

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1163

Filed: 4 December 2018

Forsyth County, Nos. 13 CRS 60085, 60074, 7754

STATE OF NORTH CAROLINA

v.

ANTHONY VINH NGUYEN

Appeal by defendant from judgments entered 3 October 2016 by Judge Edwin G. Wilson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 8 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

ELMORE, Judge.

Defendant Anthony Vinh Nguyen appeals from a judgment sentencing him to life imprisonment without parole after a jury convicted him of first-degree burglary, first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. He argues the trial court erred by allowing the prosecutor to (1) repeatedly comment

on his post-*Miranda* silence and failure to disclose his alibi until trial; (2) ask a question assuming a fact not in evidence, which directly undermined his alibi defense; and (3) argue during its closing argument to the jury about the absence of evidence it had successfully moved to exclude. We hold defendant received a fair trial, free of prejudicial error.

I. Background

On 10 October 2013, Sheila Pace Gooden was fatally shot during a home invasion at 700 Magnolia Street in Winston-Salem. The State charged defendant, Steven Assimos, and Danny Benson with first-degree murder and related crimes. Assimos and Benson served as witnesses for the State at defendant's trial, and following that trial, entered into plea agreements with the State in which they pled guilty to second-degree murder and other related charges.

At trial, the State's evidence tended to show that before September 2013, Benson, Assimos, and Gooden's son, Cory Prince, who were all in their early twenties, were good friends who regularly partied together; that after a party in September 2013 in which Benson and Prince altercated, and Prince swung a machete at Benson, Benson and Assimos stopped hanging around with Prince; that during the evening of 10 October 2013, Benson, Assimos, and defendant were working together at the mall and arranged to meet up later that evening for a party; that the three met up before the party at one of defendant's friend's houses to drink alcohol and formulated a plan

STATE V. NGUYEN

Opinion of the Court

to rob and/or beat up Prince; that the three then drove to defendant's house where he supplied Benson and Assimos with clothes to cover their faces and gloves to wear during the crimes; that defendant then drove himself, Assimos, and Benson to Prince's residence at 700 Magnolia Street to carry out the plan; that the three walked up to the front door together and, while attempting to forcibly enter the residence, defendant shot Gooden; that after defendant unsuccessfully chased after Prince, he returned to Gooden and shot her twice in the head; and that Benson and Assimos searched the home and stole a television.

Defendant testified on his own behalf, presenting an alibi that he was not present during the crimes. According to defendant, he drove Benson and Assimos to Prince's residence to pick up Prince for a barbeque; dropped off Benson and Assimos at Prince's residence and drove to a nearby convenience store, Jo-Jo's, to buy cigarettes for Benson; and, after discovering Jo-Jo's was closed for the night, he drove back to Prince's residence, where Benson and Assimos loaded the TV into his car. Defendant testified that Benson and Assimos told him Prince gave them the TV to smooth things over and did not discover it had been stolen until later that evening, nor was he aware that Gooden had been murdered until his arrest. Additional trial evidence will be discussed in greater detail when relevant to addressing the issues presented on appeal.

STATE V. NGUYEN

Opinion of the Court

During Assimos's cross-examination, defense counsel sought to question him about a photograph depicting Assimos holding what appeared to be a gun for the purpose of impeaching his testimony that defendant was the only person who owned firearms and Prince's anticipatory testimony that he never saw Assimos in possession of a firearm. The trial court sustained the State's objection to the introduction of the photograph. During defense counsel's *voir dire* proffer of evidence, Assimos testified that the picture depicted him holding a BB gun, not a real gun; that the BB gun belonged to someone else; and that the photograph was taken at some point before the date of the crimes. The trial court excluded the photograph as unfairly prejudicial.

During defendant's cross-examination, the State questioned his alibi. The prosecutor asked the following question concerning the convenience store defendant had previously testified that he had driven to while Assimos and Benson committed the crimes: "Would you be surprised if there's not any convenience store near 700 Magnolia Street where you could have gotten to within five minutes, especially one named Jo-Jo's?" Defense counsel objected on the grounds that the question assumed facts not in evidence, which the trial court overruled. Additionally, the prosecutor asked approximately eleven questions about why defendant had not disclosed his alibi until trial. Defense counsel lodged four general objections to those questions

that were immediately sustained; did not object to five of the questions; and lodged two objections that were overruled.

Later, during its closing argument to the jury, one of the State's prosecutors argued the following: "What is a reasonable person going to do when Sergeant Azar comes to your house and places you under arrest? What does your common sense tell you he's going to say? I didn't have anything to do with that. I didn't do it. I didn't kill her. Or is common sense telling you that you're hearing about this [for] the first time in 34 months . . . because the story has been made up. . . ." Defense counsel lodged a general objection, which the trial court overruled. Additionally, the prosecutor argued: "What testimony did you hear about someone owning guns? Did you hear anything about Steven Assimos owning a gun? . . . Did you hear any testimony about Danny Benson owning a gun? Or did you hear an explanation about who is the person who owns guns? Who is the person who needed money and pawned guns? That's the defendant." Defense counsel lodged a general objection, which the trial court overruled.

Following the presentation of evidence, the trial court charged the jury on first-degree burglary; first-degree murder under the theories of premeditation and the felony-murder rule; first-degree kidnapping; robbery with a dangerous weapon; and the criminal liability theory of concerted action for each crime. On 27 September 2016, the jury found defendant guilty as charged, including guilty of first-degree

murder under both theories of premeditation and the felony-murder rule. Upon the jury's recommendation that defendant not be sentenced to death but life imprisonment, the trial court entered a judgment sentencing defendant to life imprisonment without parole. Defendant appeals.

II. Issues Presented

On appeal, defendant presents the following three issues: (1) “[t]he trial court failed to correct or control the prosecutor who repeatedly elicited, emphasized, and capitalized on [his] post-arrest silence. Though that silence was inadmissible for any purpose, the prosecutor used it to undermine the credibility of [his] alibi testimony”; (2) “[t]he trial court prejudicially erred in overruling [his] objection to the prosecutor’s question that assumed a critical but untrue fact—that there was no convenience store within a five minute drive of 700 Magnolia”; and (3) “[t]he trial court prejudicially erred in overruling [his] objection to the prosecutor’s misleading argument that urged the jury to rely on the absence of evidence that Assimos owned a gun, where, during trial, the prosecutor successfully argued for exclusion of that evidence.”

III. Post-Appeal Procedure

After defendant’s appeal was docketed, the State moved to strike certain appendixes to defendant’s appellate brief—that is, the judgment and commitment entered against Assimos and Benson, and Google Maps images of the location of Jo-Jo’s in proximity to 700 Magnolia Street. In response, defendant filed a motion to

take judicial notice of these documents, and the State later filed a response requesting we deny the motion. Because we conclude these challenged documents are irrelevant to our disposition of the issues on appeal, we dismiss these motions as moot.

Additionally, defendant filed a conditional motion for appropriate relief (“MAR”) in the event we (1) conclude the record is insufficient to establish that defendant received his *Miranda* warnings following his arrest and invoked those rights, and (2) decline to take judicial notice of the challenged documents. Appended to the MAR are, *inter alia*, discovery documents that were not presented to the trial court purportedly identifying when defendant was advised of and invoked his *Miranda* rights. In the alternative, to the extent we deem these documents necessary to properly address defendant’s constitutional arguments, defendant requests we invoke Appellate Rule 2 to consider them. Defendant also filed a reply to the State’s MAR response, which the State has moved to strike as improper. Because we conclude these documents are unnecessary to adjudicate the issues on appeal, we also dismiss these motions as moot.

IV. Analysis

A. Post-Arrest Silence

Defendant first asserts the trial court erred by “fail[ing] to correct or control the prosecutor who repeatedly elicited, emphasized, and capitalized on [his] post-arrest silence” for the purpose of “undermin[ing] the credibility of [his] alibi

testimony.” He argues the State improperly commented on his post-*Miranda* silence during cross-examination and again during its closing argument to the jury, in violation of his Fifth Amendment rights. We conclude the trial court’s actions did not rise to the level of plain error and therefore overrule this argument.

1. Issue Preservation

As an initial matter, defendant recognizes his trial objections may not have preserved this issue for appellate review and thus argues, in the alternative, that “the prosecutor’s improper questions constituted plain error.” N.C. R. App. P. 10(a)(4). On appeal, defendant argues eleven prosecutorial questions during cross-examination improperly commented on his post-*Miranda* silence in violation of his Fifth Amendment rights. But at trial, defense counsel only lodged general objections, *see State v. Roache*, 358 N.C. 243, 288, 595 S.E.2d 381, 411 (2004) (“[I]nasmuch as defendant made no objection based on violation of his federal or state constitutional rights before the trial court, any assignment of error premised on a constitutional violation is not properly before this Court for review.”), and only objected to six of the eleven questions, *see State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (“It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.” (citation omitted)). Accordingly, we review this issue only for plain error. *See, e.g., State v. Richardson*, 226 N.C. App. 292, 300, 741 S.E.2d 434, 440 (2013) (“At trial, Defendant

failed to object to most of the questions and prosecutorial comments upon which his request for appellate relief is predicated. In addition, the limited number of objections that Defendant did make at trial did not include any reference to the constitutional principle upon which he now relies. As a result, our review of Defendant's challenge to the relevant prosecutorial questions and comments is limited to determining whether plain error occurred.”).

2. Review Standard

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 affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

3. Discussion

“It is well established under both the United States and the North Carolina Constitutions that post-*Miranda* silence may generally not be used to impeach the defendant on cross-examination.” *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 518 (2001) (citations omitted). Defendant argues the following eleven prosecutorial

questions during his cross-examination were improper comments on his post-*Miranda* silence:

[1.] Q. [STATE:] When Officer Azar, the sergeant from the S.W.A.T. team said, “You’re under arrest for murder,” did you say, “I didn’t do that”?

[DEFENSE]: Objection.

THE COURT: Sustained.

[2.] Q. [STATE:] Did you deny what the Winston-Salem police told you what you were under arrest for?

[DEFENSE]: Objection.

THE COURT: Sustained.

[3.] Q. [STATE:] When have you told this story to the police?

[DEFENSE]: Objection.

THE COURT: Sustained.

....

[4.] Q. [STATE:] Is this the first time that you have told this story in public?

A. Yes, ma’am.

[5.] Q. [STATE:] After 34 months, you’ve finally spoken up for what happened to you on October 10 of 2013?

A. Yes, ma’am.

[6.] Q. [STATE:] That you were manipulated and tricked by Danny Benson and Steven Assimos?

A. Ma’am, they did trick me.

[7.] Q. [STATE:] But you waited 34 months to tell us about it?

A. No -- here, yes.

....

STATE V. NGUYEN

Opinion of the Court

[8.] Q. [STATE:] Then when you heard that Sheila Gooden had been murdered, you must have reached out the way Dr. Gessner did to report what happened?

A. When I found out that she was murdered, I was at the jail when I read my paperwork. Initially, I thought that something happened to Cory, and I knew that anything I said would have been used against me because I was already charged.

[DEFENSE]: Objection.

THE COURT: Overruled.

[9.] Q. [STATE:] So you were making sure you didn't get in any kind of trouble?

[DEFENSE]: Objection.

THE COURT: Overruled.

[10.] Q. [STATE:] So you were making sure you didn't get in any kind of trouble?

A. I sold a TV, and I didn't want to get in trouble for that.

[11.] Q. [STATE:] So you told the detectives you were at Jo-Jo's?

[DEFENSE]: Object[ion].

THE COURT: Sustained.

Additionally, defendant challenges the following argument made by the prosecutor to the jury during its closing argument:

[STATE]: What is a reasonable person going to do when Sergeant Azar comes to your house and places you under arrest? What does your common sense tell you he's going to say? I didn't have anything to do with that. I didn't do it. I didn't kill her. Or is common sense telling you that you're hearing about this the first time in 34 months —

[DEFENSE]: Objection.

[STATE]: — because the story —

THE COURT: Overruled.

[STATE]: Are you hearing about this for the first time after 34 months because the story has been made up and put together to admit what he can't deny and deny what he can't admit. . . .

Assuming, *arguendo*, the prosecutor's commenting on defendant's silence was error, it did not amount to plain error. In assessing plain error in this context, we consider

the following factors, none of which should be deemed determinative[] . . . : (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

Richardson, 226 N.C. App. at 302, 741 S.E.2d at 441–42 (2013) (footnote omitted).

Even if the State explicitly made improper comments or directly elicited improper testimony, the record contained substantial evidence of defendant's guilt, the credibility of his alibi was undermined by three eyewitnesses and, because many of the challenged questions were either objected to and sustained, or did not directly implicate his right to silence under *Miranda*, we hold there was no plain error.

First, the record contained substantial evidence of defendant's guilt. In contrast to defendant's alibi, Prince, Assimos, and Benson all testified that defendant entered Gooden's home and participated in the crimes, and the jury was instructed on the criminal liability theory of acting in concert for each crime.

Prince testified that after he heard knocking on the door to the residence, he heard defendant announce his name, and "recognize[d his] voice." According to Prince, he saw "three" people, "the door was hit in and [Gooden] was shot," defendant "came in the house first" and "shot," and Prince took off running.

Assimos testified that he, Benson, and defendant "decided [they] were going to go over to [700 Magnolia Street] and rob [Prince] and probably beat him up and take some things from his home" "[b]ecause of the altercation with the machete." According to Assimos, this plan was "really all our [their] idea[s]" and after they decided "to go rob Cory," defendant "hand[ed] out things from a backpack, T-shirts that [they] could put over [their] face[s] and gloves." Assimos testified that when they arrived at 700 Magnolia Street, defendant knocked on the door, announced his name, and "not until [they] got to the front door" did he realize "that [defendant] had a gun[.]" According to Assimos, once Gooden opened the door, "[defendant] fired off a shot and told her to get down." Defendant immediately chased after Prince and, when defendant returned to where Gooden was lying, Assimos ran out of the house and he

heard “two gunshots.” When defendant returned to the car, he repeatedly stated, “I f[*]cked up”—“I think I shot her.”

Benson testified that after he, Assimos, and defendant agreed to rob Prince, defendant provided them clothes and gloves to wear during the crimes, and as they were changing, defendant “handed [him] a knife,” and he observed that defendant “had a silver semi-automatic gun.” According to Benson, after they arrived at 700 Magnolia Street, “defendant pushed the front door open,” Gooden told him to get out of her house, and defendant “shot her in the leg.” Benson testified that after defendant returned from unsuccessfully chasing Prince, he observed defendant “walk[] up to [the victim] and all [he] heard was two shots.” Defendant then stated, “[w]hat are you waiting for, go grab something,” and Benson took the TV. After the three left the residence together, defendant stated: “I shot her, I f[*]cked up. I f[*]cked up. I killed her” and “[d]on’t snitch.” Particularly given that the jury was instructed on the criminal liability theory of acting in concert for each crime, and on first-degree premeditated murder and first-degree murder under the felony-murder rule, we conclude that there was substantial evidence of defendant’s guilt of the crimes charged.

Second, defendant’s credibility was attacked, *inter alia*, by a disinterested witness, Mark Tuttle, who testified that, after the incident, defendant asked him to provide an alibi on his behalf, and by another disinterested witness who observed

defendant's car slowly drive past 700 Magnolia Street multiple times and did not observe that any passengers had been dropped off.

Third, although the prosecutor attacked defendant's credibility during closing argument about his not having previously disclosed his alibi to police prior to trial, defendant's objections during cross-examination to questions numbered 1, 2, 3, and 11 were immediately sustained, rendering them irrelevant. *See State v. Fair*, 354 N.C. 131, 157, 557 S.E.2d 500, 519 (2001) ("When the objection is immediately sustained, the use of defendant's silence for impeachment purposes is avoided and no due process violation occurs." (citing *Greer v. Miller*, 483 U.S. 756, 764, 107 S. Ct. 3102, 3108, 97 L. Ed. 2d 618, 629–30 (1987))). Additionally, the trial court had instructed the jury to disregard any questions to which it sustained objections. *See State v. Tirado*, 358 N.C. 551, 593, 599 S.E.2d 515, 543 (2004) ("[J]urors are presumed to follow the instructions of the trial court[.]"). Only questions 4, 5, 7, and 8 could be construed as improper comments on defendant's silence or directly eliciting improper testimony. But questions 4 and 5 were permissible to impeach defendant's prior testimony that he had previously told his alibi to "[his] family . . . [and] some of [his] friends in jail." Further, although questions 7 and 8 commented on defendant's failure to disclose his alibi until trial, the prosecutor never mentioned defendant's exercise of his *Miranda* rights. *State v. Moore*, 366 N.C. 100, 107, 726 S.E.2d 168, 173–74 (2012) ("In either event, the prosecutor did not emphasize or highlight

defendant's exercise of his rights. Moreover, the prosecutor did not mention defendant's exercise of his rights when he cross-examined defendant or in his closing argument.”).

Given the substantial evidence of defendant's guilt of the crimes charged, and “given the brief, passing nature of [questions 7 and 8, and the single prosecutorial statement made during one of the State's two closing arguments] in the context of the entire trial,” we conclude the challenged prosecutorial remarks were “not likely to have ‘tilted the scales’ in the jury's determination of defendant's guilt or innocence.” *Id.* at 107, 726 S.E.2d at 174 (citing *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983)). Accordingly, we hold the trial court did not plainly err by allowing the challenged questions and comments.

B. Prosecutor's Question Assuming a Fact not in Evidence

Defendant next asserts the trial court erred by overruling his objection to the prosecutor's question that assumed a fact not in evidence. Defendant presented an alibi defense that he had driven to a convenience store, Jo-Jo's, located about five miles from the victim's home, while Benson and Assimos committed the crimes. The State's questioning on cross-examination implied no such convenience store existed:

Q. Would it surprise you there is no Jo-Jo's convenience store in Winston-Salem?

A. There is. It's on West Academy, ma'am.

Q. So it's just not listed in the yellow pages?

STATE V. NGUYEN

Opinion of the Court

A. Ma'am, there is a Jo-Jo's in Winston-Salem.

Q. Would you be surprised if there's not any convenience store near 700 Magnolia Street where you could have gotten to within five minutes, especially one named Jo-Jo's?

[DEFENSE COUNSEL]: Objection. Assumes facts not in evidence.

THE COURT: Overruled.

[DEFENDANT]: Ma'am, you're wrong. There is a Jo-Jo's.

Q. (BY [STATE]) What's the address of Jo-Jo's?

A. It's right on the intersection of Peters Creek and West Academy. It's right next to the dry cleaners and down the road from the Filly's strip club.

Q. So you brought a picture for the jury to see of this store that you went to while Sheila Gooden was being gunned down in her house?

A. No, I did not.

As reflected, although defendant objected to one question by the prosecutor on the grounds that it assumed facts not in evidence, he did not request that the challenged statement be stricken, and he thus waived the benefit of his objection. *See State v. Jones*, 347 N.C. 193, 214–15, 491 S.E.2d 641, 654 (1997) (deeming unpreserved an argument that the prosecutor's question improperly assumed facts not in evidence because, after the trial court sustained the objection, defendant never

moved to strike the challenged statement in the question); *see also State v. Chatman*, 308 N.C. 169, 178, 301 S.E.2d 71, 77 (1983) (“Failure to move to strike the unresponsive part of an answer, *even though the answer is objected to*, results in a waiver of the objection.”).

“[Q]uestions asked by an attorney are not evidence.” *State v. Taylor*, 344 N.C. 31, 41, 473 S.E.2d 596, 602 (1996). Additionally, “a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind.” *Richardson*, 226 N.C. App. At 303, 741 S.E.2d at 442 (quoting *State v. Smith*, 289 N.C. 143, 157, 221 S.E.2d 247, 255 (1976)). Here, no evidence was generated by the challenged questioning other than defendant’s testimony about the existence of the convenience store. He denied the prosecutor’s insinuation that there was no convenience store located within a five mile radius of Gooden’s home. *See State v. Davis*, 349 N.C. 1, 40, 506 S.E.2d 455, 476 (1998) (“No improper testimony was admitted, and the jurors heard defendant’s sister deny any knowledge of such conversation.”).

Because defendant failed to consistently object or move to strike the challenged statements from the prosecutor’s questioning, he waived the benefit of his one objection. Since the challenged questioning implicated no evidentiary error, this argument is precluded from even plain error review. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (“[P]lain error review in North Carolina is normally limited to

instructional and evidentiary error.” (citing *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882, 154 L. Ed. 2d 795 (2003))). Therefore, we overrule this argument.

C. Closing Argument

Defendant next asserts the trial court erred by overruling his objection to a statement in the State’s closing argument to the jury as to the lack of evidence that Assimos owned a gun. He argues his constitutional due process rights were violated because the prosecutor impermissibly referenced excluded evidence. We disagree.

1. Issue Preservation

Because defendant only lodged a general objection to the challenged statement of the prosecutor’s closing argument, his constitutional due process argument raised for the first time on appeal has not been preserved. We therefore review any constitutional issue only for plain error. *Roache*, 358 N.C. at 288, 595 S.E.2d at 411; N.C. R. App. P. 10(a)(4).

2. Review Standard

Where a defendant lodged an objection to a prosecutor’s closing argument, we review the trial court’s ruling on the objection for abuse of discretion. *See, e.g., State v. Murrell*, 362 N.C. 375, 407, 665 S.E.2d 61, 82 (2008). We “first determin[e] if the remarks were improper. . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been

excluded by the trial court.” *Id.* (quoting *State v. Peterson*, 361 N.C. 587, 607, 652 S.E.2d 216, 229 (2007)).

3. Discussion

The challenged part of the prosecutor’s closing argument follows:

[STATE]: What testimony did you hear about someone owning a gun? Did you hear anything about Steven Assimos owning a gun?

[DEFENSE]: Objection.

THE COURT: Overruled.

[STATE]: Did you hear anything about Steven Assimos owning a gun? Did you hear any testimony about Danny Benson owning a gun? Or did you hear an explanation about who is the person who owns guns? Who is the person who needed money and pawned guns? That’s the defendant.

Previously, the trial court excluded a photograph of Assimos holding what appeared to be a gun that defense counsel sought to introduce while cross-examining him for the purpose of impeaching Assimos’s prior testimony that defendant was the only person who owned a gun at the time of the crimes and Prince’s anticipatory testimony that he never saw Assimos in possession of a firearm. The trial court sustained the State’s objection to the introduction of the photograph. During defense counsel’s *voir dire* proffer of evidence, Assimos testified that he had never possessed a firearm, and that the picture depicted him holding a BB gun, not a real gun; that the BB gun belonged to someone else; and that the photograph was taken at some

point before the date of the crimes. The trial court again sustained the State's objection and excluded the photograph as unfairly prejudicial.

Defendant cites to *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996), to support his argument that the trial court here erred by failing to stop or correct the prosecutor's leading argument. In *Bass*, we held that although the trial court properly excluded evidence of the prior abuse of the victim, it erred "in allowing the prosecutor to use this absence of evidence of the victim's prior abuse to mislead the jury." *Id.* at 313, 465 S.E.2d at 338. We concluded that a "prosecutor may not properly argue to the jury that [an] inference would be correct where the prosecutor is aware that the contrary is true." *Id.* at 314, 465 S.E.2d at 338.

Bass is distinguishable because defendant's proffer of evidence did not establish that Assimos owned a gun. Thus, unlike the excluded evidence in *Bass*—which established that the victim had previously been abused—the excluded evidence here did not establish that Assimos owned a gun. Accordingly, unlike the prosecutor in *Bass*, the prosecutor here did not argue an inference to be correct when he knew it to be untrue. Indeed, the prosecutor here could have made the same argument even if the excluded evidence had been admitted. However, even if the remark had been improper, in light of the overwhelming evidence of defendant's guilt, we conclude the trial court did not err by overruling the objection, or by failing to stop or correct the prosecutor's argument. Accordingly, we overrule this argument.

V. Conclusion

Even if the prosecutor improperly commented on defendant's post-*Miranda* silence, we conclude the trial court's allowance of the challenged questioning and comments did not rise to the level of plain error. Defendant's argument that the prosecutor's question assumed a fact not in evidence was waived for appellate review. Finally, the trial court did not err by overruling, or by failing to stop or correct, the challenged statement in the prosecutor's closing argument about the absence of evidence that Assimos owned a gun, since defendant's proffer of evidence did not establish that Assimos owned a gun, and thus the remark did not impermissibly draw inferences from the absence of excluded evidence. Accordingly, we hold that defendant received a fair trial, free of prejudicial error. In light of our adjudications of these issues, we dismiss as moot the multiple motions filed with this Court.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).