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NO. COA12-325
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 10 CRS 84056
10 CRS 24667

TERRENCE TERMAINE OAKLEY

Appeal by Defendant from judgment entered 11 October 2011 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2012.

Roy Cooper, Attorney General, by Joseph Ellis Herrin, Special Deputy Attorney General, for the State.

Daniel F. Read for the defendant.

THIGPEN, Judge.

Terrence Termaine Oakley ("Defendant") appeals from a judgment entered convicting him of assault with a deadly weapon inflicting serious injury, possession of a firearm by a felon and of having attained the status of an habitual felon, arguing the following constitutes reversible error: (1) that the trial court erroneously allowed an amendment to the habitual felon

indictment, the admission of allegedly irrelevant evidence relating to a firearm, and the excusal of an alternate juror prior to the habitual felon proceeding; (2) that the trial court committed plain error by failing to act, *sua sponte*, when the State introduced allegedly irrelevant evidence relating to a firearm and evidence that Defendant had previously pled guilty to second degree murder; and (3) that the trial court erred by entering a judgment convicting Defendant of assault with a deadly weapon inflicting serious injury when the jury acquitted Defendant of this charge. We find error in the judgment, which convicts Defendant of assault with a deadly weapon inflicting serious injury, despite his acquittal thereof. However, our review reveals no prejudicial error at trial, and Defendant's remaining arguments are meritless. We thus vacate Defendant's conviction of assault with a deadly weapon inflicting serious injury and remand the case to the Superior Court for entry of an amended judgment consistent with the jury's verdicts.

The evidence of record tends to show the following: In the evening hours of 25 July 2010, Defendant forced his way into an apartment on Tillman Street in Greensboro, North Carolina, where Jamie Walker ("the victim") and three other people were visiting. At the time of Defendant's forced entry, the victim

was asleep on a couch inside the apartment. Defendant approached the victim and began hitting the victim on the head, face and shoulders with a handgun - specifically, a MAC-11 9MM Cobray - and demanding money. Two other visitors in the apartment were on the floor, "holding their hands up." The victim sustained injuries, including abrasions and cuts to his head and face. He testified at trial that "[b]lood was running down my face." The victim was later told he needed "a few stitches," but he declined to go to the hospital with EMS personnel.

After hitting the victim with the handgun, Defendant began searching the apartment for money. Defendant also demanded that the victim and two other visitors go into one room in the apartment together. The fourth person in the apartment "was so scared, he [did]n't move one bit." It is unclear whether the fourth person joined the victim and the two visitors in the room as demanded by Defendant.

LaVonda Clark ("Clark"), the lessee of the apartment, had left her residence earlier in the evening to "go to the store." Clark was not present in the apartment when Defendant forced his way inside.

Officers of the Greensboro Police Department were dispatched to the apartment after the incident was reported in a 911 call. When Defendant saw the police, he "thr[ew] the gun in [a] [bed]room."

Clark, who had returned from the store, met the police in the parking lot of the apartment building. She attempted to call someone inside in order to aid the police in their effort to make contact therein. However, after several failed attempts to call someone inside, the police approached and knocked on the front door to try to create a dialogue with Defendant. The door opened, and the police observed Defendant, armed with a handgun. An officer then yelled, "gun, gun, gun!" which was protocol for the department in situations involving firearms. Defendant then shut the door and retreated into the residence.

Officers then demanded that Defendant and the other people inside the apartment come out. Slowly, and one-by-one, the four people in the apartment, including the victim, came outside. Defendant also exited the apartment and was placed on the ground and arrested. During a subsequent search of the apartment by the police, Officers discovered a handgun "[o]n the floor at the end of the bed" in the master bedroom. This was the only firearm found in the apartment.

Defendant was indicted on charges of first degree burglary, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a felon. Defendant was also indicted on a charge of having attained the status of an habitual felon, based on three separate prior felony convictions. Defendant had previously been convicted of second degree murder, after a guilty plea, on 3 February 1993.

At trial, the State chose not to proceed on the burglary charge. The jury found Defendant guilty of possession of a firearm by a felon but not guilty of assault with a deadly weapon inflicting serious injury. The jury also found Defendant guilty of having attained the status of an habitual felon. The trial court entered a judgment convicting Defendant of possession of a firearm by a felon, assault with a deadly weapon inflicting serious injury, and of having attained the status of an habitual felon, and sentencing Defendant to 84 to 110 months imprisonment. From this judgment, Defendant appeals.

I. Habitual Felon Indictment

In Defendant's first argument on appeal, he contends the trial court erred by allowing the State to amend the indictment charging that Defendant had obtained the status of an habitual felon. We disagree.

"We review the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008) (citation omitted).

N.C. Gen. Stat. § 14-7.3 provides the following:

An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2011). An indictment may not be amended in a way that would substantially alter the charge set forth in the indictment. *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). "A change in an indictment does not constitute an amendment where the variance was inadvertent and [the] defendant was neither misled nor surprised as to the nature of the charges." *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735, *disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999) (citation omitted).

In this case, the file number for one of the prior convictions was listed incorrectly in the indictment by one digit: The indictment indicated file number 92 CRS 39549, when

it should have indicated file number 92 CRS 39548. The trial court overruled Defendant's objection and granted the State's motion to amend the indictment to reflect the proper file number for the conviction. On appeal, Defendant argues the trial court erred in overruling Defendant's objection to the State's motion to amend the habitual felon indictment, citing N.C. Gen. Stat. § 15A-923(e) for the proposition that "[i]t is axiomatic that a bill of indictment may not be amended," and "the correct procedure to correct a defective indictment is to compel the State to seek a new indictment." This argument is misplaced, as it ignores precedent construing N.C. Gen. Stat. § 15A-923(e) to mean that an indictment may not be amended in such a manner that would substantially alter the charge set forth in the indictment. See *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824.

In similar challenges to amendments to habitual felon indictments, this Court has previously held that the following amendments do not constitute reversible error: a change to the date of the commission of the defendant's prior felony, see *State v. Taylor*, 203 N.C. App. 448, 458, 691 S.E.2d 755, 763 (2010) (reasoning that "[t]he indictment in this case provided adequate notice to defendant of the specific felony convictions supporting the charge of his having attained habitual felon

status"); a change to the county and date of conviction; see *State v. Lewis*, 162 N.C. App. 277, 285, 590 S.E.2d 318, 324 (2004) (reasoning that the indictment included other information "sufficient[] [to] notif[y] defendant of the particular conviction that was being used to support his status as an habitual felon"); and a change to allege that one of the specified felonies was committed prior to the defendant's 18th birthday, see *State v. Hicks*, 125 N.C. App. 158, 160, 479 S.E.2d 250, 251 (1997) (reasoning that "the amendment to the indictment against defendant did not substantially alter the charge of habitual felon[,] [and] [t]he three underlying felonies required to constitute the offense of habitual felon remained the same").

In the context of indictments on principal crimes, this Court has held that "[t]he mere typographical error in the bill of indictment involving the case number does not alter the charge in any way." *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E.2d 197 (1981) (holding that an amendment to the file number on the indictment to accurately reflect the file number on the warrant for arrest was a "mere typographical error" and not reversible error). However, N.C. Gen. Stat. § 14-7.3 (2011), sets forth what must be included in an habitual felon indictment, which differs from what is required to be included

in an indictment on a principal crime. *State v. Luker*, 721 S.E.2d 408 (2012), *disc. review denied*, 724 S.E.2d 523 (2012), addresses this particular question and is indistinguishable from the present case.¹ In *Luker*, “the habitual felon indictment set forth, along with information required by section 14-7.3, the case number of Luker[']s principal felony charge, *i.e.*, the charge of possession of a firearm by a felon. However, the indictment incorrectly listed that case number as 09 CRS 81335 instead of 09 CRS 51335.” *Id.* The defendant in *Luker* argued on appeal that the trial court erred by allowing the State to amend the habitual felon indictment to correct the case number. *Id.* This Court concluded the trial court did not err and gave the following explanation:

As previously noted by our Supreme Court, nothing in the plain wording of section 14-7.3 requires any specific reference to the principal felony in the habitual felon

¹We recognize that an unpublished decision of a prior panel of this Court cannot bind a subsequent panel, *see State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918 (2007), and that Rule 30(e)(3) of the Rules of Appellate Procedure permits the citation to unpublished opinions in a party’s brief on appeal when that party “believes . . . there is no published opinion that would serve as well as the unpublished opinion.” *State ex rel. Moore County Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005) (quoting N.C.R. App. P. 30(e)(3) (2004) (internal quotation marks omitted)). Even though *Luker* is not binding authority on this Court, we find the logic employed in *Luker* persuasive and, therefore, apply it here.

indictment. *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995). Thus, the file number of the principal felony was mere surplusage, and amendment of the indictment here was inconsequential rather than substantive. See *State v. Grady*, 136 N.C. App. 394, 396-97, 524 S.E.2d 75, 77 (2000). Accordingly, because correcting the file number on the habitual felon indictment did not substantially alter the charge set forth in the indictment, the trial court did not err in allowing the State to amend the habitual felon indictment.

Id.

In this case, Defendant conceded he was aware of the file number error prior to trial and understood which conviction the indictment referenced; moreover, the habitual felon indictment - apart from the file number error - properly identified the charges upon which the indictment was based. The indictment also complied with the requirements of N.C. Gen. Stat. § 14-7.3. Because there is no requirement in N.C. Gen. Stat. § 14-7.3 that specific reference to a principal felony - such as a file number - be included in an habitual felon indictment, and because the habitual felon indictment in this case both complied with the requirements of N.C. Gen. Stat. § 14-7.3 and provided adequate notice to Defendant of the specific felony convictions supporting the charge of his having attained habitual felon status, we conclude the file number of the principal felony was

mere surplusage. Resultantly, the amendment to the file number did not substantially alter the charge of attaining the status of an habitual felon, and the trial court did not err by overruling Defendant's objection to the State's motion to amend the habitual felon indictment to reflect the correct file number.

II. Admission of Evidence; Plain Error

In Defendant's second argument, he contends the trial court committed error by overruling Defendant's objection and allowing the admission of the allegedly irrelevant evidence of the type of pistol Defendant used to hit the victim. Defendant further contends the trial court committed plain error by allowing the admission of allegedly irrelevant evidence regarding how the pistol was loaded and set. We disagree.

Rule 401 defines relevant evidence as such "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2011). Rule 403 restricts the admission of relevant evidence by stating that "[a]lthough relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2011).

In cases in which the defendant properly objects to the admission of evidence at trial, "[i]t is a fundamental principle of appellate review that an appellant alleging improper admission of evidence has the burden of showing that it was unfairly prejudiced or that the jury verdict was probably influenced thereby, that appellant has been denied some substantial right and that the result of the trial would have been materially more favorable to appellant." *McNabb v. Bryson City*, 82 N.C. App. 385, 389, 346 S.E.2d 285, 288 (1986), *disc. review improvidently allowed*, 319 N.C. 397, 354 S.E.2d 239 (1987).

In cases in which the defendant does not object, this Court reviews the admission of evidence pursuant to a plain error standard of review, which requires that "the defendant has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citation omitted).

Thus, under either of the foregoing standards of review - review for error in the trial court's ruling on admissibility of evidence or review for plain error - the defendant has the burden of showing that prejudice resulted from the admission of the evidence.

The crux of Defendant's argument in this case is that evidence of the type of gun Defendant employed to hit the victim, or how it was loaded and set, was irrelevant because "[t]here was no evidence that the gun was fired, inflicting any injury." Defendant further argues that the evidence "served only to inflame the jury and get them to believe that Defendant was even more dangerous than the evidence made him out to be."

We find this argument unconvincing, because Defendant fails to explain how the admission of the evidence in question prejudiced him. Defendant was convicted of possession of a firearm by a felon and of attaining the status of an habitual felon. However, Defendant appears to focus his argument in his brief on the evidence prejudicing the outcome of his charge of assault with a deadly weapon inflicting serious injury. Defendant argues the evidence regarding the type of gun and how it was loaded was irrelevant, due to the fact that Defendant never fired the gun or inflicted any injury by firing the gun.

Rather, the injury was sustained by a physical blow by Defendant with the gun, not a gunshot. However, Defendant was acquitted by the jury of the charge of assault with a deadly weapon inflicting serious injury. Otherwise, Defendant makes only a general argument pertaining to prejudice - that the evidence made Defendant seem "dangerous." This argument does not reference Defendant's convictions of possession of a firearm by a felon and of attaining the status of an habitual felon, nor does it further specifically explain how Defendant was prejudiced. We believe this argument fails to show Defendant was prejudiced as a result of the admission of the evidence at issue here. Other substantial evidence, besides this challenged evidence, was sufficient to support Defendant's convictions of possession of a firearm by felon and of attaining the status of an habitual felon. *State v. Franklin*, 23 N.C. App. 93, 96, 208 S.E.2d 381, 383 (1974) (holding the defendant did not meet his burden of showing prejudice where based on the other evidence the jury's verdict would have been the same even without the inclusion of the contested evidence, and stating, in the context of admission of evidence, that "[a] verdict or judgment is not to be set aside on the basis of mere error and no more[;] [t]he ruling complained of must not only be erroneous[,] but [i]t must

also be material and prejudicial . . . and prove that but for the error a different result likely would have ensued). Because Defendant has not met his burden of showing prejudice, the trial court's rulings on the evidence in question in this case do not constitute reversible error or plain error.

III. Statements to the Jury

In Defendant's third argument, he contends the trial court erred by excusing the alternate juror early and by telling the jury that the habitual felon stage of the trial would be very brief and that there may not be any arguments. We disagree.

As a preliminary matter, we note that Defendant did not object to these statements at trial. However, our Courts have held that "[w]henver a defendant alleges a trial court made an improper statement by expressing an opinion . . . in violation of N.C.G.S. §§ 15A-1222 and 15A-1232, the error is preserved for review without objection due to the mandatory nature of these statutory prohibitions." *State v. Duke*, 360 N.C. 110, 123, 623 S.E.2d 11, 20 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006) (citation omitted).

N.C. Gen. Stat. § 15A-1222 (2011) provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be

decided by the jury." *Id.* Similarly, N.C. Gen. Stat. § 15A-1232 (2011) provides that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." *Id.*

"[A] trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988) (citation omitted). "Also, an alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made." *Id.* (citation omitted).

"In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citation omitted). "Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *Id.* (citation omitted). "The burden rests upon defendant to show that the trial court's remarks were prejudicial." *State v. Anderson*, 350 N.C. 152,

179, 513 S.E.2d 296, 312, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999) (quotation omitted).

In this case, Defendant argues that the trial court expressed an opinion in violation of N.C. Gen. Stat. § 15A-1222 by stating, according to Defendant's brief, "that the habitual felon portion of the trial would be very short and a foregone conclusion . . . by excusing the alternate juror before it began." Defendant also argues the following statement by the trial court was an impermissible expression of opinion: "Obviously, they're going to argue a little bit more about it. They may, they may not. It won't be as lengthy as the trial."

Our review of the transcript shows that the trial court's opinion regarding the habitual felon proceeding was, contrary to Defendant's assertion, not that the outcome was a "foregoing conclusion." When contextualized, the trial court statements appear to be an opinion as to whether, regardless of the outcome of the proceeding, the proceeding would conclude that day:

THE COURT: Anyone opposed to me excusing the alternate at this time?

[The State]: No.

THE COURT: Reason I selected an alternate was in the event something happened overnight, but I think we're goin[g] [to] finish this trial today, so you can be excused[.] . . .

The trial court also gave the jury the following instruction:

As presiding judge I'm required by law to be impartial. You should not mistakenly infer that I have implied that any of the evidence should be believed or not, that a fact has been proved or not, or what your findings ought to be. You, alone, are the finders of fact in this case.

After reviewing the challenged statements of the trial court, in context, we do not believe that the trial court's statement expressed any impermissible opinion regarding the evidence or its sufficiency. See *State v. Porter*, 340 N.C. 320, 330, 457 S.E.2d 716, 721 (1995) (holding, in the context of a capital, first-degree murder case, that the trial court's statement to an alternate juror - specifically, "*I'm not going to discharge you because we may need you further in this case.* So you might have to sit around and twiddle your thumbs, if you'll step out into that jury room, I'll let the original twelve go to the jury room." - did not constitute prejudicial error, and the defendant's argument that the statement "intimated to the jurors that the trial court believed the evidence to justify verdicts of guilty of first-degree murder, which might necessitate the alternate juror's presence at a capital sentencing proceeding" was without merit). Rather, the statements inferred that the habitual felon portion of the trial

would likely not last as long as the trial.² Further, the trial court made it clear that it had no such opinion on any matter of fact by instructing the jury as follows: "You should not mistakenly infer that I have implied that any of the evidence should be believed or not, that a fact has been proved or not, or what your findings ought to be. You, alone, are the finders of fact in this case."

Because the trial court's statements were not, as Defendant argues, an opinion that the habitual felon proceeding was a foregone conclusion, and because the trial court instructed the jury not to infer any opinion from his statements, we conclude that the trial court's comments did not constitute prejudicial error in this case.

IV. Transcript of Plea and Judgment

In Defendant's fourth argument, he contends the trial court committed plain error by allowing the jury to see the transcript of plea and judgment in Case No. 93 CRS 42688, which included a plea of guilty to second degree murder, and that he received ineffective assistance of counsel when his attorney did not

²In fact, the transcript shows that the introduction of the entirety of the State's evidence in the habitual felon phase of the trial was brief - consisting of approximately two transcript pages. Defendant did not present evidence in the habitual felon phase of trial.

object to the jury seeing, and did not request redaction of, the transcript of plea and judgment in the same case. We disagree.

A. Plain Error

We first address Defendant's argument that the trial court committed plain error by allowing the jury to see the transcript of plea and judgment in Case No. 93 CRS 42688.

"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." N.C.R. App. P. 10(a)(4). We "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). In this case, Defendant challenges the admission of evidence - specifically, documents containing Defendant's prior plea of guilty to second degree murder.

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d

375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A defendant's prior felony conviction "may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913, *disc. review denied*, 356 N.C. 440, 572 S.E.2d 792 (2002) (citing N.C. Gen. Stat. § 14-7.4) (internal quotation marks omitted). "[T]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984) (citation omitted).

In this case, the indictment charging that Defendant had attained the status of an habitual felon included in allegation No. 2 that Defendant had previously "pled guilty to and/or was convicted of the felony offense of Possession With Intent to Sell or Deliver Cocaine" in case No. 93 CRS 42688. The

allegation in the indictment was limited to this particular felony. However, the evidence admitted to prove this conviction encompassed, among other documents, the transcript of plea pertaining to possession with intent to sell or deliver cocaine in case No. 93 CRS 42688, which also contained Defendant's plea of guilty to second degree murder. Defendant contends this constituted plain error.

Evidence of convictions upon which the State does *not* rely in attempting to prove that a defendant has attained habitual felon status is irrelevant, so that information concerning such convictions should be redacted from any judgment which the State seeks to have admitted into evidence at an habitual felon proceeding. See *State v. Lotharp*, 148 N.C. App. 435, 444-45, 559 S.E.2d 807, 812, *rev'd on other grounds*, 356 N.C. 420, 571 S.E.2d 583 (2002). Therefore, it was error in this case for the transcript of plea containing Defendant's plea of guilty to second degree murder to be submitted to the jury, as the guilty plea to second degree murder was irrelevant and should have been redacted "to ensure that the jury would not improperly consider [it]." *Id.* at 445, 559 S.E.2d at 812.

However, under a plain error standard of review the defendant has the burden of showing the error prejudiced his

trial. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. In this case, Defendant argues that he was prejudiced in the following way: "The gratuitous and unnecessary, but explosive, fact that defendant had admitted murder at some earlier point was therefore enormously prejudicial." While recognizing that the submission to the jury of evidence containing Defendant's guilty plea to murder may have been, as Defendant puts it, "explosive[,] " we also recognize that the other relevant evidence submitted to the jury - to support Defendant's three prior felony convictions upon which the indictment for having attained the status of an habitual felon was based - was incontrovertible. Our review of the record reveals no evidence tending to show that Defendant had not been convicted of the three felonies enumerated in the habitual felon indictment. Moreover, by giving the following instruction, the trial court only allowed the jury to consider the three convictions delineated in the habitual felon indictment in determining whether Defendant had attained habitual felon status:

For you to find the defendant guilty of being an habitual felon, the State must prove three things beyond a reasonable doubt. The three things are the three prior convictions. First, that on August 24th, 1992, the defendant, in the Superior Court of Guilford County, pled guilty to the offense of possession of cocaine. The

commission of such offense was on April 24th, 1992. Second, that thereafter, on or about January 11th, 1994, in Superior Court of Guilford County, the defendant pled guilty to the offense of possession with intent to sell or deliver cocaine, with the date of offense on March 20th, 1993. And, third, that thereafter on March 10th, 2009, in Superior Court of Guilford County, the defendant pled guilty to the offense of possession with intent to sell or deliver cocaine, and the date of offense was September 14th, 2008.

Based on the foregoing, we believe Defendant has failed to meet his burden of showing prejudice resulting from the admission of the irrelevant evidence at issue here. See *Lotharp*, 148 N.C. App. at 445, 559 S.E.2d at 812 (holding that, although the trial court erred by failing to redact evidence of irrelevant convictions in an habitual felon proceeding, the error was not prejudicial, because the trial court instructed the jury to consider the convictions related to the habitual felon proceeding, and because the defendant failed to show how the admission of the irrelevant convictions resulted in prejudice). Based on the foregoing, we conclude the trial court did not commit plain error.

B. Ineffective Assistance of Counsel

We now address Defendant's argument that he received ineffective assistance of counsel when his attorney did not

object to the jury seeing, and did not request redaction of, Defendant's guilty plea to second degree murder.

A criminal defendant has a constitutional right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted).

To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error. However, the fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. This determination must be based on the totality of the evidence before the finder of fact.

State v. Batchelor, 202 N.C. App. 733, 739, 690 S.E.2d 53, 57 (2010) (citations and quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984). Generally, "the defendant bears the burden of meeting [the aforementioned] two-part test[.]" *State v. Holder*, ___ N.C. App. ___, ___, 721 S.E.2d 365, 366 (2012).

In this case, for the same reasons Defendant has not met his burden of showing plain error, we believe Defendant has failed to carry his burden of showing a reasonable probability that, but for counsel's alleged error at trial, there would have been a different result in the habitual felon proceeding. There is no evidence of record tending to show that Defendant had not been convicted of the three felonies enumerated in the habitual felon indictment. Moreover, the trial court only allowed the jury to consider the three convictions delineated in the habitual felon indictment in determining whether Defendant had attained habitual felon status. Defendant's ineffective assistance of counsel claim must necessarily fail, as Defendant has not shown prejudice.

VI. Error in Judgment

In Defendant's sixth and final argument, he contends the trial court erred in entering a judgment convicting Defendant of assault with a deadly weapon inflicting serious injury when the jury acquitted him of that charge.

Our review of the record shows that the judgment in this case does, in fact, convict Defendant of assault with a deadly weapon, despite the jury's acquittal of Defendant of this charge. The State, in its brief, advises this Court that the

judgment was amended on 2 March 2012 to reflect that Defendant was only found guilty of possession of a firearm by a felon and of attaining the status of an habitual felon. The State also says Defendant filed the amended judgment with this Court on or about 16 May 2012. However, our records do not show that an amended judgment was ever filed with this Court - either with the original record on appeal, or subsequently, as an addendum - and Defendant's brief is silent on the subject. Our review is limited to information contained in the record. *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254-55, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). We cannot consider the amended judgment the State references in its brief, as it is not in the record on appeal in this case.

Moreover, the original judgment in this case was filed on 11 October 2011, and Defendant gave notice of appeal in open court at the conclusion of the trial. Generally, in criminal proceedings, "[t]he jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given[.]" N.C. Gen. Stat. § 15A-1448(a)(3) (2011). N.C. Gen. Stat. § 15A-1448(a)(3) enumerates exceptions to the general rule; however, none of the exceptions are applicable to this case. Thus, the trial court was without jurisdiction to amend

the judgment in this case after Defendant filed notice of appeal.

Based on the foregoing, we vacate Defendant's erroneous conviction of assault with a deadly weapon inflicting serious injury - as the jury acquitted him of this charge - and remand this case to the Superior Court with instructions to file an amended judgment properly reflecting Defendant's acquittal of assault with a deadly weapon inflicting serious injury. We further conclude Defendant had a fair trial, free from prejudicial error.

NO ERROR, in part; VACATED, in part; and REMANDED.

Judges McGee and Beasley concur.

Report per Rule 30(e).