NO. COA12-54
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 22504-06,
11 CRS 3138

WILLIE LEE MOBLEY

Appeal by Defendant from judgment entered 3 June 2011 by Judge Robert T. Sumner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 22 May 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Mary Louise Lucasse, for the State.

M. Alexander Charns for Defendant.

McGEE, Judge.

Willie Lee Mobley (Defendant) was convicted on 2 June 2011 of breaking or entering a motor vehicle, possession of stolen property, misdemeanor larceny, and having obtained habitual felon status. Defendant was sentenced to an active term of 90 months to 117 months in prison.

At approximately 11:30 p.m. on the night of 26 May 2009, Randy Arsund (Arsund) was working the late shift at his place of employment in Charlotte when he heard noises coming from the parking lot. Arsund went to the open door of the shop to investigate. At trial, Arsund testified as follows:

> A I could see feet underneath my truck. It's a four-by-four up underneath the ground. I could see feet and my dome light on.
>
> Q Do you recall if your doors were locked or unlocked on the truck that night?
>
> A They were unlocked.
>
> Q Once you observed all of that, what, if anything, did you do?
>
> A I ran out the door. I [went] around the back of my truck. I seen him getting in the passenger's side of the little green car [the green car].
>
> Q When you say him, are you talking about the defendant, Mr. Mobley?
>
> A Correct.
>
> Q If you see him in the courtroom today, would you please identify him by an article of clothing that he is wearing.
>
> A Striped shirt.
>
> [ADA]: May the record reflect he has made in-court identification of . . . [D]efendant.
>
> THE COURT: Let the record reflect that the witness has identified [Defendant] in the courtroom.

. . . .

[ARSUND]: As I come around the truck, in between the two trucks and the car, he is getting in the passenger's seat and shutting the door. I ran up to the window of the car.

Q Which window?

A The passenger's window, his door.

Q Was it a two-door car?

A Just two door, I think. A little car. When I looked in the window, the driver is sitting over there waiting on him. He gets in and shuts the door. I was going to reach in to grab my Riteaid bag, which I saw in between of them, in between my truck.

About the time I reached, she threw it in reverse and backed out. She was so tight, and I was so close that the mirror on the passenger's side of the vehicle hit me in the hip and folded it flat. They backed out, threw it in drive, pulled out on Davidson [Street]. I ran out on Davidson trying to get the license number.

. . . .

A I was looking right at them, 2 or 3 feet away in the window there.

. . . .

[The driver] is sitting there with . . . her hands on the steering wheel. As soon as [Defendant] got in the car, she threw it in gear, in reverse.

. . . .

Q Now, after they begin to drive away --

> after they begin to drive away, what else did you do at that point?
>
> A I ran out into Davidson. I was out in the middle of the street looking down trying to get the license plate as they are speeding away. I couldn't see the license plate. Very next car coming up behind me going in the same direction was a sheriff. I could see the lights on top. The glare in my eyes from the headlights, I could see it had police lights. I just pointed to down the street and said, "They just robbed me," and he took off.
>
> He wasn't more than half a block away. He followed them down to the next intersection and caught them. He come back and got me in about 15, 20 minutes.

The State asked: "Mr. Arsund, are you positive [Defendant] is the same person that broke into your truck that night?" Arsund responded: "Yes, ma'am." Arsund testified that he investigated his truck and found that

> it had been gone all through, torn apart, opened the glovebox and broke it.
>
> Everything was out of it. All my stuff, my air compressor, little plug-in air compressor was under my seat. It was gone. Jumper cables and a black bag was behind my seat. That was gone.
>
> The Riteaid bag. Deodorant, facewash, Bandaids and wound cleaning stuff. That was gone. I had two 12 packs of Cheerwine down in my floorboard. They were gone.

Defendant and the woman were quickly apprehended. The woman driving was Maranda Martin Roof (Roof) who, at the time of

the incident, was Defendant's girlfriend. Arsund was brought to where Defendant and Roof had been stopped, and Arsund observed as the items stolen from his truck were removed from the green car.

Officer Robert Marquez (Officer Marquez) of the Mecklenburg County Sheriff's Department was the officer Arsund flagged down that night. Officer Marquez testified that he saw the green car as it exited the parking lot, and that he never lost sight of the green car from the time he saw it leave the parking lot until the time he stopped it. Officer Marquez testified that after he activated his lights and siren, the green car appeared to be attempting to flee from him. Officer Marquez identified Defendant as the passenger in the green car he stopped that night. Arsund identified Defendant and Roof as the people he saw flee in the green car.

Officer Aksone Inthisone (Officer Inthisone) of the Charlotte-Mecklenburg Police Department testified that he interviewed Arsund at the scene of the stop. Officer Inthisone testified that Arsund informed him that Defendant was the man Arsund had seen inside his truck, and that Arsund had no doubt that it was Defendant, and not Roof, who was inside his truck. Officer Inthisone also testified that various other items, including a purse, cell phones, a GPS, and personal checks that

belonged to another victim of a larceny were recovered from the trunk of the green car that night.

Roof testified on Defendant's behalf. She testified that she was driving with Defendant when she saw Arsund's truck, which she believed belonged to an ex-boyfriend. Believing that some of her belongings might be in the truck, Roof stopped, got out of the green car, and "got what was inside the truck." When she saw Arsund come out of the building, she "just put [her] car in drive and took off." According to Roof, Defendant had advised her not to break into the truck, and did not help her break into the truck. Roof testified that they were stopped shortly after driving away from the scene.

Roof was interviewed at the police station, and a portion of that interview was played for the jury. In the interview, Roof gave an account generally in line with her testimony, stating that Defendant had nothing to do with the incident. Roof denied knowing how the stolen items that did not belong to Arsund came to be in the green car, including stolen checks made out to her. Roof later confessed to writing her name on a check that was, according to her, already otherwise filled out. Roof testified she had already pled guilty to charges brought against her based upon the breaking or entering of and larceny from

Arsund's truck. Roof was then questioned concerning her relationship with Defendant:

> Q. And you -- I believe it was your statement to the officer that you also helped raise his child?
>
> A. I did.
>
> Q. -- is that correct?
>
> A. Uh-huh (affirmative).
>
> Q. Was that a daughter?
>
> A. A little girl; yes, ma'am.
>
> Q. So would it be fair to say that, you know, [Defendant] is somebody you really love and care about his well being?
>
> A. Yes, ma'am.
>
> Q. Care about his family?
>
> A. Oh, yes.
>
> Q. Do anything for him?
>
> A. Uh-huh (affirmative).
>
> Q. And are you still -- I believe you said he's your boyfriend, so you're still in that sort of relationship today and you see him as such?
>
> A. Oh, yes, ma'am.
>
> Q. And do you love him more than anything?
>
> A. Not my children.
>
> Q. But more than any other man.
>
> A. Yes, ma'am.

At trial, Defendant's argument was that Roof committed the crimes by herself, and that Defendant was an innocent "bystander" who either did not know what Roof was doing, or who advised Roof not to enter the truck. The State argues that Roof was lying to protect Defendant because she loved him, and because she had already pled guilty to the crimes and had nothing to lose.

Prior to trial, Defendant submitted a written request that the trial court instruct the jury on "mere presence." Defendant asked that the jury be instructed as follows from the pattern jury instruction concerning acting in concert:

> [A] person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission.
>
> To be guilty you must aid or actively encourage the person committing the crime or in some way communicate with this person his intention to assist in its commission.

The trial court denied Defendant's request.

The jury found Defendant guilty of felonious breaking or entering a motor vehicle, misdemeanor possession of stolen goods, misdemeanor larceny, and having obtained habitual felon status. The trial court sentenced Defendant to 90 months to 117 months in prison. Defendant appeals.

I.

The issues on appeal are whether: (1) the trial court committed prejudicial error by not instructing the jury on "mere presence," (2) the trial court erred by sustaining an objection by the State to Defendant's questioning Roof as to whether Defendant coached Roof to say Defendant was not involved in the crimes, (3) the trial court committed plain error by allowing the State to question Roof about Defendant's felony criminal record and allowing testimony about other stolen items recovered from Roof's car, (4) the trial court erred by allowing the State to call Roof a "liar" while asking police officers to state that they thought Arsund was truthful, (5) Defendant's counsel was ineffective and, (6) the trial court erred in allowing testimony about "the unduly suggestive spotlit show-up identification[.]"

II.

In Defendant's first argument, he contends that the trial court committed prejudicial error by refusing to submit Defendant's requested instruction on "mere presence" to the jury. We disagree.

> The law is well settled that a judge is required to instruct on all substantial features of the case. Where an instruction is requested by a party, and where that instruction is supported by the evidence, it is error for the trial court not to instruct in substantial conformity with the requested instruction.

State v. Rose, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (citations omitted); *see also State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997).

By pretrial motion filed 31 May 2011, Defendant's attorney requested the following instruction on "mere presence": "The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense[.]" **R 28** Our Supreme Court stated in *State v. Sanders*, 288 N.C. 285, 218 S.E.2d 352 (1975):

> The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

Id. at 290-91, 218 S.E.2d at 357 (citations omitted). The trial court denied Defendant's request to include an instruction for mere presence.

The trial court instructed the jury as follows:

> I instruct you that the State has the burden of proving the identity of . . . [D]efendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you the jury must be satisfied beyond a reasonable doubt that . . . [D]efendant was the perpetrator of the crime charged before you may return a verdict of guilty.
>
> For a person to be guilty of a crime, it is not necessary that he personally do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit breaking or entering a motor vehicle or larceny, each of them if actually or constructively present, is guilty of that crime if the other person commits the crime.

The trial court instructed the jury on larceny and breaking or entering a motor vehicle as follows:

> [D]efendant has been charged with larceny. For you to find . . . [D]efendant guilty of this offense, the State must prove five things beyond a reasonable doubt.
>
> First, that . . . [D]efendant took property belonging to another person.
>
> Second, that . . . [D]efendant carried away the property.
>
> Third, that the victim did not consent to the taking and carrying away of the property.
>
> Fourth, at the time . . . [D]efendant intended to deprive the victim of its use permanently.
>
> And fifth, that . . . [D]efendant knew he was not entitled to take the property.

If you find from the evidence beyond a reasonable doubt that . . . [D]efendant on or about the alleged date, by himself or acting together with others, took and carried away another person's property without his consent, knowing that he was not entitled to take it, and intending at that time to deprive the victim of its use permanently, it would be your duty to return a verdict of guilty.

If you do not so find or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

. . . .

[D]efendant has been charged with breaking or entering into a motor vehicle. For you to find . . . [D]efendant guilty of this offense the State must prove five things beyond a reasonable doubt.

First, that there was an entry by . . . [D]efendant. Opening the door of an automobile would be an entry.

Second, the State must prove that it was a motor vehicle which was entered.

Third, that there was something of value in the motor vehicle.

Fourth, that the owner did not consent to the entering.

And fifth, that at the time of the entering . . . [D]efendant intended to commit larceny therein. Larceny is the taking and carrying away the personal property of another without his consent, with the intent to deprive him of his possession permanently.

If you find that . . . [D]efendant was found in the motor vehicle, and he had no lawful

> purpose for being there, you are permitted, but not required to infer from this that he entered with the intent to commit larceny therein.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date . . . [D]efendant, acting either by himself or acting together with others, without the consent of the owner, entered into another's motor vehicle which contained something of value, intending at that time to commit larceny therein, it would be your duty to return a verdict of guilty.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

After the jury had retired for deliberation, the foreperson sent a note to the trial judge asking two questions. The second question is the one relevant to this appeal. The trial court discussed its intended response to the second question with counsel outside the presence of the jury:

> THE COURT: All right. The second [question] is a little different[.] It says legal interpretation of breaking and entering, can you be guilty of breaking and entering only by being the person who commits the act or by association?
>
> And my response to that would be to read the breaking and entering a motor vehicle charge to them again, tell them what the elements of that charge are. There are five of them. And of course there are three charges in this case, and I gave them something like twelve or thirteen elements to remember.

So I will go back and reread that, and I think it would be appropriate to read the breaking and entering instruction.

MR. OSHO [Defendant's attorney]: That's fine, Your Honor.

THE COURT: And the final mandate of that instruction it includes the in concert mandate, by himself or acting in concert with others.

MS. COLBERT [ADA]: Yes, sir.

THE COURT: And it's integrated into that as part of the instruction that I gave. It wasn't on the instruction I handed you necessarily, but the in concert mandate essentially says that either by himself or acting in concert with others or together with others. That's what I had incorporated in the larceny and the breaking and entering a motor vehicle.

So that's what I will read and –

MR. OSHO: Your Honor, so just to -- for the record to be clear, I'm going to renew my motion and object to all those additional instructions. So I don't want anyone to think we've waived those objections.

THE COURT: I think we entered those into the record yesterday, --

MR. OSHO: Yeah; yeah.

THE COURT: -- and it's duly noted.

MR. OSHO: In light of their question, Your Honor, I really think -- again, just for court of appeal purposes and not to argue with the Court's ruling, -- I really think this now brings into focus [the] mere presence additional instruction that I requested that was denied.

> I just want the appellate record to have the context so when they are reviewing the appellate record, that we did request for the mere presence because we did anticipate this particular issue may come up. The mere association or presence in the crime scene may also be evidence of guilt, and that mere presence would have addressed that.
>
> That wasn't given, and I just want the appellate court to know that we did ask for that instruction.
>
> THE COURT: All right, so noted.

We hold that the trial court erred in not instructing the jury on mere presence, but that Defendant cannot show he was prejudiced by the error. This case involved two eyewitnesses. The first, Arsund, testified that it was Defendant who broke into his truck. The second, Roof, testified that it was she who broke into the truck, and that Defendant counseled her against it. If Roof was believed, then Defendant was merely present at the scene and should not have been held criminally liable for Roof's actions. The requested instruction was a correct statement of the law and was supported by evidence presented by Defendant at trial. *State v. Cheek*, 351 N.C. 48, 73, 520 S.E.2d 545, 560 (1999) (citation omitted) ("a court must give a requested instruction if it is a correct statement of the law and is supported by the evidence").

Nonetheless, Defendant has failed to prove there was "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." N.C. Gen. Stat. § 15A-1443(a) (2011). In finding Defendant guilty of larceny based upon the trial court's instructions, the jury found that, *inter alia*, "at the time [of the taking] [D]efendant intended to deprive the victim of [the property's] use permanently[,]" and "that [D]efendant knew he was not entitled to take the property." By finding that Defendant intended to deprive the victim of the property permanently, and that Defendant knew he was not entitled to the property, the jury inherently found that Defendant was not merely present, but was an active and culpable participant in the larceny. This is true whether Defendant actually committed the larceny, or was found guilty by acting in concert.

The jury was instructed on the breaking or entering a motor vehicle charge as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date . . . [D]efendant, acting either by himself or acting together with others, without the consent of the owner, entered into another's motor vehicle which contained something of value, intending at that time to commit larceny therein, it would be your duty to return a verdict of guilty.

Because the jury determined that Defendant intended to commit larceny at the time the truck was entered, Defendant cannot show a reasonable possibility that a different result would have been reached at trial had the mere presence instruction been given. Defendant's argument is without merit.

III.

In Defendant's second argument, he contends that the trial court erred by preventing Defendant's counsel from asking Roof if Defendant had instructed her how to testify. We find no prejudicial error.

The following exchange occurred at trial:

> [Defendant's Counsel]: Did [Defendant] at [any time] t[ell] you what to say?
>
> [The State]: Objection, Your Honor, hearsay.
>
> [Defendant's Counsel]: It's just a question.
>
> The Court: Sustained.

Defendant argues that the trial court should not have prevented Roof from answering this question and, in doing so, the trial court violated Defendant's "constitutional right to present evidence[.]" However, other than making a blanket statement that this alleged error violated his Sixth Amendment rights, Defendant does not make any argument in his brief concerning how the trial court's evidentiary ruling rises to the

level of a constitutional violation. It is Defendant's burden to show this Court that the evidentiary ruling involves a violation of his constitutional rights, and that the standard of review for constitutional violations should apply. *State v. Thompson*, 359 N.C. 77, 114, 604 S.E.2d 850, 876 (2004). Defendant has failed to meet this burden. Defendant seems to argue that the State was accusing Defendant of suborning perjury, and the trial court's ruling prevented Defendant from presenting a defense to this accusation. The portion of the State's closing argument quoted by Defendant in support of this argument, however, is taken out of context, and does not support Defendant's argument.

Defendant has failed in his burden of demonstrating a violation of any constitutional right, and Defendant does not argue that the ruling violated any specific provision of North Carolina Rules of Evidence. Thus, Defendant has not properly presented any issue for appellate review. N.C.R. App. P. 28(b)(6). Defendant's argument also fails to indicate specifically how any alleged error prejudiced him. *State v. Shareef*, __ N.C. App. __, __, 727 S.E.2d 387, 398 (2012). Defendant has abandoned this argument.

IV.

In Defendant's third argument, he contends that the trial court committed plain error by admitting certain testimony at trial. We disagree.

> 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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." 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[.]"

State v. Lawrence, __ N.C. __, __, 723 S.E.2d 326, 334 (2012) (citations omitted). Defendant first argues that the trial court committed plain error in allowing the State to elicit testimony from Roof that Defendant had a felony record. Defendant played a DVD of Roof being questioned at the police station concerning the crimes and Defendant's involvement in

them. In a portion of this interview that Defendant played for the jury, the questioning officer said to Roof: "[Defendant's] got a lot more to lose than you do . . . . He has a few more felonies[.]" Following presentation of this interview to the jury, the State cross-examined Roof, including this exchange, to which Defendant now objects:

> Q. If you will just listen to this for a second.
>
> (WHEREUPON, [the above portion of the DVD was replayed for Roof].)
>
> Q. So the detective just told you that [Defendant] has more to lose than you because he has more felonies; correct?
>
> A. Yes, ma'am.
>
> Q. And you knew that prior to this incident this night; correct?
>
> A. I knew about mine. I did not know about [Defendant's] until the officer told me.

Defendant was the first to introduce evidence of his felony record at trial. The State then questioned Roof specifically about the evidence Defendant had just elicited. Even assuming *arguendo* that it was error for this evidence to be discussed by the State, and we make no finding that it was, it was already before the jury because Defendant elicited it. Defendant fails in his burden of proving plain error. *Lawrence*, __ N.C. at __, 723 S.E.2d at 334.

Defendant similarly fails to prove plain error when the State questioned Roof, without objection, about other stolen items retrieved from her car. Officers Marquez and Inthisone testified without objection that they saw pocket books, GPS devices, Blackberry devices, and multiple cell phones in Roof's car. Officer Inthisone also saw personal checks in Roof's car that did not belong to Roof or Defendant. Defense counsel then asked Roof about these items, and Roof confirmed that "various purses and clothes and all kinds of different things [were found] in [her] trunk." In response to defense questioning, Roof testified that there were about four or five cell phones in her car. In the DVD of Roof's interview played by the defense, Roof first lied to police, then admitted that she wrote her name on stolen checks recovered from her car. **DVD 53:15** Defendant obtained the admission of Defendant's Exhibit 1 into evidence, which was a written statement from Officer Marquez. This statement included information that Officer Marquez had "noticed a number [of] electronics, purses and many other items in plain view" in Roof's car.

Roof responded as follows on cross-examination:

> Q. So would it surprise you [to] know that there were six working cell phones in that vehicle?
>
> A. Yeah, you can get them working.

Q. But they were already working.

A. Yeah, I wasn't aware of that, not six.

Q. And as far as -- as far as the purses, would it surprise you to know that there were in fact six purses in your vehicle?

A. Uh-huh (affirmative), some in the trunk, yes, ma'am. The one in the front seat was the one that belonged to that lady.

Q. And isn't it true that you also had multiple GPSs, satellite radio, and a bunch of chargers for cell phones and GPSs?

A. Uh-huh (affirmative).

Q. Individual cameras?

A. Yes, ma'am.

Q. And Carowind[s] season passes?

A. Those were in that purse.

Q. That had been stolen?

A. In that purse with the checkbook, yeah.

Q. That you stole.

A. That I admitted to, yes, ma'am.

Defendant introduced most of this evidence at trial, and opened the door for the State to question Roof and others concerning this evidence. Even assuming *arguendo* that some of this evidence was improperly elicited by the State at trial, Defendant has failed to prove that any such error rose to the

level of plain error. *Lawrence*, __ N.C. at __, 723 S.E.2d at 334. This argument is without merit.

V.

Defendant next argues that "the trial court erred by allowing the prosecutor to call [Roof] a liar while asking officers to state they believed [Arsund] was truthful." We disagree.

Defendant cites two cases in support of his argument that the trial court abused its discretion and committed plain error in allowing certain statements by the prosecutor and the testimony of certain witnesses. In *State v. Britt*, 288 N.C. 699, 711-12, 220 S.E.2d 283, 291 (1975) (citations and emphasis omitted), our Supreme Court stated:

> The argument of counsel is left largely to the control and discretion of the presiding judge and counsel is allowed wide latitude in the argument of hotly contested cases. Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom and the law relevant thereto. Language may be used consistent with the facts in evidence to present each side of the case.
>
> Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. Nor may counsel ask impertinent and insulting questions which he knows will not elicit competent or relevant evidence but are designed simply to badger and

> humiliate the witness. The district attorney should refrain from characterizations of defendant which are calculated to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred.

State v. Phillips, 240 N.C. 516, 524, 82 S.E.2d 762, 767 (1954) (citations omitted), states:

> It thus appears that in cross-examining the male defendant, the solicitor repeatedly violated the rule of law which forbids a prosecuting attorney to inject into the trial of a cause to the prejudice of the accused by argument or by insinuating questions supposed facts of which there is no evidence.

Defendant argues that the trial court should have prevented the State from characterizing Roof as a liar. Roof, however, admitted to having lied to the police concerning her involvement in stealing a purse and writing her name in the payee section of stolen checks. There was evidence before the jury from which Roof's untruthfulness could be legitimately inferred. *See Id.* Defendant also claims that the State had witnesses improperly vouch for the credibility of Arsund. Defendant cites to no law in support of this position, and Defendant does not support this claim with "reason or argument," which constitutes a violation of our Rules of Appellate Procedure, and subjects this argument to dismissal. N.C.R. App. P. 28(b)(6) (2011). Similarly, Defendant makes no argument concerning how any error prejudiced

the outcome of the trial. Defendant, concerning prejudice, merely states: "It is an abuse of discretion to allow the prosecution and police witnesses to vouch for the truthfulness of their witnesses. It denies the accused a fair trial for the prosecutor to call the defense witness a liar while vouching for the truthfulness of its own witnesses." It is Defendant's burden to demonstrate he was prejudiced by any error. *Shareef*, __ N.C. App. at __, 727 S.E.2d at 398. Defendant has clearly failed to meet his burden. This argument is without merit.

VI.

Defendant next argues that his trial counsel was ineffective because his trial counsel failed "to object to the prosecutor asking [Roof] about [Defendant's] felony criminal record, allowing testimony about allegedly stolen items in [Roof's] car . . ., and allowing the prosecution to argue about [Defendant's] felony record in closing when [Defendant] did not testify." We disagree.

> The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions. A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.'" Generally, "to establish prejudice, a 'defendant must show that there is a reasonable probability

> that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"

State v. Thompson, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004) (citations omitted). We have addressed Defendant's arguments above. Suffice it to say that Defendant has not shown, even assuming *arguendo* his trial counsel's performance was deficient in some way, that "there is a reasonable probability . . . the result of the proceeding would have been different" absent the deficient performance. *Id.* This argument is without merit.

VII.

In Defendant's final argument, he contends that the trial court erred in allowing testimony concerning Arsund's identification of Defendant at the scene of the stop. We disagree.

At trial, it was uncontested that Defendant was with Roof in the green car when Arsund's truck was entered and Arsund's possessions were stolen. It was uncontested that Defendant and Roof were stopped shortly after the crime at Arsund's truck. The only question for the jury was whether Defendant was guilty of the crimes as the primary actor, guilty based upon a theory of acting in concert, or merely present at the scene but not guilty of the crimes. Even assuming *arguendo* the identification

of Defendant by Arsund at the scene of the stop was improper in some way, because there is no question that it was Defendant at the stop, and that Defendant was the man at the scene of the crime, Defendant cannot demonstrate any prejudice that could have occurred due to any improper identification procedures. This argument is without merit.

No prejudicial error.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).