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NO. COA12-1344  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v.

Union County  
No. 09 CRS 53823

JAMES CHRISTOPHER BOSHERS

Appeal by defendant from judgment entered 12 March 2012 by Judge Mark E. Klass in Union County Superior Court. Heard in the Court of Appeals 10 April 2013.

*Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.*

*James N. Freeman, Jr., for Defendant.*

ERVIN, Judge.

Defendant James Christopher Boshers appeals from a judgment sentencing him to a term of 250 to 309 months imprisonment based upon his conviction for the second degree murder of Sandra Denise Wengerd. On appeal, Defendant argues that the trial court erred by allowing the State to present prior bad act evidence, by allowing the prosecutor to question him concerning his invocation of his rights to remain silent and to the assistance of counsel, and by instructing the jury concerning

the manner in which it should consider evidence tending to show that Defendant had confessed. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Although Ms. Wengerd was married to John Wengerd, she was separated from him at the time of her death. Ms. Wengerd worked for Christopher Blount as a truck driver at a plumbing and HVAC wholesale company. Sometime before meeting Defendant, Ms. Wengerd had requested that Mr. Blount aid her in obtaining a handgun. Ms. Wengerd made a similar request of Phillip Jackson Benton, a friend and colleague, because she was afraid that someone was "messing with her door." In response to her request, Mr. Benton allowed Ms. Wengerd to borrow his .38 caliber Derringer pistol, a two-barrel weapon which had to be broken apart during the process of loading the weapon or retrieving spent shell casings.

Ms. Wengerd met Defendant through a dating website that she had joined after separating from her husband. At the time that the Defendant and Ms. Wengerd met, Defendant was living in a halfway house in which he was seeking help for his substance

abuse problems. Shortly after meeting Ms. Wengerd, Defendant began living with her. The relationship between Ms. Wengerd and Defendant lasted three weeks before Ms. Wengerd's death, during the second and third of which Defendant lived with Ms. Wengerd.

As their relationship progressed, Defendant began sitting around the house watching television without communicating with Ms. Wengerd. According to Mr. Blount, Ms. Wengerd became fearful because her relationship with Defendant started "great" and then "went downhill pretty quickly." For example, Defendant made numerous purchases, including online transactions, using Ms. Wengerd's credit card and, on at least one occasion, fired a weapon at Ms. Wengerd. As a result, according to a friend of Ms. Wengerd's named David Brown, Ms. Wengerd had grown afraid of Defendant and wanted to find a way to get him out of her home. Similarly, Ms. Wengerd informed a former co-worker named Penny Hines that Defendant "was verbally abusive and threatening and [that] she was afraid of him." During the week of her death, Ms. Wengerd asked Ms. Hines to stay with her in the hope that Ms. Hines could "diffuse" the situation which had developed between herself and Defendant. Ms. Hines, however, did not agree to Ms. Wengerd's request because she was also afraid of Defendant.

On 19 July 2009, Defendant drove to Columbia, South Carolina, in Ms. Wengerd's vehicle. At that time, Defendant

made withdrawals using Ms. Wengerd's debit card which resulted in a \$295.00 deficit balance in Ms. Wengerd's account. After Ms. Wengerd's vehicle broke down, Defendant called for an ambulance from a nearby Hardee's restaurant in Columbia. Defendant was taken to the emergency department of Palmetto Health Richland Memorial Hospital.

At the time that he requested medical assistance, Defendant claimed to be hearing voices and reported that he had "been on a drinking and drugging binge for the last two weeks." When he spoke with the attending physician, Dr. Steven Charles Stanfield, Defendant did not exhibit a strong odor of alcohol and appeared to be sober. While examining Defendant, Dr. Stanfield learned that he had a history of psychiatric difficulties. As Dr. Stanfield took his history, Defendant requested that Dr. Stanfield find out about Ms. Wengerd because "he thought he may have killed her" when he shot her twice. At that point, the police were contacted.

After receiving word that a homicide might have occurred at that location, officers of the Monroe Police Department went to Ms. Wengerd's address. Upon confirming that Defendant was not present, investigating officers made a forcible entry into the residence and found Ms. Wengerd slumped over on her couch. An examination of Ms. Wengerd's body revealed the presence of two gunshot wounds, one to her face and the other, which was a

contact wound that caused her death, to her sternum. A third bullet found at the scene had gone through a wall and into a shutter without making any contact with Ms. Wengard's body. Investigating officers found two spent shell casings at the scene, one of which was on top of the trash inside a trash can and the other of which was on the bottom of the trash can underneath the trash bag. The only things that appeared to be out of place in Ms. Wengard's home were a fallen figurine and a salt shaker found under an armoire.

After Dr. Stanfield contacted investigating officers based upon Defendant's statement, Sergeant Donald Cribb of the Columbia Police Department went to the hospital at which Defendant was receiving treatment. Upon contacting officers of the Monroe Police Department, Sergeant Cribb learned that Ms. Wengard's body had been discovered. Having received confirmation that a warrant had been issued for Defendant's arrest, officers of the Columbia Police Department took Defendant into custody. Investigating officers also located Ms. Wengard's car. The weapon used to kill Ms. Wengard was eventually located in Orangeburg, South Carolina.

Sergeant Mark Anthony Greene and Detectives Javier Villarreal and Ricardo Garcia of the Monroe Police Department went to Columbia for the purpose of transporting Ms. Wengard's car, some clothing, and Defendant to Monroe. Although Defendant

told Sergeant Greene and Detectives Villarreal and Garcia that he was willing to cooperate, he also stated that he wanted a lawyer in order to avoid "sit[ting] there and cut[ting his] throat." At that point, an attorney was appointed to represent Defendant. At the jail, during the course of the booking process, Defendant spontaneously stated that he had heard the District Attorney say that the case could be a capital case and asserted, in response, that the killing was not premeditated and that he loved "that woman."

## 2. Defendant's Evidence

Although Defendant had resided in South Carolina for many years, he had begun living in an all-male rehabilitation center operated by the Salvation Army in Charlotte in May 2009. In June 2009, Defendant met Ms. Wengerd online. After communicating with Ms. Wengerd for a week, Defendant obtained a one day pass for 4 July 2009. As a result, Ms. Wengerd drove to Charlotte, where she met Defendant in person for the first time. After having a successful date on 4 July 2009, Defendant and Ms. Wengerd met again on the following day and talked each day for the remainder of the week. Defendant testified that he was under the impression that Ms. Wengerd was divorced.

During the following week, Ms. Wengerd said that she wanted Defendant to move into her home. Defendant used a two day pass to visit Ms. Wengerd on the ensuing Friday. Although he was a

recovering addict, Defendant began drinking and abusing drugs with Ms. Wengerd. After "partying" together all night, Defendant and Ms. Wengerd decided on Saturday morning that Defendant could not return to the rehabilitation center and would, instead, have to live with Ms. Wengerd because he would inevitably fail the breathalyzer test when he returned to the facility.

On Wednesday, 15 July 2009, Ms. Wengerd fired a gun inside her home because she believed that someone was attempting to break into the house. However, Defendant was standing by the door when Ms. Wengerd fired and could see that no one was attempting to enter the house. As a result of the fact that Ms. Wengerd was clearly intoxicated, Defendant helped her into her bed and allowed her to sleep the rest of the evening.

Two days later, Defendant told Ms. Wengerd that he had to stop drinking as much as he had been drinking and that he needed medication to address his alcohol consumption problems. In response, Ms. Wengerd purchased Xanax and a pair of wedding rings for the couple. Later that night, Ms. Wengerd took Defendant to a bar in Monroe, from which the two of them were eventually expelled after Ms. Wengerd almost started a fight when another woman began flirting with Defendant.

On the following morning, which was Saturday, 18 July 2009, Ms. Wengerd's husband woke Defendant up by banging on the

residence door. After Mr. Wengerd entered the residence, he and Defendant talked. At that time, Defendant discovered that Ms. Wengerd was not divorced. After Ms. Wengerd explained the nature of her relationship with Defendant to her husband, she requested that he agree to a divorce. As soon as Mr. Wengerd left at around 9:30 a.m., Ms. Wengerd and Defendant began drinking. Around noon, Defendant also began drinking. The two continued drinking, using cocaine, and ingesting Xanax as the day progressed.

At some point during the day, Defendant called the friend who had referred him to the drug rehabilitation center to tell her that he had relapsed. At the end of the conversation, Defendant said "I love you too," a statement which caused Ms. Wengerd to become angry and to slap Defendant's face four times. After slapping Ms. Wengerd in self-defense, Defendant went to the bathroom to wash the blood out of his mouth. When Defendant returned to the room in which their altercation has occurred, Ms. Wengerd was standing near the couch holding a handgun. As Defendant attempted to wrestle the gun out of Ms. Wengerd's hand, it discharged, hitting Ms. Wengerd. The gun discharged a second time as Defendant began to fall to the ground.

When Defendant noticed that blood was coming out of Ms. Wengerd's mouth, he panicked, took the keys to her car, and drove to Columbia. After taking money from Ms. Wengerd's



account using her bank card, Defendant began drinking and ingesting drugs. As a result of the fact that Ms. Wengerd's car eventually broke down, Defendant walked to a nearby Hardee's restaurant and asked the cashier to call an ambulance.

After law enforcement officers and an ambulance arrived at the restaurant, Defendant was taken to an emergency room. After an initial examination by a nurse, Defendant saw Dr. Stanfield and told him that someone should check on his girlfriend because Defendant "thought [he] might have killed her." Eventually, Sergeant Greene and Detective Villareal picked Defendant up for the purpose of returning him to North Carolina. Although Defendant told the investigating officers that he would cooperate, he also stated that he wanted a lawyer because he "didn't want to sit there and cut [his] throat."

#### B. Procedural Facts

A warrant for arrest charging Defendant with murdering Ms. Wengerd was issued on 19 July 2009. The Union County grand jury returned a bill of indictment charging Defendant with first degree murder on 28 September 2009. The charge against Defendant came on for trial before the trial court and a jury at the 5 March 2012 criminal session of the Union County Superior Court. On 12 March 2012, the jury returned a verdict convicting Defendant of second degree murder. At the conclusion of the ensuing sentencing hearing, the trial court entered a judgment

sentencing Defendant to a term of 250 to 309 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

## II. Legal Analysis

### A. Admission of Prior Bad Act Evidence

In his first challenge to the trial court's judgment, Defendant contends that the trial court committed plain error by allowing the admission of testimony concerning specific acts committed by Defendant during the course of his relationship with Ms. Wengerd. More specifically, Defendant argues that the trial court erred by allowing the admission of testimony that he had been charging purchases to Ms. Wengerd's credit card and that he had fired a shot into the wall of Ms. Wengerd's residence in violation of N.C. Gen. Stat. § 8C-1, Rule 404(b).<sup>1</sup> We do not find Defendant's argument persuasive.

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<sup>1</sup>In addition to the testimony discussed in the text, Defendant also argues that the trial court erred by allowing the admission of general statements to the effect that Ms. Wengerd was afraid of Defendant on the grounds that these statements were excessively vague and non-specific. However, given that such statements clearly showed the nature of the relationship between the parties and given that Defendant has not presented a specific argument, supported by citation to relevant authority, in support of his position, N.C.R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"), we are unable to ascertain how the admission of this evidence constituted plain error and see no need to discuss this aspect of Defendant's challenge to the trial court's judgment in any greater detail.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."<sup>2</sup> N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," which means that the reviewing court must determine, "after examination of the entire record, [that] 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) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "Moreover, because plain error is to be 'applied cautiously and only in the exceptional case,' the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378) (citations omitted).

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<sup>2</sup>Although Defendant filed a motion *in limine* challenging the admission of prior bad act evidence, he failed to object to any of the challenged testimony at trial, thereby losing the benefit of his earlier motion. *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied.*, 516 U.S. 884, 116 S. Ct. 223, 133 L. Ed. 2d 153 (1995).

A trial court properly allows the admission of "relevant evidence of other crimes, wrongs or acts by a defendant [unless] . . . its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Rollins*, \_\_ N.C. App. \_\_, \_\_, 725 S.E.2d 456, 460 (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)) (internal quotation marks omitted), *appeal dismissed*, 366 N.C. 242, 242, 731 S.E.2d 415, 415-16 (2012). A determination concerning whether evidence was properly admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) requires the Court to address three issues:

First, is the evidence relevant for some purpose other than to show that the defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case? Third, is the probative value of the evidence substantially outweighed by the danger of unfair prejudice pursuant to [N.C. Gen. Stat. § 8C-1,] Rule 403?

*Id.* (quoting *State v. Foust*, \_\_ N.C. App. \_\_, \_\_, 724 S.E.2d 154, 159, (2012) (quotation marks omitted). We do not believe that the trial court committed plain error by admitting any of the evidence which Defendant challenges in his brief.

As an initial matter, Defendant argues that the trial court erred by allowing Mr. Brown to testify that Ms. Wengerd had informed him that Defendant was using her bank card to make

online purchases on the grounds that this evidence had no relevance other than to show that Defendant was a person of bad character. On the contrary, however, the evidence presented at trial demonstrates that relations between Defendant and Ms. Wengard were strained in the days prior to her death for a number of reasons, including his use of her money to make purchases, and that Defendant utilized Ms. Wengard's bank card to withdraw funds from her account after killing her. In light of that set of circumstances, we conclude that the challenged testimony tends to shed light on the nature of the relationship between the parties at the time of Ms. Wengard's death and the reasons that might have led Defendant to act as he did. As a result, we have no difficulty in concluding that evidence concerning Defendant's unauthorized use of Ms. Wengard's credit card was relevant for a purpose other than showing Defendant's propensity to engage in improper conduct, that the trial court did not abuse its discretion by concluding that the probative value of this evidence outweighed its prejudicial effect, *State v. Garcell*, 363 N.C. 10, 38, 678 S.E.2d 618, 636, *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009), and that the trial court did not err by allowing the admission of the challenged evidence.

Secondly, Defendant contends that evidence that he had previously fired a weapon into a wall near the place where Ms.

Wengerd was situated "show[ed] only a disposition to commit such crimes." However, the appellate courts in this jurisdiction have repeatedly upheld the admission of evidence tending to show that the defendant had previously assaulted the alleged victim. For example, this Court has previously stated that:

In the case at bar, evidence of defendant's prior assault on the victim tended to establish not only malice, intent, premeditation and deliberation, all elements of first-degree murder, but more importantly, it tended to establish ill-will against the victim and lack of accident. Because defendant contended that he shot Reels by mistake, this evidence was relevant to an issue other than defendant's character.

*State v. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 397 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). Similarly, Defendant claimed at trial that the shooting of Ms. Wengerd was unintentional, a contention which the challenged evidence tends to refute. Moreover, according to well-established North Carolina law, malice is an element of both first and second degree murder. *See State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 785, *cert. denied*, 516 U.S. 996, 116 S. Ct. 533, 133 L. Ed. 2d 438 (1995). In addition, Defendant was charged with first degree murder, a crime which requires proof that the defendant acted with the specific intent to kill. *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (holding that, "[i]n order to convict a defendant of

premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation"), *cert. denied*, 552 U.S. 1271, 128 S. Ct. 1682, 170 L. Ed. 2d 377 (2008). Evidence that Defendant had previously fired a weapon at Ms. Wengerd tends to show an intention to inflict harm upon her. Thus, the trial court did not err by allowing the admission of the evidence of Defendant's prior assault upon Ms. Wengerd. As a result, neither of Defendant's arguments in reliance upon N.C. Gen. Stat. § 8C-1, Rule 404(b) have merit.

B. Defendant's Right to Counsel and to Remain Silent

Secondly, Defendant contends that the trial court erred by failing to intervene on its own motion when the State cross-examined him concerning his decision to exercise his right to remain silent and to invoke his right to the assistance of counsel. More specifically, Defendant contends that certain questions posed by the prosecutor on cross-examination concerning his failure to tell investigating officers that the death of Ms. Wengard was accidental while investigating officers were driving him from Columbia to Monroe violated his rights to

remain silent and to the assistance of counsel.<sup>3</sup> We do not find Defendant's argument persuasive.

"Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). "For example, a defendant's decision to remain silent following her arrest cannot be used as substantive evidence of her guilt of the crime charged;" "[h]owever, if the defendant is not yet under arrest, the State may use the defendant's pre-arrest silence for impeachment purposes at trial." *Id.* (citing *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) and *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 2130, 65 L. Ed. 2d 86, 96 (1980)). "If the defendant has been arrested but has not yet been informed of her *Miranda* rights, the State may use the defendant's silence for impeachment purposes." *Id.* (citing *Fletcher v. Weir*, 455 U.S. 603, 606-07, 102 S. Ct. 1309, 1312-13, 71 L. Ed. 2d 490, 494 (1982) (per

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<sup>3</sup>Although Defendant asserts at one point in his brief that the challenged cross-examination violated his rights under both the Fifth and Sixth Amendments to the United State Constitution, the authorities cited in support of his argument deal solely with Fifth Amendment issues. As a result, given Defendant's failure to advance any argument accompanied by the citation of authority in support of his Sixth Amendment claim, we conclude that Defendant has abandoned that claim and decline to consider it. N.C.R. App. P. 28(b)(6).



curiam)). As a result, a defendant's post-*Miranda* silence may not be used for either substantive or impeachment purposes. See *Id.*; see also *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010) (citing *Boston* for the proposition that "[a] defendant's post-arrest, post-*Miranda* warnings silence, however, may not be used for any purpose").

At trial, the prosecutor questioned Defendant on cross-examination as follows:

Q And you drove from Columbia to Monroe, North Carolina; is that right?

A (No response.)

Q With the police?

A Oh, yes, ma'am.

Q And did you tell them that you struggled with her over the gun?

A I didn't tell them nothing. This is what I told them. I told them to get me a lawyer when we got to Monroe and I would tell them that everything that happened. I agreed to cooperate from day one; all they had to do was get me a lawyer. When my lawyer came in after they had carried me up -- I guess it was up to this building and gave me a bond hearing and told me what the charges were. When my lawyer came in, my lawyer said -- he talked to me and I talked to him, and he said I advise you not to say anything else.

Q Let me ask you that question again. Did you tell the police in that long drive from Columbia, South Carolina to here

--

A Uh-huh.

Q -- that you killed Sandra while y'all were struggling?

A No.

Q Did you tell them that you killed her by accident?

A No, I ain't told them nothing.

Q Didn't you, in fact, tell them that you wanted to talk to them but you didn't want to cut your own throat?

A I told them that I needed a lawyer so I wouldn't cut my own throat.

Q Well, if you had an accidental fight with her, what -- how would that cut your throat?

A Why shouldn't I get a lawyer to make sure that I'm protected?

Q Well, let's talk about what happened after you had that hearing and you got a lawyer and they were booking you.

A Uh-huh.

Q What did you tell them then?

A I told them that I loved her.

Q You told them you loved her.

A Yes.

Q Did you tell her it was an accident?

A (No response.)

Q Did you tell them that it happened during a struggle?

A I didn't tell them anything like that.

Q Did you tell them that you thought your life was in danger?

A No, ma'am.

Q Did you tell them that she pointed a gun at you and threatened to shoot you --

A No.

Q -- in those male parts?

A Listen, my Miranda rights tells me that anything I say will be used against me in a court of law.

Q And you thought that that would make you look bad?

A They read me my Miranda rights.

Q Did you think that that statement would make you look bad?

A What's that?

Q That she pointed a gun at you and you thought your life was in danger.

A My lawyer had advised me don't say nothing.

Q What about on that drive back from Columbia?

A I just told you what I said.

As the record clearly reflects, the prosecutor's questioning related to Defendant's post-*Miranda* silence given Defendant's explicit statement that the investigating officers had "read

[him his] *Miranda* rights" by the time relevant for purposes of our analysis of Defendant's claim. As a result, the prosecutor repeatedly questioned Defendant about his failure to provide certain information to investigating officers despite the fact that he had been informed of his *Miranda* rights and had invoked his right to the assistance of counsel. Although the prosecutor's questions were clearly impermissible, that determination does not end our inquiry.

Although an error of constitutional dimensions would ordinarily necessitate an award of appellate relief unless the State has satisfied us that the error in question was harmless beyond a reasonable doubt, N.C. Gen. Stat. § 15A-1443(b), we are limited to reviewing Defendant's challenge to the prosecutor's questions utilizing a plain error standard of review given Defendant's failure to lodge an objection to the challenged questions at trial. *See State v. Lemons*, 352 N.C. 87, 95, 530 S.E.2d 542, 547 (2000), (holding that the "defendant's failure to object at trial and properly preserve the constitutional issue for appeal requires us to review this potential constitutional error under the plain error standard of review"), *cert. denied*, 531 U.S. 1091, 121 S. Ct. 813, 148 L. Ed. 2d 698 (2001). As a result, in order to obtain an award of appellate relief, Defendant must convince us "that the jury probably would have returned a different verdict had the error not occurred."

*Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327. In making the required plain error determination, the Supreme Court has indicated that we should consider:

(1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

*State v. Richardson*, \_\_ N.C. \_\_, \_\_, 741 S.E.2d 434, 442 (2013) (analyzing the Supreme Court's decision in *State v. Moore*, 366 N.C. 100, 105-07, 726 S.E.2d 168, 173-74 (2012)).

The record clearly shows that the prosecutor both elicited and emphasized the evidence elicited on cross-examination concerning Defendant's post-arrest silence. As we have already established, the prosecutor repeatedly questioned Defendant about his failure to claim that Ms. Wengerd had attacked him or that the killing of Ms. Wengerd was unintentional and implicitly challenged the appropriateness of Defendant's decision to invoke his right to remain silent and to have the assistance of counsel

on cross-examination. During its closing argument, the State again emphasized Defendant's failure to claim that he had been under attack and that the death of Ms. Wengerd was unintentional before taking the witness stand as sufficient "reason enough to not believe him." As a result, the prosecutor clearly and explicitly elicited and emphasized the inadmissible testimony in question during the process of seeking to persuade the jury to convict Defendant.

On the other hand, the record contains substantial evidence tending to show Defendant's guilt and undercutting Defendant's claim that he was under attack and that the death of Ms. Wengerd was unintentional. For example, the record contains substantial evidence tending to show that Defendant had previously assaulted Ms. Wengerd with a deadly weapon. In addition, the undisputed record evidence tends to show that Ms. Wengerd sustained two gunshot wounds, a fact which is inconsistent with Defendant's claim to have been attempting to ward off an attack by Ms. Wengerd and that Ms. Wengerd's death was unintentional. The record also contains substantial evidence tending to show that Ms. Wengerd wanted to bring an end to both her relationship with Defendant and Defendant's use of her money for unauthorized purchases. Finally, the record shows that, instead of seeking help for Ms. Wengerd, Defendant took steps to hide the shell casings later found at the scene, failed to notify anyone that

Ms. Wengerd had been injured, fled to South Carolina, and liquidated Ms. Wengerd's bank account using her bank card. As a result, the record contains substantial evidence casting doubt on the validity of Defendant's account of the circumstances surrounding Ms. Wengerd's death.

In addition, the record demonstrates the existence of a substantial basis for questioning Defendant's credibility aside from the prosecutor's impermissible emphasis upon Defendant's post-arrest silence and his decision to invoke his right to counsel. For example, the prosecutor challenged the credibility of Defendant's claim that Ms. Wengerd had shot at him by questioning why Defendant would continue to cohabit with someone who had acted in that manner. In addition, the prosecutor challenged Defendant's contention that Ms. Wengerd had purchased rings for the two of them given the fact that she had not introduced Defendant to any member of her family and the fact that she attempted to kill him on the day after the alleged purchase. Furthermore, Defendant was forced to admit on cross-examination that, in spite of his claim that Ms. Wengerd had allowed him to use her debit card to purchase things for the home, he had not used it for that purpose after her death. Similarly, Defendant was closely questioned on cross-examination about how he was able to remove the gun from Ms. Wengerd's hand without injury during a period of time in which it discharged

twice. Finally, the State elicited evidence that, prior to his arrest, Defendant had failed to tell Dr. Stanfield that he had acted to protect himself and that the killing of Ms. Wengerd was accidental. As a result, the record contains ample basis for questioning Defendant's credibility aside from the impermissible use of Defendant's post-arrest silence and his invocation of the right to counsel.

Although the issue is admittedly a close one given the extent of the prosecutor's impermissible questioning of Defendant and his use of the evidence concerning Defendant's post-arrest silence and his invocation of his right to the assistance of counsel during the State's closing argument, we conclude that the strength of the evidence against Defendant coupled with the substantial legitimate questions raised about Defendant's credibility precludes us from granting Defendant's request for a new trial. Although Defendant emphasizes that the impermissible cross-examination occurred right before closing arguments and the jury's deliberations took "quite some time," we have never held such factors to be entitled to significant weight in conducting plain error analysis. Similarly, Defendant's argument based on the length of the jury's deliberations sheds little light on the extent to which we should hold that the impermissible cross-examination of Defendant constituted plain error given its speculative nature



and the fact that the jury convicted Defendant of a lesser included offense instead of the offense with which he had originally been charged. As a result, we conclude that Defendant has not shown that he is entitled to relief on the basis of this claim when it is considered utilizing a plain error standard of review.

### C. Jury Instruction

Finally, Defendant contends that the trial court erred by instructing the jury concerning the law which should be applied in evaluating Defendant's "confession." More specifically, Defendant contends that the "confession" instruction delivered by the trial court lacked adequate record support given that "the evidence can in no way support [a determination] that [Defendant] confessed to killing Ms. Wengerd with premeditation and deliberation and malice aforethought." We do not find Defendant's contention persuasive.

"Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.'" *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009)

(quoting N.C. Gen. Stat. § 15A-1443(a)). The burden is on the defendant to show prejudice when the alleged violation is not constitutional in nature. N.C. Gen. Stat. § 15A-1443(a).

In its final charge to the jury, the trial court stated that, "[i]f you find that the defendant has confessed, the defendant committed the crime charged in this case, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight that you will give to it." In challenging the trial court's decision to deliver this "confession" instruction, Defendant places principal reliance upon the Supreme Court's decision in *State v. Young*, 324 N.C. 489, 498, 380 S.E.2d 94, 99 (1989), in which the Court stated that such "instruction[s] should not be given in cases in which the defendant has made a statement which is only of a generally inculpatory nature." Assuming, without in any way deciding, that the trial court erred by delivering a "confession instruction" in this case, we conclude that any such error did not prejudice Defendant's chance for a more favorable jury verdict. Aside from the fact that the trial court explicitly allowed the jury to determine whether Defendant had, in fact, confessed instead of telling it that the record contained evidence tending to show that Defendant had confessed, the jury's decision to convict Defendant of second degree murder indicates that it agreed with Defendant that he was not guilty

as charged. In view of the jury's decision to refrain from convicting Defendant of first degree murder and the fact that the killing of another resulting from an assault with a deadly weapon is, without more, sufficient to support a conviction for second degree murder, see *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (quoting *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997), cert. denied, 522 U.S. 1053, 139 L. Ed. 2d 647, 118 S. Ct. 704 (1998)) (stating that "malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death"), we are unable to see how the trial court's decision to deliver a "confession" instruction despite the absence of evidence tending to show that Defendant admitted to having killed Ms. Wengerd with premeditation and deliberation could have prejudiced Defendant. Simply put, the fact that the trial court might have instructed the jury in such a manner as to suggest that he had confessed to having acted with premeditation and deliberation when the record did not support that instruction could not have had any bearing on the jury's decision to find him guilty of an offense which did not require proof that he had acted in that manner. As a result, we conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of his challenge to the trial court's decision to deliver a "confession" instruction.

III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges Calabria and Dillon concur.

Report per Rule 30(e).