An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-973

Filed: 5 June 2018

Union County, No. 14 CRS 51109

STATE OF NORTH CAROLINA

v.

REGINALD LEON ALLEN

Appeal by defendant from judgments entered 6 December 2016 by Judge Anna M. Wagoner in Union County Superior Court. Heard in the Court of Appeals 1 May 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.*

*Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.*

BRYANT, Judge.

Where defendant has waived all review of the sole issue he presents on appeal by failing to properly object at trial and failing to argue plain error, we dismiss defendant's appeal.

On 27 May 2014, a Union County Grand Jury returned indictments charging defendant Reginald Leon Allen with committing three crimes on 9 March 2014: (1) the murder of Alicia ("Lisa") Terrell Sligh, defendant's wife; (2) first-degree

kidnapping of Lisa; and (3) possession of a firearm by a felon. The three indictments were joined for trial, and the murder charge was prosecuted non-capitally.

The charges came on for trial during the 14 November 2016 Criminal Term of the Union County Superior Court, the Honorable Anna M. Wagoner, Judge presiding. Defendant entered a guilty plea to the charge of possession of a firearm by a felon. After a jury was impaneled and opening arguments concluded, the trial court addressed defendant's pretrial motion *in limine*, in which he objected to the admission of testimony regarding past allegations of abuse between defendant and Lisa. A *voir dire* examination was conducted during which Lisa's sister and defendant's sister-in-law, Alice Sligh, testified over defendant's objection. The trial court overruled defendant's objection and Alice testified about a June 2013 incident that she overheard between defendant and Lisa.

At the close of all the evidence, the trial court granted defendant's motion to dismiss the kidnapping charge. On 6 December 2016, the jury returned a verdict finding defendant guilty of first-degree murder. Defendant was sentenced to life imprisonment without parole for the murder and given a consecutive term of twelve to twenty-four months of imprisonment on the charge of possession of a firearm by a convicted felon. Defendant appeals.

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On appeal, defendant contends the trial court erred by admitting evidence of a prior assault on Lisa occurring in June 2013 where it had no probative value to prove any material fact other than defendant's bad character. Specifically, defendant contends there was nothing about the incident that was remotely similar to the shooting of Lisa eight months later. As such, defendant argues the admission of this evidence was prejudicial and requires that defendant's conviction for first-degree murder be vacated.

The State contends that defendant has waived all review of this issue. Defendant is arguing a different issue now on appeal than the one he raised at trial when the evidence he objects to was introduced, and now on appeal, he has not specifically argued that the trial court's error amounts to plain error. We first address the issue of waiver.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). "Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *Id.* "It is insufficient to

object only to the presenting party's forecast of the evidence." *Id.* "As such, in order to preserve for appellate review a trial court's decision to admit testimony, objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Id.* "A specific objection, if overruled, will be effective only to the extent of the grounds specified." *State v. Ward*, 301 N.C. 469, 477, 272 S.E.2d 84, 89 (1980).

However, "[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action in question is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). But failure to argue plain error waives plain error review. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012); *see also State v. Holloway*, 311 N.C. 573, 578, 319 S.E.2d 261, 265 (1984) (stating that issues not briefed are deemed abandoned). Here, before this Court, defendant has not argued, in either his original brief or in his reply brief, that the error of which he complains amounts to plain error.

In *Ray*, the "defendant objected to the admission of evidence regarding his 1990 assaultive behavior only during a hearing out of the jury's presence." 364 N.C. at 277, 697 S.E.2d at 322. "In other words, [the] defendant objected to the State's

forecast of the evidence, but did not then subsequently object when the evidence was actually introduced at trial." *Id.* "Thus, [the] defendant failed to preserve for appellate review the trial court's decision to admit evidence regarding his 1990 assaultive behavior." *Id.* "Moreover, [the] defendant lost his remaining opportunity for appellate review when he failed to argue in the Court of Appeals that the trial court's admission of this testimony amounted to plain error." *Id.* at 277–78, 697 S.E.2d at 322.

In the instant case, prior to trial, defendant filed a Motion to Preclude The [I]ntroduction of Evidence Relating to Other/Prior Assaults, pursuant to N.C.G.S. § 8C-1 Rule 401, 402, 403 and 404(a). A *voir dire* examination of Alice was held regarding the June 2013 "slapping incident." Thereafter, defendant "renew[ed] [his] objection pursuant to 404A, impermissible character evidence." To the trial court, defendant argued "that incident should be prohibited from being elicited from the witness." Defendant further argued:

> I would contend that most of [Alice's proposed testimony] is not relevant to the Crawford purpose from the State, specifically about the drinking, the arguments of them going back and forth. The incident that the State indicated [it] wanted to elicit was the June, 2013 incident. I would contend that's not during a relevant timeframe, we're dealing with the alleged killing that occurred March, 2014 about several months later, allegation is that [defendant] used a weapon, a firearm specifically, shot and killed [Lisa]. Here the witness stated she heard a noise, assumes that it was some type of slapping hitting noise but heard a noise. When she proceeds in, she does not see a weapon of

> any type on [defendant's] possession, in fact sees a bat in [Lisa's] possession. And I would contend that that doesn't fit the purpose of 404(b) and as a result that incident should be prohibited from being elicited from the witness.

The trial court overruled defendant's objection and found the June 2013 incident was relevant, that its "prejudicial value [was] not outweighed by [its] probative [value]," and advised the State that Alice could also "testify that [Lisa and defendant] had a stormy relationship . . . ." Notably, defendant's attorney acknowledged at the end of this hearing that "[j]ust in terms of to preserve the record, *I have to object again when she testifies*. . . . But I won't make an argument . . . ." (emphasis added).

Following this hearing, the jury was returned to the courtroom and Alice proceeded to testify. When the prosecutor "direct[ed] [Alice]'s attention to June of 2013" during her direct examination and asked whether she "remember[ed] an incident that occurred in [her] home during that timeframe[,]" defendant objected by saying: "I apologize. Just for the record, we'd object to the proposed testimony on *due process grounds, Federal Constitution*, do not wish to be heard." (emphasis added).

The only timely objection defendant made in this case regarding the evidence of the June 2013 incident was on federal due process grounds. Defendant did not object at the appropriate time or for the aforementioned Rule 404 and evidence-based reasons *as even defendant himself acknowledged he was required to do* in order to preserve the record. As a result, defendant is limited to review of his "due process

grounds, Federal Constitution" objection (which was overruled), because it is the specific objection he made in the presence of the jury. *See Ray*, 364 N.C. at 277, 697 S.E.2d at 322. However, as this issue has not been brought forth on appeal, it is considered abandoned. N.C. R. App. P. 28(a) (2017).

The issue which defendant does argue on appeal is the admissibility of evidence—the June 2013 incident—pursuant to a statutory rule of evidence, N.C. Gen. Stat. § 8C-1, Rule 404(b). This issue, as explained above, was not preserved for appellate review. Furthermore, this issue is not subject to plain error review because defendant has also failed to argue that the error amounted to plain error in his brief to this Court. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. As to the discretionary ruling regarding whether the probative value of the evidence was outweighed by any prejudice, Rule 403 is not subject to plain error review. *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008). Defendant has therefore waived all review of this issue. Accordingly, we do not address the merits of the issue defendant raises on appeal. Defendant's appeal is

DISMISSED.

Judges CALABRIA and HUNTER, JR. concur.

Report per Rule 30(e).