

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA14-842
NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2015

STATE OF NORTH CAROLINA

v.

Pitt County
No. 13 CRS 55724

REGINALD GORHAM

Appeal by defendant from judgment entered 21 April 2014 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 9 February 2015.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Marie H. Mobley for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from a judgment entered upon his guilty plea to robbery with a dangerous weapon. The State's factual basis for the plea established that on 8 July 2013, defendant used a handgun to steal cash and a large amount of cigarettes and cigars from Dana Langston. The trial court sentenced defendant pursuant to his plea arrangement with the State to a term in the mitigated

range of 96 to 128 months' imprisonment. Defendant filed timely written notice of appeal on 29 April 2014.

Defendant now presents two arguments to this Court: (1) whether the trial court erred in accepting defendant's guilty plea because the court did not adequately advise defendant of his rights as required by N.C. Gen. Stat. § 15A-1022; and (2) whether the trial court erred at sentencing because it failed to make findings in mitigation where the evidence for the findings was uncontroverted. We first must address whether defendant's issues are properly before this Court on appeal.

Acknowledging that his first issue is not reviewable in his direct appeal, defendant has filed a petition for writ of certiorari asking this Court to review the issue in our discretion. See *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987) ("[A] defendant is not entitled as a matter of right to appellate review of his contention that the trial court improperly accepted his guilty plea. [However, the d]efendant may obtain appellate review of this issue only upon grant of a writ of certiorari."). In response, the State has filed a motion to dismiss defendant's appeal, arguing that both of defendant's issues do not fall within the limited right of appeal for defendants who have entered guilty pleas, and are thus not properly

before this Court. See N.C. Gen. Stat. § 15A-1444(a1), (a2), (e) (2013); see also *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870 (2002) (“[A] defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea.”). The State’s argument regarding defendant’s second issue is misplaced, as this Court has held that “a defendant may, pursuant to N.C. Gen. Stat. § 15A-1444(a1), appeal the issue of the sufficiency of the evidence to support his or her sentence even though he or she was sentenced in the mitigated range.”¹ *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011). The State is correct that defendant is not entitled to an appeal as a matter of right to challenge the trial court’s acceptance of his guilty plea. *Bolinger*, 320 N.C. at 601, 359 S.E.2d at 462. However, in our discretion, we allow defendant’s petition for writ of certiorari to review this issue on appeal.

Defendant first argues the trial court erred in accepting his guilty plea, because the court did not advise him of his right to

¹ Because defendant has an appeal of right as to one of his two issues, we deny the State’s motion to dismiss defendant’s appeal.

remain silent or of his right to cross-examine and confront witnesses against him. Defendant asserts that the trial court's failure to so advise him renders his plea involuntary, unknowing, and without the full knowledge and understanding of the consequences of his plea.

Pursuant to N.C. Gen. Stat. § 15A-1022, a trial court may not accept a guilty plea from a defendant without personally addressing the defendant and, in relevant part:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

. . . .

(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him[.]

N.C. Gen. Stat. § 15A-1022(a) (2013). Nevertheless, a trial court's failure to comply with the mandate of N.C. Gen. Stat. § 15A-1022 constitutes reversible error only where a defendant can show he was prejudiced as a result of the trial court's lack of compliance. *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000). In determining whether a defendant has shown prejudice, "we must look to the totality of the circumstances and determine whether non-compliance with the statute either affected defendant's decision to plead or undermined the plea's validity."

Id. Where there is a signed transcript of the plea, which includes defendant's responses to the inquiries mandated by N.C. Gen. Stat. § 15A-1022, the trial court's failure to strictly follow the statute does not result in prejudice to the defendant. *Id.* at 670-71, 531 S.E.2d at 898-99; *see also State v. Crain*, 73 N.C. App. 269, 271-72, 326 S.E.2d 120, 122 (1985) ("The State's evidence from the plea transcript, the court's questions to defendant and the testimony of defendant's attorney all tend to support the State's contention that defendant was properly and adequately informed of the consequence of his plea and that he entered into the plea arrangement freely, knowingly and voluntarily.").

Here, the verbatim transcript of the plea proceedings shows that the trial court conducted a plea colloquy with defendant that covered all but two of the statutorily required inquiries necessary before the court may accept a guilty plea. The trial court did not ask defendant in open court if he understood that he had the right to remain silent, and instead of following the language on the transcript of plea form regarding defendant's understanding of his right to confront the witnesses against him, asked, "[D]o you understand that at that jury trial you have a right to have your lawyer ask questions of witnesses on your behalf?" Defendant responded, "Yes, sir" to this latter question. The record before

us further reveals that defendant answered all of the questions provided on the transcript of plea form, signed the form, and was sworn to his answers therein. Defendant answered "yes" on the transcript of plea form to the questions, "Do you understand that you have the right to remain silent and that any statement you make may be used against you?" and "Do you understand that at such trial you have the right to confront and to cross examine witnesses against you?"

After considering the totality of the circumstances, we hold defendant was not prejudiced by the trial court's failure to fully comply with the statutory mandates of N.C. Gen. Stat. § 15A-1022. The court's question as to whether defendant understood that if he had gone to trial his attorney could have questioned the witnesses against him sufficiently conforms to the inquiry mandated by section 15A-1022(a)(4), and the court's failure to inquire into defendant's knowledge that he had the right to remain silent did not affect defendant's decision to plead guilty or undermine the plea's validity. Accordingly, we overrule this argument and hold that defendant's plea was made freely, understandingly, and voluntarily.

Defendant next argues that the trial court erred in failing to find three uncontroverted mitigating factors: (1) that he made

substantial restitution to the victim; (2) that he has a support system in the community; and (3) that he has a positive employment history or is gainfully employed. See N.C. Gen. Stat. § 15A-1340.16(e) (5), (18), (19) (2013). We disagree.

In *State v. Mabry*, this Court reiterated the burden a defendant faces when he presents a claim that the trial court failed to find mitigating factors at sentencing:

[T]he offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. A defendant proves a mitigating factor when the evidence is substantial, uncontradicted, and there is no reason to doubt its credibility.

As this Court has previously explained, a trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence. An appellate court may reverse a trial court for failing to find a mitigating factor only when the evidence offered in support of that factor is both uncontradicted and manifestly credible.

Mabry, 217 N.C. App. at 471, 720 S.E.2d at 702 (citations omitted). Here, none of defendant's evidence offered in support of the three mitigating factors is both uncontradicted and manifestly credible, and thus the trial court did not err by not finding the mitigating factors.

In support of the mitigating factor that he made substantial restitution to the victim, defendant notes that both he and his counsel stated that he returned the stolen cigarettes and cigars, and the prosecutor stated that the merchandise was "recovered". Based on the prosecutor's statement, there is some evidence suggesting that the cigarettes were not voluntarily returned, but rather recovered by investigating officers. Additionally, defendant did not return the \$400 he stole from the victim, and did not present any evidence that the property was returned in the condition in which it was stolen. Accordingly, we hold the trial court did not err by not finding the mitigating factor that defendant had made substantial or full restitution to the victim within the meaning of N.C. Gen. Stat. § 15A-1340.16(e)(5).

Similarly, defendant's evidence that he was gainfully employed and had a support system in the community is derived entirely from the unsworn statements of his trial counsel and father. None of the statements offered by defendant in support of these two mitigating factors are manifestly credible such that the trial court was required to find the factors in mitigation. See *Mabry*, 217 N.C. App. at 472, 720 S.E.2d at 703. Additionally, defendant's evidence that he had a large family with a good reputation is insufficient to require a finding that he has a

support system in the community. *Id.* at 473-74, 720 S.E.2d at 703-04. Defendant's evidence that he was gainfully employed also lacked the specific details necessary for the trial court to be required to find that he had a positive employment history or was gainfully employed. The evidence consisted of nothing more than unsworn statements from his counsel, who stated that defendant had said he was working as a subcontractor for Direct TV answering phones, and his father, who stated that defendant had been "real good for the last seven months and going to work[.]" Accordingly, we hold the trial court did not err by not finding the mitigating factor that defendant was gainfully employed or had a support system in the community within the meaning of N.C. Gen. Stat. § 15A-1340.16(e)(18) and (19).

Defendant presents no meritorious arguments in his appeal, and we thus affirm the trial court's judgment.

Affirmed.

Chief Judge MCGEE and Judge STEPHENS concur.

Report per Rule 30(e).