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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-483

Filed: @

Columbus County, Nos. 13 CRS 50014, 50018

STATE OF NORTH CAROLINA,

v.

NAPOLEON RICHARD COOPER, Defendant.

Appeal by defendant from judgment entered on 27 January 2016 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 6 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks, for the State.

Marilyn G. Ozer for defendant.

ZACHARY, Judge.

Napoleon Richard Cooper (defendant) appeals from jury verdicts finding him guilty of conspiracy to commit armed robbery and first-degree felony murder based upon the underlying felony of attempted armed robbery. At trial, the State introduced into evidence a recorded interview that its key witness gave to police officers, with no objection by defendant. However, when the State proposed to play

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only a portion of the audio recording for the jury, defense counsel objected and insisted that the recording be played in its entirety.

On appeal, defendant argues that the trial court violated his federal and state constitutional rights and committed plain error under several evidentiary rules by allowing the jury to hear certain portions of the recording, in which the State's witness indicated, *inter alia*, that defendant had previously been in jail and that defendant and his brother were robbers. Defendant also maintains that the trial court erred in failing to instruct the jury that evidence of his prior convictions and bad acts, as conveyed to the jury through the recording, could not be used for any purpose. Finally, defendant claims that he received ineffective assistance of counsel when defense counsel failed both to request that "prejudicial" portions of the recording be redacted and to insist that the jury be instructed not to rely on "incompetent" evidence contained in the recording.

For the reasons that follow, we conclude that defendant failed to preserve any constitutional issues for appellate review and that any error committed by the trial court was invited by defendant. In addition, defense counsel had sound strategic reasons for requesting that the challenged recording be played in its entirety. Consequently, we find no error and reject defendant's claim of ineffective assistance of counsel.

I. Background

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In December 2012, Amy Wilson (Wilson) had recently moved in with her boyfriend, victim Gilberto Segovia (Segovia), a farm and construction worker who resided in a two-bedroom mobile home located in Tabor City, North Carolina. **[T pp 225-26, 229, 232, 256]** Wilson had previously lived with her ex-boyfriend, Richard English (English). **[T p 249]** According to English, Wilson was “running back and forth” between his residence and Segovia’s home. **[T p 279]** However, Wilson she was “scared to death” of English, as she testified at trial. **[T pp 261-62]**

On Christmas Eve 2012, Wilson and Segovia spent the day preparing to leave for Florida, where Segovia planned to work with his brother. Later that evening, the couple went to Wal-Mart and then picked up some Chinese food before returning to Segovia’s home. Wilson watched television for 20-30 minutes before she fell asleep on the couch. **[T p 227]**

That same evening, a man dropped English off at a Time Saver convenience store in Loris, South Carolina (Loris) between 11:00 p.m. and midnight. **[T pp 277-78]** While there, English ran into the Cooper brothers, Lapoleon Cooper and defendant. Lapoleon Cooper and English had served time in prison together and the two men also lived in the same neighborhood. **[T pp 276-77, 278]** English had no transportation, but he “just felt like” Wilson needed to be with him; he also knew that Wilson was living with Segovia. The Cooper brothers agreed to drive English to

Segovia's home, and the three men left together in a white, four-door Pontiac sedan.

[T p 279]

After English and the Cooper brothers arrived at Segovia's home during the early hours of Christmas morning 2012, English exited the car, walked up the mobile home's front steps, and knocked on the door. While standing at the front door, English observed Segovia look out the window, reach down, and grab a pipe. **[T p 279]** As English backed down the steps, Segovia exited his home with the pipe in hand. At this point, the Cooper brothers were standing next to English at the bottom of the steps. Both defendant and Lapoleon Cooper wore black bandanas that covered their faces. **[T pp 236, 279]** According to English, defendant pulled a gun and asked Segovia something to the effect of, "[W]here's your money?" **[T p 279]** As Segovia attempted to strike defendant with the pipe, defendant shot Segovia once in the chest. Defendant backed up and shot Segovia again, this time near his right shoulder. **[T pp 279, 402-04]** The second shot put Segovia on the ground near the bottom of the steps. **[T p 279]**

Meanwhile, inside Segovia's home, the gunshots had awakened Wilson, and when she got her bearings, English was standing over her. English "jerked [Wilson] up . . . off the couch[,]” dragged her out of the mobile home, and forced her into the backseat of a white, four-door car. **[T pp 228, 231, 235, 236, 238-39]** At that time, Wilson saw "two black guys," disguised with black bandanas and black hats, "just

looking around” inside Segovia’s home. **[T p 236]** Once the Cooper brothers returned to the car, either Lapoleon Cooper or defendant yelled, “Where’s the money at? . . . Where is the \$2,000 at, [English]?” **[T pp 240, 281-82]** English was “scared” and “didn’t know what was going on[,]” but he appeased the Cooper brothers by promising, “We’ll get some money, man. Just get me to the house.” **[T pp 281-82]** Defendant, Lapoleon Cooper, English, and Wilson left the scene in the white car.

After a 10-15 minute car ride, the Cooper brothers dropped off English and Wilson at English’s house. At some point, English forced Wilson into some woods that were adjacent to his house, and he later forced Wilson to accompany him to two nearby residences. Ultimately, English released Wilson and ran away when he saw a police cruiser shining a spotlight in the neighborhood. Police officers found Wilson, gathered information from her, and transported her back to the shooting scene, where Wilson learned that Segovia had died from the gunshot wounds. **[T pp 243-44]** While investigating the shooting scene, Lieutenant William J. Nealey of the Columbus County Sheriff’s Office interviewed Wilson in the back of his police vehicle. The interview was recorded and it ended at approximately 4:11 a.m. on Christmas morning 2012. **[T pp 407-08, 410]** At that time, authorities were actively searching for English. **[T p 410]**

The ensuing investigation also uncovered evidence that implicated defendant and Lapoleon Cooper in Segovia’s murder. Investigators found a pipe and a 9mm

Luger bullet shell casing lying a few feet from Segovia's dead body. [T pp 328, 355-57] Another 9mm Luger shell casing was discovered on the floor just inside Segovia's home. [T pp 340, 342-43] Both shell casings were manufactured by Winchester Arms (Winchester). [T pp 355-57] The imprint of a Nike Air Force 1 tennis shoe was also detected near Segovia's body. [T pp 337-38] Segovia's wallet was missing from his home and it was never recovered.

The investigation eventually led Lt. Nealey to defendant's residence in Tabor City. Parked outside was a white, four-door car that belonged to defendant's girlfriend. [T p 411] During a short interview with Lt. Nealey, defendant stated that neither he nor Lapoleon Cooper had used the white car on 24 or 25 December 2012, and defendant denied knowing English. [T pp 411-12] Defendant also denied any knowledge of Lapoleon Cooper's address. [T p 412] Not convinced of the veracity of defendant's statements, Lt. Nealey parked his police vehicle down the road from defendant's residence. A few minutes later, defendant got into the white, four-door car parked outside his residence and drove to 3991¹ Greensea Road in Greensea, South Carolina. [T pp 413-14] Lt. Nealey followed defendant, and when defendant arrived at the Greensea Road residence, Lapoleon Cooper came outside to meet him. Lt. Nealey interviewed Lapoleon Cooper at that time. [T p 414]

¹ Lt. Nealey testified that he followed defendant to "2991" Greensea Road, but State's Exhibit No. 36, a Horry County Police Department official document, indicated that Lapoleon Cooper resided at 3991 Greensea Road in Greensea, South Carolina. [T pp 375-76, 414]

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Police officers arrested English several days after Segovia's murder, and English was interviewed by Lt. Nealey and another officer on 31 December 2012. Information gleaned from the audio-recorded interview prompted Lt. Nealey to visit the Time Saver convenience store in Loris. Film recorded by the Time Saver's surveillance camera showed Lapoleon Cooper and defendant get out of a white, four-door car—the same car that Lt. Nealey observed outside defendant's residence—at approximately 11:31 p.m. on Christmas Eve 2012. The film also showed English talking with Lapoleon Cooper and defendant. **[T p 414, 416, 419]**

On 4 January 2013, U.S. Federal Marshalls and deputies with the Columbus County Sheriff's Office searched Lapoleon Cooper's South Carolina residence. **[T pp 373-74]** A Hi-Point 9mm handgun was found in a basket of dirty clothes, and a box of Winchester 9mm Luger ammunition lay next to the basket. **[T pp 376-77]** Forensic testing revealed that the shell casings found at the murder scene were fired from the 9mm Hi-Point handgun discovered at Lapoleon Cooper's residence. **[T pp 468-68]** Lapoleon Cooper was arrested after the search was completed. **[See T p . . .]**

While Lapoleon Cooper's residence was being searched, Lt. Nealey was across the state line in North Carolina conducting a recorded interview with defendant, who was arrested immediately thereafter. **[T pp 426-27]** Defendant wore a pair of Nike Air Force 1 tennis shoes at the time of his arrest. **[T pp 429, 431, 524]**

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On 9 January 2013, the Columbus County Grand Jury indicted defendant on one count each of first-degree murder, second-degree kidnapping, and conspiracy to commit armed robbery. **[R pp 8-10]** English entered an *Alford* plea to one count of second-degree murder in March 2015. It is unclear from the record before the Court whether Lapoleon Cooper was tried on any charges or if he accepted a plea deal. Defendant's trial began on 19 January 2016 in Columbus County Superior Court. **[T pp 1, 276, 293]**

At trial, Wilson, English, and Lt. Nealey were among the State's witnesses. Wilson testified that English threatened to kill her if she ever left him. She also stated that English was extremely jealous of her relationship with Segovia. **[T p 251]** Wilson's recorded interview with Lt. Nealey was played for the jury without objection. **[T p 408-09]**

The essence of English's testimony was that his only intention was to get Wilson to return home with him. English testified that he never possessed a gun, and he identified defendant as the only shooter. **[T pp 281, 283]**

Defendant did not testify, but his recorded interview was played for the jury during Lt. Nealey's direct testimony. **[T p 421]** During the interview, defendant claimed that: English was "crazy" and talked extensively about "beating Wilson's a**[;]" after English knocked on Segovia's door, Segovia came out with something in

his hand and English shot him; and English dragged Wilson to the car by her hair and kept the gun pointed at her during the ride to English's house.² **[State's Ex. 43]**

On redirect, Lt. Nealey could not recall all of the statements that English made concerning the events that led to Segovia's murder. The State then moved to play English's recorded interview in order to refresh Lt. Nealey's recollection, to which defendant did not object. **[T p 447]** Yet when the prosecutor announced his intention to "fast-forward" the recording, defense counsel objected and insisted that English's interview be played in its entirety. **[T p 448]** During the interview, English stated, *inter alia*, that defendant and Lapoleon Cooper Cooper had a predilection for robbery and indicated that defendant had recently been released from prison. **[State's Ex. 50, 28:20-28:32; 22:55]**

During the initial charge conference, the trial court dismissed the second-degree kidnapping charge against defendant. **[T pp 496-5500, 503; R pp 57-58]** Defense counsel did not request any kind of limiting instruction regarding statements made in English's interview. However, during jury deliberations, the foreman sent two questions to the trial court, one of which asked whether defendant's "prior conviction" was for armed robbery or robbery. **[T p 547]** This question, likely prompted by portions of English's interview, led the trial court, the State, and defense

² We note that defendant's recorded interview was not included in the record on appeal. However, defendant's brief summarizes the contents of his interview. Because the State does not dispute defendant's summary on appeal, we repeat it here to provide useful detail of the factual and procedural history of this case.

counsel to work together to craft a special re-instruction to address the jury's inquiry. **[T pp 547-551]** The trial court then re-instructed the jury that it was the jurors' duty to recall the evidence and that defendant's prior convictions could not be used to prove his guilt in the instant case. **[T p 552]** Both parties agreed to the additional instruction.

On 26 January 2016, the jury returned verdicts finding defendant guilty of first-degree felony murder based on the underlying felony of attempted armed robbery. The jury also found defendant guilty of conspiracy to commit armed robbery. **[T pp 555-56; R pp 57-58]** The trial court consolidated defendant's convictions for judgment and sentenced him to life imprisonment. **[T p 558; R pp 61-62]** Defendant appeals.

II. Analysis

A. The Admission of English's Interview and the Additional Jury Instructions on It

Defendant first contends that the trial court committed plain error in admitting evidence of certain statements made by English and police officers during English's recorded interview. Defendant also argues that the trial court committed plain error by failing to instruct the jury that it could not consider evidence of defendant's prior criminal convictions or bad acts for any purpose. We conclude that any error committed by the trial court was invited and therefore cannot be the basis

for setting aside defendant's convictions. In addition, the constitutional violations that defendant contends resulted from the alleged errors have not been preserved for appellate review.

During the trial, the prosecutor asked Lt. Nealey a series of questions regarding his interviews of Wilson, English, and defendant. **[T pp 407-14]** After the State moved to admit the Compact Disc (CD) of Wilson's interview into evidence, defense counsel stated that she did not object and requested that the recording be played for the jury. Defense counsel also had no objection when the State moved to admit and play the recording of defendant's interview with Lt. Nealey. **[T p 421]**

On cross-examination, Lt. Nealey answered specific questions about certain statements English made during the interview. Then, on redirect examination, the prosecutor inquired, "Did [English] tell you what was said when [English, Lapoleon Cooper, and defendant] got up to the steps [of Segovia's home] -- well, what did [English] say happened when they got there?[,]" and Lt. Nealey replied, "If I had the audio recording, it would help." **[T p 447]** As a result, the State moved to both admit English's interview into evidence and play the recording for the jury. Once again, defense counsel did not object to admitting English's interview into evidence; however, when the State proposed to advance the recording rapidly, defense counsel stated, "I object to that. I want it to be played in the entirety." **[T p 448]** Consequently, a version of English's entire interview was played for the jury.

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During the interview, officers stated that they had heard Segovia “sold dope at the state line,” to which English responded, “I don’t know if he sells at the state line, or not, I heard he push some.” **[State’s Ex. 50, 18:52-19:30]** English eventually acknowledged that Segovia was “well known” as some kind of drug dealer. In addition, after some prodding by the interrogating officers, English admitted that the Cooper brothers were under the impression that they “might have a lick”³ at Segovia’s home. **[State’s Ex. 50, 29:25]**

Later on in the interview, English confirmed that defendant had just been released from jail. **[State’s Ex. 50, 22:55]** English also stated that defendant was a “bad dude.” **[State’s Ex. 50, 22:34-22:55]** Further elaborating on this point, English explained what he viewed as the Cooper brothers’ *modus operandi*: “These boys are going to rob everybody, man. . . . Them boys is robbery boys.” **[State’s Ex. 50, 28:20-28]** One officer responded, “Any kind of lick they can make.” “They’re looking for a robbery.” **[State’s Ex. 50, 28:54-58]** All the while, English maintained that he was not involved with the murder, and that his only intentions were to get a ride to Segovia’s home and to retrieve Wilson.

Defendant did not request any instruction that would prohibit the jury from considering defendant’s prior convictions and bad acts, as described by English in the recorded interview. However, while the jury was deliberating, the foreman sent a

³ Lt. Nealey explained that a “lick” is street slang for a way to make money, such as a robbery or burglary. **[R pp 447-48]**

note to the trial court, which read, in pertinent part: “What is [defendant’s] prior conviction for? Armed robbery or robbery?” **[T p 547]** As demonstrated by the following exchange between the trial court and the parties, the trial court recognized that this question stemmed from English’s statements in his interview, and that the jury might improperly use evidence of defendant’s prior convictions to find him guilty of the crimes currently charged:

The Court: My recollection, he never testified -- there was never -- and I don’t recall -- I knew there was talk about -- through Mr. English’s conversation with the officer about maybe a history of past robbery. I don’t recall -- I didn’t remember off the top of my head about conviction being stated. I don’t think that’s appropriate.

My suggestion would be just tell the jurors it would be their duty to recall the evidence from what they’ve heard from the stand and presented; the Court can’t tell them at this point; they have to determine what the evidence is. State satisfied --

[Prosecutor]: Yes, sir.

The Court: -- with that response? Defense satisfied?

[Defense Counsel]: Yes. **[T p 547]**

After both the State and defendant agreed to the proposed instruction without further discussion, the trial court then went on to state, *sua sponte*, that it would be “inclined to look at doing a possibly modified instruction regarding -- just to give as to the defendant testifies as to prior criminal convictions, that you don’t use the past conviction -- you don’t convict somebody of this charge based on conviction of a past

charge.” [T pp 548-49] As a result, the prosecutor used a laptop computer to research pattern jury instructions that might address any concerns related to Rules 404(b) and 609(a) of the North Carolina Rules of Evidence. Defense counsel participated in this process. Ultimately, the parties settled on a modified version of North Carolina Pattern Jury Instruction 105.40, which normally applies when a defendant has testified at trial and the State has sought to impeach the defendant’s credibility with evidence of prior convictions. *See* N.C.P.I. Crim. 105.40 (2011). At this point, the State, the trial court, and defense counsel engaged in the following colloquy:

[Prosecutor]: Seems like maybe an appropriate instruction saying -- modify the thing, evidence has been received concerning prior criminal activity of the defendant.

[Defense Counsel]: I think what [English] said was [defendant] had just gotten out of the Department of Corrections.

[Prosecutor]: Yeah.

[Defense Counsel]: I think that’s the language.

The Court: You’re okay using prior criminal convictions of the defendant, maybe for evidence of one purpose only -- which is -- bears on the defendant’s credibility. He hasn’t testified.

Possibly just to say evidence has been received concerning prior criminal convictions of the defendant. And then just say a prior conviction is not evidence of the defendant’s guilt in this case. You may not convict the defendant of the present charge or charges because of something the

defendant may have done in the past. Satisfied with that instruction? The defense?

[Defense Counsel]: Yes.

The Court: State satisfied?

[Prosecutor]: Yes, sir.

...

The Court: Okay. With that being said, if you'll bring the jurors on back, please. **[T pp 550-51]**

The trial court then re-instructed the jurors that it was their duty to recall the evidence, and that the court could not aid the jury in the recollection of "specific fact[s]." This re-instruction also contained the following admonition:

The Court: I will caution you, however, evidence has been received concerning a prior criminal conviction of the defendant. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charges because of something the defendant may have done in the past. **[T p 551-52]**

On appeal, defendant argues his federal and state constitutional rights were violated when the trial court allowed the State to play English's interview in its entirety. **[Def. Br. pp 16, 27, 29-32]** Defendant further contends that portions of the interview constituted inadmissible hearsay under Rules 801 and 802 of the North Carolina Rules of Evidence. **[Def. Br. pp 29-30]** As to English's discussion of defendant's character, prior convictions, and prior bad acts, defendant asserts that these statements should have been excluded under North Carolina Evidence Rules

404(a), 404(b), and 609(a). **[Def Br. pp 11-14]** Defendant also maintains that statements regarding Segovia’s alleged status as a drug dealer were impermissible character evidence of the victim and inadmissible, “highly prejudicial” hearsay.⁴ **[Def. Br. pp 29-31]** Finally, defendant argues that the trial court committed plain and prejudicial error by failing to instruct the jury that it could not consider defendant’s prior criminal convictions or bad acts for any purpose. **[Def. Br. pp 18-27]**

As an initial matter, we note that defendant never raised any constitutionally-based objections at trial regarding English’s recorded interview. Because defendant failed at trial to argue any constitutional theory related to the interview’s admission into evidence or the trial court’s re-instruction of the jury as to a portion of the interview’s contents, he has not preserved these issues for appellate review. N.C.R. App. P. 10(a)(1) (2015); *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (“[C]onstitutional error will not be considered for the first time on appeal”).

As to defendant’s remaining arguments under the evidentiary rules, defendant invited any error that the trial court may have committed. “[N]ormally, where a

⁴ In defendant’s words: “None of the State’s witnesses testified that Segovia had cash on hand. . . . The conversation . . . concerning Segovia’s [alleged] involvement in the drug trade . . . filled in the major gap in the State’s evidence necessar[y] to support [the charge of] attempted robbery. **[Def. Br. p 33]** This argument ignores the fact that Wilson and English testified that the Cooper brothers frantically asked where the “money” was before departing the shooting scene, and that Segovia’s wallet was missing and never recovered. Moreover, English testified that before he pulled the trigger, defendant asked Segovia, “Where’s your money?” This was ample evidence from which the jury could infer that a robbery was planned and attempted. The evidence also supports the inference that defendant, for whatever reason, believed Segovia had cash stored at his residence.

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defendant fails to object to an error at trial, [the appellate court] would determine whether the alleged error constituted plain error.” *State v. Thompson*, 359 N.C. 77, 103, 604 S.E.2d 850, 869 (2004) (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996)). However, “[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2015). “It is well established that a defendant who ‘causes’ or ‘joins in causing’ the trial court to ‘commit error is not in a position to repudiate his action and assign it as ground for a new trial.’” *State v. Jones*, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) (quoting *State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) and other citation omitted). In other words, “[w]hen a party invites a course of action, he is estopped from later arguing that it was error.” *State v. Eason*, 336 N.C. 730, 741, 445 S.E.2d 917, 924 (1994) (citations omitted). To that end, our courts have held that “a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (holding error was invited error and defendant waived right to appellate review when defendant failed to object to admission of evidence at trial and defendant requested exhibit be published to jury despite court’s warning that part of statement had not been properly redacted) (citing *State v. Roseboro*, 344 N.C. 364, 373, 474 S.E.2d 314, 318 (1996)), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002)).

Here, defendant not only made no objection to the admission of the recording of English's interview, defendant in fact *insisted*—through objection—that the recording be played in its entirety. By requesting that the entire recording be published to the jury, defendant invited any error that occurred. In addition, defense counsel not only agreed to the initial jury instructions, she participated in the drafting of, and explicitly agreed to, the modified jury instruction of which defendant now complains. In that defendant clearly stated his satisfaction with the re-instruction, he cannot now complain about it on appeal. *See State v. Thompson*, 359 N.C. 77, 103, 604 S.E.2d 850, 869 (2004) (“To the extent that defendant agreed with the trial court’s manner of instruction, defendant has invited any alleged error, and he may not obtain relief from such error.’”) (citation omitted). Accordingly, any error committed by the trial court was invited, and defendant’s arguments regarding the admission of and instruction on the allegedly prejudicial statements contained in English’s interview are precluded from appellate review.

B. Ineffective Assistance of Counsel

Defendant next argues, albeit in passing, that if “the failure to properly instruct the jury did not rise to plain error, an alternative basis for relief lies in ineffective assistance of counsel.” **[Def Br. p 26]** Specifically, defendant contends that counsel’s failure to: “object to [English’s recorded interview] when it was admitted; . . . move to strike the evidence; move for a mistrial when it was apparent

the jury had heard and was relying on the incompetent evidence; and failure to object to the additional instruction was prejudicially deficient performance.” **[Def. Br p 26]**

We disagree.

It is axiomatic that “ineffective assistance of counsel claims ‘brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.’” *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 165, 557 S.E.2d 500, 524 (2001)).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s 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. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (internal citations and quotation marks omitted).

Furthermore, “[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.” *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d

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534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). Consequently, “trial counsel’s representation is [presumed to have been] within the boundaries of acceptable professional conduct.” *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986). As the United States Supreme Court has explained,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”

Strickland v. Washington, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984) (citation omitted).

In the instant case, a careful reading of the transcript shows that defense counsel had specific strategic reasons for insisting that English’s recorded interview be played in its entirety. As revealed during her aggressive cross-examinations of Wilson, English, and Lt. Nealey, defense counsel’s objectives at trial were twofold: (1) to establish that English actually shot and killed Segovia, and (2) to paint English as an untrustworthy witness who should not be believed. By insisting that the recorded interview not be redacted, counsel was able to discredit English’s testimony at trial.

For example, Chris English, English's nephew, reported his 9mm handgun stolen sometime before Segovia's murder. **[T pp 291-92]** English would not admit on cross-examination that he stole the gun, but defense counsel did get Lt. Nealey to concede that Chris English told Lt. Nealey that English had stolen the 9mm handgun. **[T p 440]** English was also cross-examined as to whether he had told Chris English that he had "killed a Mexican named Gilberto [Segovia]," to which English halfheartedly replied, "Not that I remember." **[T pp 292-93]** In his recorded interview, English was confronted with information that someone (presumably Chris English) told law enforcement that English claimed to have killed Segovia. **[State's Ex. 50, fill in time stamp]** Consequently, this portion of the interview connected many of the dots that defense counsel had presented to the jury.

Furthermore, English was extensively cross-examined on the statements that he made in his police interview. Defense counsel then highlighted the inconsistencies between English's answers to police questioning and his trial testimony. Lt. Nealey later acknowledged these inconsistencies during his cross-examination. Therefore, the recorded interview served as a platform for attacking English's testimony, and it put the purposes of defense counsel's aggressive questioning in context.

For the reasons explained above, defense counsel likely insisted that English's entire interview be published to the jury for specific and strategic reasons. Because English gave the only first-hand account of what happened between him, Lapoleon

Cooper, defendant, and Segovia, English's testimony was critical to the State's case. Given the circumstances at trial, defense counsel's decision to insist that the interview be played in its entirety constituted sound trial strategy. Accordingly, we cannot conclude that her performance fell below an objective standard of reasonableness, and defendant cannot establish a claim of ineffective assistance of counsel.

III. Conclusion

By failing to raise any constitutional arguments at the trial level, defendant has not preserved the constitutional issues raised in his brief for appellate review. In addition, because defendant invited any error by the trial court in admitting and re-instructing the jury on the challenged portions of English's recorded interview, defendant has waived his right to all "appellate review concerning the invited error, including plain error review." *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416. Finally, defendant has failed to establish a claim of ineffective assistance of counsel.

NO ERROR.

Judges STROUD and McCULLOUGH _____.

Report per Rule 30(e).