019, Defendant filed a motion pursuant to North Carolina Rule of Appellate Procedure 9(b)(5) requesting amendment of the record to include the civil judgment ordering Defendant to pay attorney’s fees. This Court has discretion to grant such a motion. *State v. Petersilie*, 334 N.C. 169, 177, 432 S.E.2d 832, 837 (1993) (noting the decision to grant or deny a motion to amend the record on appeal is “a decision within the discretion of the Court of Appeals”) (citation omitted); *see also State v. Mangum*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 N.C. App. LEXIS 175 \*11 (2020) (“[T]his Court has the authority and the jurisdiction to amend a record that does not confer jurisdiction for appellate review into one that demonstrates our appellate jurisdiction.”).

In our discretion, we grant Defendant’s motion to amend the record on appeal to include the fee application and civil judgment entered on 19 December 2018, establishing the fees owed by Defendant to be \$1,567.25.

ii. Petition for Writ of Certiorari

Defendant entered an oral notice of appeal following entry of the criminal judgment on 7 December 2018 but did not file a timely written notice of appeal of the civil judgment for attorney’s fees as is required by North Carolina Rule of Appellate Procedure 3(a).

When “this Court cannot hear a defendant’s direct appeal [due to violation of a jurisdictional appellate rule], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*.” *State v. McKoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) (citation omitted). A defendant may file a petition for a writ of *certiorari* to appeal a civil judgment “when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1). In accordance with Rule 21, this Court has discretion to grant the petition and review the judgment. *Id.* As we have done in similar cases involving appeals from civil judgments ordering indigent defendants to pay attorney’s fees, *see, e.g., State v. Mangum*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 N.C. App. LEXIS 175 \*13; *State v. Patterson*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 WL 542812 \*7 (2020); *State v. Mayo*, \_\_\_, N.C. App. \_\_\_, \_\_\_, 823 S.E.2d 656, 659 (2019); *State v. Friend*, 257 N.C. App. 516, 519, 809 S.E.2d 902, 905 (2018), we grant Defendant’s petition for writ of *certiorari* and address the merits of the Defendant’s argument.

### iii. Standard of Review

Whether the trial court provided a defendant adequate “notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney” is a question of law, which this court reviews *de novo*. *Patterson*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 WL 542812 \*10. “Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own



judgment for that of the lower tribunal.” *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citation and marks omitted).

iv. Merits

Pursuant to N.C. Gen. Stat. § 7A-455, a trial court may order an indigent defendant who is convicted to pay for the amount of fees incurred by the defendant’s court-appointed attorney. N.C. Gen. Stat. § 7A-455 (2019). However, this Court has held that before entering a judgment for attorney’s fees against an indigent defendant, the trial court must afford the defendant notice and opportunity to be heard regarding the fees charged. *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907. In evaluating whether the trial court provided adequate notice and an opportunity to be heard, this Court assesses whether the trial court asked

defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

*Id.*, 809 S.E.2d at 907. This standard was established to provide “further guidance on what trial courts should do to ensure that this Court can engage in meaningful appellate review when defendants raise this issue.” *Id.* Thus, when there is no evidence in the record that the defendant was personally notified and given the opportunity to be heard “regarding the appointed attorney’s total hours or the total

amount of fees imposed,” then the “imposition of attorney’s fees must be vacated, even when the transcript reveals that attorney’s fees were discussed following [the] defendant’s conviction.” *State v. Harris*, 255 N.C. App. 653, 663-64, 805 S.E.2d 729, 737 (2017) (internal marks and citation omitted); *see also Patterson*, \_\_\_ N.C. App. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 WL 542812 \*11; *Mayo*, \_\_\_, N.C. App. at \_\_\_, 823 S.E.2d at 659; *Friend*, 257 N.C. App. at 523, 809 S.E.2d at 902-07; *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005).

Here, there is no indication in the record that Defendant was heard nor that he understood he had a right to be heard on the issue of attorney’s fees. The trial court did not engage in any colloquy in open court with Defendant regarding attorney’s fees. Instead, after the trial court announced Defendant’s sentence, the following exchange occurred between Defendant’s appointed counsel, Mr. Height, the trial court, and the court clerk:

MADAM CLERK: How about the -- how many hours on the attorney?

THE COURT: I figured he was going to probably give me a --

MR. HEIGHT: I’ll -- can I provide that to you, Your Honor?

THE COURT: Yeah. I didn’t figure you’d be able to do it right off the top of your head. And I just said whatever -- I’m going to -- but the judgment is going to include attorney’s fees. I believe that’s what I said.

MADAM CLERK: You did, but I -- usually -- with my

bookkeeper, I have to put it on the judgment.

THE COURT: Right. Well, I guess if we don't have it, we don't have it. I'll just have to wait and put that in or amend it.

Okay. That's the judgment of the Court. [Defendant], if you'd be so kind as to go with the Sheriff, please. All right. Mr. Height, thank you for your work in the case.

As is evident from the above exchange, the trial court never directly asked Defendant if he wanted to be heard on the issue of attorney's fees. Moreover, the record reflects that the trial court intended to enter a civil judgment against Defendant based on the hours that appointed counsel would later calculate, and nothing indicates that Defendant was or would be given the opportunity to be heard once those hours and fees were calculated. This ultimately came to pass on 19 December 2018 when the trial court entered a civil judgment for attorney's fees in the amount of \$1,567.25 against Defendant. Given that the trial court never directly asked Defendant whether he wished to be heard on the issue and there is no other evidence that Defendant was afforded notice and opportunity to be heard, we must vacate the civil judgment for attorney's fees and remand for further proceedings on this issue.

### III. Conclusion

For the reasons stated above, we hold that Defendant failed to show the trial court committed plain error by admitting his mug shots into evidence. We further

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hold that Defendant did not establish the necessary prejudice for an ineffective assistance of counsel claim.

We vacate the civil judgment for attorney's fees and remand for further proceedings on that issue.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).