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NO. COA05-320

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

OMEAKO LAVON BRISBON

Cumberland County
Nos. 01 CRS 059967
01 CRS 059968

Appeal by defendant from judgments entered 12 February 2004 by Judge G.K. Butterfield in Cumberland County Superior Court. Heard in the Court of Appeals 30 November 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Omeako Lavon Brisbon ("defendant") appeals from judgment entered after a jury found him to be guilty of two counts of first-degree murder. We find no error.

I. Background

Sometime between 2:00 and 2:30 a.m. on 6 August 2001, brothers Johnny Jones ("Johnny") and Jermaine Jones ("Jermaine") were shot and killed in the parking lot of a crowded nightclub called "The Zoo" on Bragg Boulevard in Fayetteville.

A. State's Evidence

The State presented evidence from eighteen witnesses, two of whom identified defendant as the perpetrator.

1. Officer Jennifer Geisinger

On the night of the shootings, Fayetteville Police Officer Jennifer Geisinger ("Officer Geisinger") was dispatched to the Sycamore Square Shopping Center in response to noise complaints outside The Zoo. Officer Geisinger heard gunshots fired when she was working with other officers to get patrons of The Zoo off the street and into the nightclub. She approached the area where the shots had been fired and found Jermaine alive with a gunshot wound in his chest. She then located Johnny who was dead.

2. Officer Shawn Arnold

Officer Shawn Arnold ("Officer Arnold") was also dispatched to the Sycamore Square Shopping Center on the night of the shootings. Officer Arnold secured the area where Jermaine had been shot.

3. Detective Chris Oldacre

Fayetteville Police Detective Chris Oldacre ("Detective Oldacre") evaluated the scene where Jermaine and Johnny had been shot. He discovered: (1) the vehicle parked near Jermaine's body had its passenger's side window shattered; (2) the vehicle's left front tire was flat and he observed damage near the rear window as if a bullet had ricocheted off of it; and (3) nine spent 0.40 caliber shell casings on the ground near the vehicle.

4. Synthia Alexander

In the early hours on 6 August 2001, Cumberland County EMS Paramedic Synthia Alexander ("Alexander") was dispatched to the

scene where both Jermaine and Johnny had been shot. Alexander made contact with Jermaine while he was still alive. Jermaine had suffered three gunshot wounds. She transferred Jermaine to Cape Fear Valley Hospital Emergency Department. Jermaine was alive upon arrival.

5. Officer Joseph Delpizzo

On 6 August 2001, Fayetteville Police Officer Joseph Delpizzo ("Officer Delpizzo") assisted Sergeant Oakes with a vehicle stop near Bragg Boulevard. Sergeant Oakes had stopped a gray Toyota Corolla at 2:35 a.m. Officer Delpizzo arrived at the scene shortly after Sergeant Oakes made the stop. Three females and one male were seated inside the car. The females were identified as Rakesha Johnson ("Johnson"), April Horne ("Horne"), and Rachel Gonzalez ("Gonzalez"). The male was identified as Kareem Wilson ("Wilson"). Sergeant Oakes determined that none of these individuals were involved in the shootings near the Zoo.

6. Rakesha Johnson

On the night of 6 August 2001, Johnson attempted to enter The Zoo with her friends Horne, Gonzalez, and boyfriend Wilson. After being denied entry into the nightclub, the group of four "hung out" in the Popeye's Restaurant parking lot, which is located within walking distance of The Zoo. The group remained there for approximately ten minutes.

They heard gunshots before they got into their car and quickly left. Johnson testified that when the police stopped them, she was driving Wilson home. She testified that after the police officers

released her, she drove Horne home, then Gonzalez, and then Wilson. After leaving Wilson, she drove home.

The police went to Johnson's home the evening after the shootings to question her. Johnson maintained that she did not know who had fired the shots. She also testified that she does not know defendant and has never seen him before.

7. Kareem Wilson

Wilson testified he did not know defendant personally, although he had seen him before. On the night of the shootings, Wilson testified he saw defendant walk pass him and begin to talk to two men with his hands raised in the air. Wilson then heard six or seven gunshots. While he was getting into the car, Wilson observed defendant running towards a brick building. Wilson also testified he saw one of the men defendant had been speaking with run by him.

One week after the shootings, police questioned Wilson about the murders. Wilson told the officers that sometime after 6 August 2001 he saw defendant in Wilson's grandmother's yard wearing a black cast.

8. April Horne

Horne does not know defendant personally but "knows of him." Horne testified that after the police released them following the vehicle stop, they went to Wilson's grandmother's house where she saw defendant speaking with Gonzalez. Horne did not speak with defendant. A few days after the shootings, police asked Horne to identify defendant in a photographic lineup. Horne identified

defendant as the same man she saw outside of Wilson's grandmother's house after the shootings.

9. Rachel Gonzalez

Gonzalez had met defendant two or three times prior to 6 August 2001. Gonzalez testified that on the night of the shootings she, Horne, Johnson, and Wilson were parked in the Popeye's parking lot when defendant drove his Green Chevrolet in front of their car to talk to them. According to Gonzalez, a man bumped into defendant, and he shot the man in the torso. Another man ran around the front of the building. Gonzalez heard gunshots, but did not see defendant. She testified defendant attempted to give Wilson his gun, but Wilson refused to take it.

Gonzalez testified that when they left the scene of the shootings, they were on their way to drop Wilson off at defendant's house. When they reached defendant's house, defendant was on the telephone. Gonzalez testified that she heard defendant say he had killed two people. Defendant spoke to Gonzalez at his house to find out if she planned to tell what she had seen. Gonzalez told defendant she would "stay out of it."

10. Detective Michael Murphy

Fayetteville Police Detective Michael Murphy ("Detective Murphy") helped Officer Hendrickson and Sergeant Oakes evaluate the crime scene. Detective Murphy found a blue bandanna in Johnny's rear pants' pocket. He interviewed the four witnesses located in the grey Toyota Corolla, Johnson, Wilson, Horne, and Gonzalez a few days after the murders.

11. Detective Jeffrey Houston

Fayetteville Police Detective Jeffrey Houston ("Detective Houston") interviewed Johnson, Wilson, Horne, and Gonzalez with Detective Murphy. When he began to look for Wilson at the address he had been given, he did not find Wilson there but found defendant. Detective Houston questioned defendant, who stated he had remained at home the night of the murders because he was scheduled to have surgery the following morning. Defendant gave Detective Houston the names of several people who were with him at his home on the night of 6 August 2001. Detective Houston noticed that defendant wore a cast on his arm.

Following this initial interview, Detective Houston attempted unsuccessfully to serve several warrants on defendant. In October 2001, the U.S. Marshal's service contacted Detective Houston and told him where defendant was located. Defendant was taken into custody by the Raleigh Police and the Federal Bureau of Alcohol, Tobacco, and Firearms.

Defendant was read and waived his *Miranda* rights. He agreed to talk to Detective Houston without an attorney present. Defendant told Detective Houston that he was at home the evening of the murders. Defendant said a man named "Jamal" approached him and gave him \$150.00 dollars and a gun to protect himself in case the victims' family members attempted to harm him.

Detective Houston said the .40 caliber shell casings were never sent to the SBI to be tested for fingerprints. He testified

that in the past he had never been able to recover fingerprints off of a casing fired from a semi-automatic weapon.

12. Doctor Kenneth Lidonnici

Doctor Kenneth Lidonnici ("Dr. Lidonnici") is a pathologist and licensed as a medical doctor by the State of North Carolina for nearly ten years. Dr. Lidonnici performed the autopsies on both Johnny and Jermaine's bodies. He concluded that both had died from gunshot wounds. Dr. Lidonnici also concluded the victims were shot with two different kinds of bullets. Johnny was shot with a copper coated bullet called a "full metal jacket." Jermaine was shot with a "hollow point bullet." Dr. Lidonnici testified that Johnny's wound would have been fatal immediately.

13. Detective Eugene Bishop

Cumberland County Sheriff's Detective Eugene Bishop is a forensic firearms examiner. He examined the nine shell casings taken from the scene and concluded: (1) all casings were fired from the same gun; (2) the gun casings were fired from a Glock or a Smith & Wesson Sigma hand gun; and (3) the bullets that were recovered from Jermaine and Johnny's bodies were .40 caliber bullets.

B. Defendant's Evidence

Defendant presented evidence from six witnesses, three of whom testified that he was at his home hosting a cook-out on the night of the murders. Defendant did not testify.

1. Cynthia Monroe

Cynthia Monroe ("Monroe") is a student at Winston-Salem State University. Monroe testified that on 5 August 2001 at about 3:00 or 4:00 p.m. she went to defendant's house with her friend, Shameka Best ("Best"), to attend a cook-out. She testified that she stayed with defendant in the backroom of his house between 11:00 p.m. and 12:00 a.m. until 2:00 a.m. Monroe testified defendant never left the house that night. At one point during the evening, a car approached the house with two females inside. Monroe testified that defendant and his friend went to talk to them, but defendant never left.

2. Shameka Best

Best is also a student at Winston-Salem State University. Best testified that she and Monroe arrived at defendant's house sometime between 5:00 p.m. and 6:30 p.m. and left around 2:00 or 2:30 a.m. on 6 August 2001.

3. James Ross

James Ross ("Ross") testified he was present at defendant's house when the shootings occurred. Ross arrived at defendant's house between 4:00 p.m. and 6:00 p.m. to attend the cook-out. Ross stayed over night at defendant's house and drove defendant to his doctor's appointment the next morning. Ross testified that he and defendant had consumed alcohol that evening and neither were in any shape to drive a vehicle. Ross testified that defendant did not leave his house the entire evening. Ross admitted he fell asleep around 2:00 a.m.

4. Mary Lee Scott

Mary Lee Scott ("Scott") is an employee of Krispy Kreme Donuts on Bragg Boulevard. On the night of the shootings, Scott supervised the midnight shift at Krispy Kreme. When the shootings occurred, Scott was sitting outside of the Krispy Kreme building on a bench. From where she was sitting, she could see a Popeye's Restaurant next door. Scott testified that she heard four or five gunshots and saw a car speed away. She did not see who did the shootings but believed the gunshots came from the car that sped away.

5. Donna Livero

Donna Livero ("Livero") is also an employee of Krispy Kreme Donuts on Bragg Boulevard. She was located outside of the building with Scott when the shootings occurred. Livero saw a car arrive in front of the Popeye's Restaurant. Livero testified she heard five gunshots and saw the car speed away. She did not see any guns protruding from the car or anyone shoot a gun.

6. LaTonya Brown

LaTonya Brown ("Brown") was present at The Zoo on the night the shootings occurred. One of her friends, who was also present at The Zoo, knew the victims. Brown testified that she saw people standing in the parking lot talking and then heard gunshots.

Defendant was found to be guilty of two counts of first-degree murder. He was sentenced to life imprisonment without parole. Defendant appeals.

II. Issues

Defendant argues the trial court: (1) erred by providing the State unsolicited advice on how to secure the attendance of the State's most important witness; (2) erred by failing to dismiss the charges against him because the testimony of the only witness who identified him as the perpetrator conflicted with indisputable physical facts and was inherently incredible as a matter of law; and (3) committing plain error by: (i) allowing a State's witness to testify that the detectives told her they "had witnesses" and "knew" defendant was guilty of murder; (ii) allowing Detective Houston to testify that defendant possessed a handgun and marijuana at the time of his arrest; and (iii) giving the incorrect jury instruction on flight for a first-degree murder charge involving premeditation and deliberation.

III. The Trial Court's Advice

Defendant argues the trial court erred by providing the State unsolicited advice on how to secure the attendance of Gonzalez, the State's most important witness. We disagree.

Before trial, the State was unable to secure Gonzalez's attendance as a witness. Prior to trial, the State requested a material witness order for Gonzalez and a subpoena for Gonzalez's sister, in order to determine if Gonzalez's sister could help the State locate Gonzalez. The court did not rule on the request, but advised the State of another way to secure the witness's attendance at trial. The court stated, "I've had this happen a few times and the better practice is to present the subpoena to the person and say, 'the judge wants you right now.'" Defendant argues the trial

court abandoned its role of neutral judge when it offered such advice. Defendant failed to object to the trial court's statements.

Our Supreme Court has stated:

It is well settled that constitutional matters that are not "raised and passed upon" at trial will not be reviewed for the first time on appeal. *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, ___ U.S. ___, 158 L. Ed. 2d 370, 124 S. Ct. 1673, (2004); N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . .").

State v. Garcia, 358 N.C. 382, 410-11, 597 S.E.2d 724, 745 (2004), *cert. denied*, ___ U.S. ___, 161 L. Ed. 2d 122 (2005). Defendant failed to object and preserve this issue for appellate review. We decline to consider it. This assignment of error is dismissed.

IV. Motion to Dismiss

Defendant argues the trial court should have dismissed the charges against him at the close of all the evidence. Defendant contends Gonzalez's testimony that she saw him shoot Jermaine and Johnny "cannot be reconciled with the indisputable physical evidence," and the trial court should not have submitted the case to the jury.

A. Standard of Review

This Court has stated:

A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is "substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the

crime." *State v. Jordan*, 321 N.C. 714, 717, 365 S.E.2d 617, 619 (1988) (citations omitted). Substantial evidence "must be existing and real," and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (citations omitted)).

State v. Cody, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999).

This Court stated in *State v. Hamilton*, "[i]n 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." 77 N.C. App. 506, 512, 335 S.E.2d 506, 510, (1985) (citation omitted), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

B. "Indisputable Physical Facts"

Defendant argues Gonzalez's testimony conflicted with indisputable physical facts and the remainder of the State's evidence in the following ways: (1) Gonzalez testified defendant first shot Johnny and then chased Jermaine around the Popeye's Restaurant prior to shooting Jermaine. The officers who were present at the shootings testified they heard a single rapid sequence of gun shots; (2) Gonzalez testified defendant shot Johnny at defendant's car, directly in front of Gonzalez. However, the medical evidence tended to show that Johnny died within a few feet from where he was shot and his wounds were fatal immediately. Detective Houston determined Johnny was found behind and to the right of the car in which Gonzalez was sitting; (3) Gonzalez testified that after the shootings, defendant came up to the car and tried to hand Wilson two guns. However, none of the other

passengers in the car mentioned that defendant approached their vehicle with guns in hand; (4) Gonzalez's testimony contradicts the testimony of her companions, who were all called by the State, whether Wilson rode to The Zoo with them; and (5) when the vehicle Gonzalez was riding in was stopped after the shootings, she did not report to the police that she had seen defendant shoot the victims.

In *State v. Parker*, our Supreme Court stated, "'The trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense' . . . The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

The State presented "substantial evidence of each essential element of the offense charged." *Id.* Officer Geisinger testified that when she arrived at the scene, prior to the shootings, "Sycamore Square had traffic, parked cars, people standing out. Popeye's parking lot was full of cars and people standing out. Tally Ho was crowded with cars parked on the side. And the [Zoo] itself was pretty well packed with cars and people." The evidence tended to show the scene at The Zoo was busy and crowded with people.

Gonzalez's testimony is not the only evidence tending to identify defendant as the perpetrator. Wilson also testified defendant was present at the scene and that he: (1) saw defendant

arguing with two men; (2) heard gun shots; (3) saw defendant run past him; and (4) saw one of the men whom defendant had been speaking with run past him.

The police officers and others testified to hearing a series of shots "in rapid succession," "at least five," "about five," "four or five," and "about five." The police officers testified that they heard fewer shots than what was accounted for by the nine 0.40 caliber shell casings that were discovered at the scene. This testimony does not contradict Gonzalez's testimony that defendant first shot Johnny and then moved to other locations to shoot Jermaine.

The locations of the victims' bodies tended to show that defendant moved from shooting one victim to shooting the other. Gonzalez testified she saw defendant shoot one victim, who fell immediately. This testimony is consistent with the medical evidence, which tended to show Johnny died near the location where he was shot.

Gonzalez testified that the car in which she was riding sped away from the scene after the shootings. The Krispy Kreme employees testified that they saw a car speed away from the scene immediately following the shootings.

In addition to Gonzalez's and Wilson's testimony, the State offered evidence of sixteen other witnesses. "The evidence presented to the jury was sufficient to establish defendant's guilt as to both charges, and his dismissal motion was properly rejected by the trial court." *State v. Buckom*, 126 N.C. App. 368, 377, 485

S.E.2d 319, 325, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997). This assignment of error is overruled.

V. Plain Error

Defendant argues the trial court committed plain error by: (1) allowing Horne, a State's witness, to testify detectives had told her they "had witnesses" and "knew" that defendant was guilty of murder; (2) allowing Detective Houston to testify that defendant was in possession of a handgun and marijuana at the time of his arrest. Defendant contends the evidence was irrelevant to the question of whether or not he shot the victims; and (3) giving the incorrect jury instruction on flight for a first-degree murder case involving premeditation and deliberation.

Defendant did not object to this testimony or the jury instruction at trial and assigned plain error on appeal. This Court has stated:

Because defense counsel did not object to the testimony now assigned as error our review is limited to a consideration of plain error. See N.C.R. App. P. 10(b)(1) (2004); N.C.R. App. P. 10(c)(4) (2004). "Defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result."

State v. Carillo, 164 N.C. App. 204, 209, 595 S.E.2d 219, 223 (2004) (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002)), *disc. rev. denied*, ___ N.C. ___, 610 S.E.2d 710 (2005).

A. Horne's Testimony

Horne testified as follows:

Q. Did [the police officers] come back and talk to you again?

A. Yes.

Q. Was that the next day?

A. Maybe a couple days later.

Q. Was it the same officers or different officers?

A. The same.

Q. Did they tell you that they had some more information for you?

A. Um-hmm.

Q. What did they tell you?

A. They told me they had witnesses and that they knew Omeako murdered someone.

Defendant argues the statement "undoubtedly created an impression with the jury that the detectives were aware of additional witnesses, who for some reason, were not presented to the jury and whose testimony would have supported the conclusion that [defendant] was guilty."

Presuming, without deciding, the trial court erred when it admitted Horne's statement, defendant has not shown the likelihood of a different result at trial if Horne's statement had not been admitted into evidence. The jury heard testimony from eighteen State's witnesses, many of whom were present at the scene of the shootings, and two who placed defendant at the scene. Horne's statement concerning what the officers told her was mentioned, without objection, during her direct examination. The State did not mention her statement during its closing argument. The jury

received lengthy instructions about what evidence it could and could not consider in determining defendant's guilt or innocence. In North Carolina, "jurors are presumed to follow the court's instructions." *State v. Richardson*, 346 N.C. 520, 534, 488 S.E.2d 148, 156 (1997) (quoting *State v. Johnson*, 341 N.C. 104, 115, 459 S.E.2d 246, 252 (1995)), *cert. denied*, 522 U.S. 1056, 239 L. Ed. 2d 652 (1998). This assignment of error is dismissed.

B. Detective Houston's Testimony

Detective Houston testified, without objection, that at the time defendant was apprehended he was in possession of a .45 caliber handgun and marijuana. Detective Houston testified as follows:

Q. Now, what else did he tell you about someone named Jamal approaching him on Shaw Road?

A. He said that after the incident, after he found out he had warrants, Jamal approached him and handed him a handgun and about 150 dollars and that Jamal told him that these were from Jamont, who is Kareem Wilson, and that he kept a handgun with him for protection from the victims' family.

Q. Did he ever tell you who this Jamal was?

A. No, he did not.

Q. He told you that Jamal gave himself, Mr. Brisbon, a gun and some money.

A. Yes, sir.

Q. And that the gun and the money came from Jamont?

A. Yes, sir.

Q. Who is Kareem Jamal Wilson?

A. Yes, sir.

Q. That's what this defendant told you?

A. Yes, sir.

Q. Did he say what had happened on this particular night, October the 16th, when the police knocked on the door where he was located?

A. He didn't -- he -- I was present when they were -- when they knocked on the door. But he said he had a handgun in his waistband and several bags of marijuana were found in his pocket when the police knocked on the door.

Rule 401 of the North Carolina Rules of Evidence provides, "[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2003).

Detective Houston's testimony provided relevant evidence concerning the relationship between defendant and Wilson. The jury also heard why defendant carried a weapon, "that he kept a handgun with him for protection from the victims' family." This evidence had a "tendency to make the existence of [a] fact that is of consequence to the determination of the action more probable or less probable." *Id.* Presuming, without deciding, the trial court erred in admitting the evidence, defendant failed to show that "the error was so fundamental that, absent the error, the jury probably would have reached a different result." *Carrillo*, 164 N.C. App. at 209, 595 S.E.2d at 223. This assignment of error is overruled.

C. Jury Instruction on Flight

Defendant argues the trial court gave the jury the incorrect flight instruction for a first-degree murder case involving premeditation and deliberation.

The State requested the trial court give a jury instruction on flight. Defendant offered a general objection to the giving of any jury instruction on flight. The court instructed the jury on flight, but neglected to include a portion of the charge that flight cannot be considered in determining whether premeditation and deliberation is proved. At the conclusion of the charge to the jury, the court asked whether "there are any specific objections to the charge or to any omissions therefrom." Defendant responded, "none other than already stated." Defendant assigned plain error in the alternative in the record on appeal. Defendant did not argue plain error in his brief to this Court.

In *State v. Beck*, our Supreme Court held the defendant failed to preserve for review the trial court's flight instruction. 346 N.C. 750, 759, 487 S.E.2d 751, 757 (1997). The defendant in *Beck* offered a general objection to the instruction on flight. 346 N.C. at 759, 487 S.E.2d at 757. When given the opportunity to specifically object after the instructions were given to the jury, the defendant did not request additional or different language. *Id.* The Court stated:

We note initially that defendant did not specifically object to the trial court's wording of the flight instruction at trial. During the charge conference defendant objected to any instruction concerning flight on the grounds that no evidence in the record

supported this instruction. After the jury had been instructed, the trial court gave each party the opportunity to make for the record any objections to the instructions given and to request any additions, deletions, or amendments to the instructions given. At this time defense counsel made a general objection to the instruction on flight.

Pursuant to N.C. R. App. P. 10(b)(2),

[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

In the instant case defendant was given the opportunity to object to the wording of the instruction on flight and failed to do so. Defendant has not alleged, nor do we find, plain error. This assignment of error is overruled.

Id.

The trial court gave defendant the opportunity to specifically address the instruction on flight. Defendant stated, "none other than already stated." Defendant "was given the opportunity to object to the wording of the instruction on flight and failed to do so." *Id.*

Defendant assigned as plain error the trial court's failure to properly instruct the jury on flight. Assignment of error fourteen provides, "[t]o the extent that this error is not preserved for appellate review, the defendant asserts plain error." However,

defendant failed to argue plain error in his brief to this Court.

N.C.R. App. P. 10(c) (4) (2005) provides:

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where *the judicial action questioned is specifically and distinctly contended to amount to plain error.*

(emphasis supplied).

This Court has stated, "because Defendant has not specifically and distinctly addressed the issue of plain error in his brief to this Court, we will not review whether the alleged error rises to the level of plain error." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). Defendant did not "specifically and distinctly" address or argue the assignment of plain error in his brief. We decline to consider this issue. *Id.* This assignment of error is dismissed.

VI. Conclusion

The trial court properly denied defendant's motion to dismiss the charges against defendant. Gonzalez's testimony did not conflict with indisputable physical facts and was not inherently incredible as a matter of law. The trial court did not err when it admitted Horne's testimony that the detectives told her they "had witnesses" and "knew" that defendant was guilty of murder. The trial court did not err when it allowed Detective Houston to testify that defendant was in possession of a handgun and marijuana at the time of his arrest. Defendant failed to preserve for appellate review any asserted error regarding the jury instructions

on flight as well as the advice the State received on how to secure Gonzalez's attendance. We do not consider those assignments of error. Defendant received a fair trial free from prejudicial errors he assigned and argued.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).