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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-738

Filed: 3 July 2018

Pender County, Nos. 15 CRS 061, 838, 839

STATE OF NORTH CAROLINA

v.

NASHID PORTER

Appeal by Defendant from judgments entered 16 June 2016 by Judge Charles H. Henry in Superior Court, Pender County. Heard in the Court of Appeals 5 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for Defendant.

McGEE, Chief Judge.

Nashid Porter ("Defendant") appeals from judgments entered after he was found guilty by a jury of first-degree murder, possession of a firearm by a felon, and discharging a firearm into an occupied dwelling inflicting serious injury. Defendant argues the trial court erred (1) in concluding that Defendant forfeited his right to

counsel and (2) by allowing the admission of evidence regarding the murder of a potential trial witness who was allegedly shot and killed by Defendant.

I. Factual and Procedural History

This case involves two separate murders allegedly committed by Defendant. The first murder was of Brian Grant ("Grant") and is the subject of this appeal. The second murder was of Obediah Hester ("Hester"), a potential trial witness to Grant's murder.

A. *Grant Murder*

Defendant spent the night of 26 July 2012 at Hester's home after an evening of using drugs. Hester's uncle, Patrick Bragg ("Bragg"), was also staying at Hester's home that evening. Earlier in the evening, Defendant saw Grant and Grant's girlfriend, Ebony Hines ("Hines"), having an argument across the street in front of Hines' apartment. When Defendant went across the street to intervene, Grant told Defendant "to mind his [own] business." Defendant returned to Hester's home and spent the remainder of the evening there. The next morning, 27 July 2012, Grant drove Hines to work and returned to her apartment alone. When Defendant saw Grant return to Hines' apartment, he crossed the street and sat in a chair in Hines' yard. A short time later, Defendant knocked on Hines' door and shot and killed Grant when Grant answered the door.

Based on statements from several witnesses, Defendant was charged with Grant's murder and possession of a firearm by a felon, and he was arrested on 4 September 2012. Indigent Defense Services appointed Assistant Capital Defender Nora Hargrove ("ACD Hargrove") to represent Defendant. Defendant moved for a reasonable bond on 30 October 2013 and received a $350,000.00 secured bond. After the State's discovery and disclosures did not move forward, Defendant moved for his bond to be unsecured in February 2014. The trial court heard Defendant's motion on 14 February 2014. The State agreed to an unsecure $360,000.00 bond and Defendant was placed on pretrial release on 14 February 2014.

B. *Hester Murder*

Detective Lee Odham ("Detective Odham") of the Wilmington Police Department testified that he was called to the scene of Grant's murder on 27 July 2012 and acted as a secondary investigator before becoming the lead investigator in February 2014. Detective Odham interviewed Hester on the day of Grant's death. Thereafter, Hester continued to cooperate with investigators and gave several statements between 2012 and 2014.

Detective Odham testified that, while Defendant was in custody, the Wilmington Police Department monitored calls between Defendant and his girlfriend, Niki Breedlove ("Breedlove"). During those calls, Defendant asked Breedlove "who ratted on him." Detective Kevin Tully ("Detective Tully") of the

Wilmington Police Department testified that he regularly patrolled the neighborhood where Grant's death occurred. Detective Tully testified that it was common in the neighborhood to be fearful of talking publicly with police out of fear of retribution.

Hester's coworker, Benjamin Patrick ("Patrick"), testified that, after work on 12 November 2014, he drove Hester to Defendant's home. Patrick said when they arrived at Defendant's home, Defendant asked Patrick to drive him to his father's home. Patrick, Hester, and Defendant rode together to the trailer Defendant claimed was his father's home. Defendant exited the car and asked Hester to go with him to the trailer. After Defendant and Hester walked out of Patrick's view, Patrick heard gunshots and saw Hester running from Defendant. The gunshots caused Hester to fall to the ground. Patrick testified that he then saw Defendant stand over Hester and fire several more shots. Patrick quickly drove away from the scene to Hester's grandmother's house. Hester's grandmother immediately called 911.

Detective Matt English ("Detective English") of the Duplin County Sheriff's Department responded to the call reporting Hester's shooting. Hester had a total of eleven gunshot wounds and was pronounced dead at the scene. After interviewing Patrick, Detective English found out that Defendant was equipped with a GPS monitoring device as part of his pretrial release. Using the GPS monitoring device, investigators were able to confirm that Defendant was present at the scene of Hester's death at the time it allegedly occurred. Defendant was arrested for Hester's murder

and violation of his pretrial conditions on 19 November 2014 and held under a $1,000,000.00 secured bond.

C. *Procedural History of Motions to Exclude Evidence of Hester Murder*

Defendant filed a motion on 6 November 2014 to require the disclosure of any evidence that the State intended to introduce pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) and for a pretrial determination regarding the admissibility of any such evidence. At a 3 December 2014 hearing, the State gave Defendant and the trial court notice that it intended to introduce evidence of Hester's death pursuant to N.C.G.S. § 8C-1, Rule 404(b) and filed a notice of intent on 29 December 2014. After Defendant filed a motion *in limine* to prohibit the State from introducing evidence of Hester's death, the trial court held a hearing on 26 January 2015, but deferred on ruling until a later date.

At hearings held on 2, 3, and 13 June 2016, the trial court heard pretrial motions, including the admissibility of the Rule 404(b) evidence. Defendant refused to participate in the hearings and, when the trial court told Defendant he would be able to watch the hearings through two-way video, the following exchange occurred:

> [] DEFENDANT: I'm not going to -- your Honor, I'm not going to be looking at nothing on no TV about no witnesses. I do not wish to speak to [standby counsel] about no witnesses. I'm not participating in this unconstitutional 404(b) hearing. Point blank. Period. So I'm not going to be looking at no monitor or nothing. Nothing about this.
>
> . . . .

> [] DEFENDANT: It's unconstitutional. The past is past. Unconstitution. (sic)
>
> THE COURT: Your objection is noted. I will overrule the objection.

During the pretrial hearings, the trial court ruled that statements made by Hester prior to his death would be admissible and that Defendant forfeited his Sixth Amendment right to confront Hester under the doctrine of forfeiture by wrongdoing. After Defendant objected and the trial court noted Defendant's objection, Defendant asked: "I'm saying can I overrule -- can I overrule and allow the appeal?" The trial court explained,

> [I]t's not time to appeal these rulings. Only after a conviction will there be an appeal . . . . And again, I'll do everything I can to make sure that the record is clear, that you note your objection, you note your exception. And that I think that will be sufficient under the appellate rules to keep your argument alive.

The State agreed with the trial court's decision and the hearings continued. The trial court then found the evidence regarding Hester's death to be admissible under Rule 404(b) for limited purposes, and also found that, under N.C. Gen. Stat. § 8C-1, Rule 403, the probative value of the evidence was not outweighed by the danger of unfair prejudice or confusion. Defendant objected, and the trial court again stated that its rulings would be grounds for appeal only if there was a conviction. We note that it is difficult, based on reading the transcripts, to tell whether Defendant's

objection was directed toward the trial court's Rule 404(b) ruling or to its Rule 403 ruling. The trial court reduced its findings to writing and specified the limited purposes for which the Rule 404(b) evidence would be admissible.

At trial, the trial court cautioned the jury that the evidence "will be received solely for the purpose of showing the identity of the person who committed [the murder of Grant], to show a common modus operandi, to explain why . . . Bragg has come forward to testify[,] [a]nd to explain the absence of the witness . . . Hester." Bragg testified he witnessed Defendant leaving the scene of Grant's murder holding a pistol, but that he had initially refused to aid police because "it wasn't my business." After Hester's death, however, Bragg felt that "it became my business." Defendant did not object to the introduction of the Rule 404(b) evidence at trial.

D. *History of Defendant's Representation*

Defendant represented himself *pro se* at trial after the trial court determined he had forfeited his right to counsel. Defendant had moved to "withdraw counsel" on 20 May 2015, contending that his attorney-client relationship with ACD Hargrove had deteriorated and "it's beyond reparable." Defendant claimed ACD Hargrove was "inefficient" and her continued representation was "not in [his] best interest." ACD Hargrove admitted that the attorney-client relationship was "strained," but emphasized that she was "committed to the case." The trial court denied Defendant's motion to withdraw counsel and cautioned that if Defendant failed to assist his

counsel in effectively representing him, "it's not the [c]ourt that's infringing on your Sixth Amendment right to effective counsel, that you've effectively been deemed as waiving that right . . . by your own actions."

ACD Hargrove moved to withdraw on 28 May 2015, stating that: "Defendant has become increasingly difficult to deal with," is "increasingly hostile," and the attorney-client relationship has been "irreparably destroyed." On the same day, ACD Hargrove moved for the trial court to conduct a hearing to determine Defendant's competency to proceed to trial and to waive counsel, alleging "[D]efendant does not respond in a rational manner to the information supplied by the discovery, accuses the undersigned of unnamed shortcomings, accuses the undersigned of hiding discovery, of failing to seek proper court procedures and refuses to discuss [the Hester murder] case at all." The trial court stated that it would revisit ACD Hargrove's motion to withdraw after the hearing on Defendant's competency.

Before the trial court was able to hold a hearing regarding Defendant's competency, ACD Hargrove renewed her motion to withdraw on 15 June 2015, after Defendant had refused to speak with her and had filed complaints against ACD Hargrove with the North Carolina State Bar. Defendant filed a second written motion to withdraw counsel on 22 June 2015. At a hearing on 29 June 2015, the trial court again cautioned Defendant:

> [L]et's just assume I give you another lawyer and the next lawyer comes in and says "[Defendant] wants me to

> withdraw, Judge. He says that I really don't have his best interests at heart and that he and I aren't able to communicate meaningfully"? You see, at some point in time where we're going here with this is that it's not that the [c]ourt is denying you your right to be represented. It's that you, by your own actions, are acting in such a fashion as to actually forfeit your right to be represented.
>
> And what the [c]ourt is gonna be very jealous of is those type of tactics going forward. Because in this [c]ourt's experience . . . I've seen folks in similar situations as you engage in these type of tactics for no other reason than to pollute the record and hope that the judge will do something inappropriate so that the case can be subsequently reversed if you're convicted or just to delay it and delay it and delay it.
>
> . . . . See, I'm anticipating that that possibility exists and that I'll have to address it at some point in time. So my point in telling you all this is that you, sir, by your own actions can effectively forfeit your right to be represented. Do you understand that concept?

The trial court entered an order allowing ACD Hargrove to withdraw on 29 June 2015.

Public Defender Jennifer Harjo ("PD Harjo") was assigned as Defendant's counsel on 2 July 2015. Defendant filed a motion to withdraw counsel on 5 November 2015, alleging that PD Harjo was a "puppet" of the prosecution, was ineffective, neglected her duties, and her continued representation was not in his best interests. PD Harjo moved to withdraw the motion to determine Defendant's competency on 1 December 2015, stating she "ha[d] no reason to believe that the defense should seek the relief requested[;]" however, the trial court denied PD Harjo's motion to withdraw

ACD Hargrove's prior motion to determine Defendant's competency.

The trial court held a hearing to determine Defendant's competency and Defendant's motion to withdraw counsel on 4 December 2014. A forensic psychiatrist who evaluated Defendant testified that she did not believe Defendant had any "mental disease or defect that would prevent him from being competent." Based on the psychiatrist's testimony and the trial court's observations of Defendant, the court decided it was "satisfied that by any measure . . . [D]efendant has the capacity to proceed." The trial court then denied Defendant's motion to withdraw counsel, stating:

> [T]here is no basis to remove [PD] Harjo. As a matter of fact, in doing so, the [c]ourt in the exercise of its discretion can only determine that that would work as a hardship to [Defendant].
>
> [Defendant], again, understands that should he choose to conduct himself in a fashion that interferes with [PD] Harjo's ability to more effectively represent him, then that's a choice that [Defendant] himself is making.

PD Harjo filed a motion to withdraw on 2 March 2016, alleging that Defendant remained "steadfast in his claim that defense counsel has a conflict [of interest] in his case[,]" and that Defendant had informed PD Harjo that he was "no longer in need of her services." After a hearing on 7 March 2016, the trial court entered an order denying PD Harjo's motion to withdraw, but appointed Walter Paramore ("Paramore") to assist PD Harjo in representing Defendant. In that order, the trial

court reiterated that "[t]he right to choose one's counsel is not absolute. . . . Where [D]efendant is appointed counsel, he may not demand counsel of his choice." During the 7 March 2016 hearing, Defendant questioned the jurisdiction of the trial court, claiming that there was not a valid indictment. The trial court showed Defendant the indictments and stated that they appeared to be valid.

The trial court held additional hearings regarding PD Harjo's motion to withdraw on 4 April 2016 and 8 April 2016. During the 4 April 2016 hearing, Defendant moved to have PD Harjo and Paramore removed from his case. The trial court referred to the 29 June 2015 hearing where it warned Defendant, after the removal of ACD Hargrove, that the court would be wary of efforts by Defendant to delay his trial and that Defendant ran the risk of forfeiting his right to counsel. During the 8 April 2016 hearing, PD Harjo and Defendant revealed that Defendant planned to initiate a civil suit against PD Harjo seeking a "no-contact" order. Defendant also claimed during the 8 April 2016 hearing that "this Court do[es] not have my jurisdiction."

Defendant filed a "Petition for a Writ of Habeas Corpus and Motion to Dismiss" in Superior Court on 4 April 2016, again questioning the jurisdiction of the trial court, but the writ was denied on 18 April 2016. The record shows this Court entered an order dismissing a petition by Defendant entitled "Petition for a Writ of Habeas Corpus and Certiorari to Dismiss" on 28 April 2016. Defendant filed a petition for a

writ of certiorari with the North Carolina Supreme Court on 6 May 2016, which the Supreme Court dismissed on 23 May 2016. Additionally, on 22 April 2016, Defendant filed a complaint in the New Hanover County Superior Court alleging the District Attorney prosecuting his case, Benjamin David ("DA David"), had "intentionally utter[ed] forged instruments," and "exhibited a pattern [of] . . . government misconduct, [and] prosecutorial misconduct . . . so outrageous that it violates fundamental fairness and is shocking to the universal sense of justice."

At the request of PD Harjo and the trial court, Defendant met with Assistant Capital Defender Kevin Peters ("ACD Peters") on 28 April 2016. ACD Peters had previously met with Defendant while Defendant was represented by ACD Hargrove and had cross-examined a witness in a 26 January 2016 hearing. The trial court thought that, due to their previous relationship, Defendant could have a cooperative relationship with ACD Peters. Additionally, the trial court determined that, pursuant to N.C. Gen. Stat. § 15A-141(2), ACD Peters had acted as Defendant's attorney during the 26 January 2016 hearing and had continued as such on the record. During the 28 April 2016 meeting ACD Peters, Defendant was "hostile and argumentative" and threatened to sue ACD Peters. ACD Peters then moved to withdraw as counsel on 6 May 2016.

The trial court held an additional hearing regarding Defendant's motions to remove PD Harjo and Paramore from his case on 6 May 2016. Defendant refused to

attend, but was informed he could address the court via video. Defendant refused to address the court, claiming that the trial court had no jurisdiction over him. The trial court made efforts to address Defendant's complaints, but was unable to convince Defendant to participate. Having found that, through his actions, Defendant had forfeited his right to counsel, the trial court entered an order on 10 May 2016 that required Defendant to appear *pro se* at his trial and the appointment of standby counsel. The Office of Indigent Defense Services appointed Richard McNeil as Defendant's standby counsel. The trial court's 10 May 2016 order contained findings of fact outlining the entirety of Defendant's conduct toward his former appointed attorneys, his conduct during trial court proceedings, his reliance on unsupported legal arguments, and his refusal to appear at trial proceedings. Defendant represented himself *pro se* at trial, but declined to attend the trial proceedings in person. Defendant was convicted by a jury of first-degree murder, possession of a firearm by a felon, and discharging a firearm into an occupied dwelling inflicting serious bodily injury and was sentenced to life imprisonment without parole. Defendant appeals.

II. Analysis

Defendant argues on appeal that (1) the trial court's order concluding that Defendant forfeited his right to counsel and requiring him to appear *pro se*

constituted structural error necessitating that his convictions be vacated, and (2) the trial court erred in admitting the Rule 404(b) evidence regarding Hester's death.

A. *Forfeiture of Right to Counsel*

Defendant first argues the trial court erred in concluding that Defendant forfeited his right to counsel, despite Defendant's clearly expressed desire to have the assistance of counsel for his defense, and the error constituted structural error requiring his convictions be vacated and a new trial ordered. Defendant contends the trial court violated his constitutional right to counsel and "that, despite this Court's cases, the right to counsel cannot be forfeited and can be lost only by a voluntary waiver" by Defendant.

1. Standard of Review

"Criminal defendants have a constitutional right to the assistance of counsel in conducting their defense." *State v. Leyshon*, 211 N.C. App. 511, 514, 710 S.E.2d 282, 286 (2011). "It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *State v. Blakeney*, ___ N.C. App. ___, ___, 782 S.E.2d 88, 93 (2016) (citing *State v. Wray*, 206 N.C. App. 354, 356, 698 S.E.2d 137, 140 (2010)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Allah*, 236 N.C. App. 120, 127, 762 S.E. 524, 528 (2014) (citing *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)).

2. Discussion

The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution and is a "fundamental component of our criminal justice system." *United States v. Cronic*, 466 U.S. 648, 653, 80 L. Ed. 2d 657 (1984); *State v. McFadden*, 292 N.C. 609, 611-12, 234 S.E.2d 742, 744-45 (1977). However,

> the right to choose one's counsel is not absolute. Where defendant is appointed counsel, he may not demand counsel of his choice. . . . . Finally, and importantly, "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial."

State v. Montgomery, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000) (internal citations removed).

> Our appellate courts have recognized two circumstances . . . under which a defendant may no longer have the right to be represented by counsel. First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. . . . The second circumstance . . . occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel.

Blakeney, ___ N.C. App. at ___, 782 S.E.2d at 93. Despite Defendant's insistence that he "never made an unequivocal request that he represent himself" and "never voluntarily waived his . . . constitutional right to the assistance of counsel," those

facts are not relevant here, as this case falls within the second circumstance of forfeiture.

Defendant first argues that "the right to counsel cannot be lost by anything short of voluntary waiver, cannot be forfeited." While recognizing that this position is contrary to established North Carolina precedent, Defendant points to *United States v. Ductun*, 800 F.3d 642 (4th Cir. 2014) to support his argument. "North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court" and the United States Supreme Court has yet to speak on this issue. *Enoch v. Inman*, 164 N.C. App. 415, 420-21, 596 S.E.2d 361, 365 (2004). Because this argument directly contradicts prior holdings of this Court and of our Supreme Court, Defendant's argument is without merit. *See, e.g.*, *McFadden*, 292 N.C. at 616, 234 S.E.2d at 747 ("[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial."); *Blakeney*, ___ N.C. App. ___, 782 S.E.2d 88.

Defendant's second argument is that his conduct failed to meet the standard required for forfeiture of the right to counsel. "A forfeiture results when 'the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of defendant's right to counsel.'" *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69

(citing Wayne R. LaFave et al., *Criminal Procedure* § 11.3(c) (4th ed. 1999)). This Court has found three categories of situations that have justified forfeiture of counsel:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, ___ N.C. App. at ___, 782 S.E.2d at 94.

In *Montgomery*, this Court held that a defendant had forfeited his right to counsel because he had released his appointed counsel twice, had refused to cooperate with counsel and, becoming dissatisfied with private counsel, became disruptive in the courtroom. *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69 ("Such purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned."). Similarly, in *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014), this Court held that the defendant had forfeited his right to counsel where he had fired counsel twice within fourteen months, advanced unsupported legal theories, and refused to participate at trial.

In the present case, we are unable to meaningfully distinguish Defendant's actions from those of the defendants in the above cases. Over the course of four years, Defendant "fired" three separate appointed counsel: ACD Hargrove on 29 June 2015 and PD Harjo and Paramore on 10 May 2016. He refused the assistance of another

counsel, ACD Peters, on 28 April 2016, and did not retain his own counsel. Additionally, Defendant consistently disrupted the proceedings prior to trial by interrupting the trial court and opposing counsel, and by refusing to participate in the proceedings. He further disrupted the proceedings by threatening to file, or filing, lawsuits. He filed a complaint against ACD Hargrove in June 2015 and against DA David on 22 April 2016. At the 8 April 2016 hearing, Defendant threatened to file a lawsuit against PD Harjo. Finally, at the 7 March 2016, 8 April 2016, and 6 May 2016 hearings, and in his petition for writ of habeas corpus, Defendant argued that the trial court lacked jurisdiction. Defendant continued to raise this argument despite the trial court's dismissal of the argument and the trial court's attempts to address Defendant's concerns. As the trial court stated, Defendant's conduct was "purposeful conduct and tactics [that] delayed and frustrated the orderly processes of the court." The trial court warned Defendant numerous times of the possible effect of his behavior; yet, Defendant persisted. The trial court did not err in determining that through such tactics, Defendant forfeited his right to counsel.

B. *N.C. Gen. Stat. § 8C-1, Rule 404(b) Evidence*

Defendant's second argument is that the trial court erred by allowing the introduction of evidence regarding the death of Hester under N.C.G.S. § 8C-1, Rule 404(b). Before addressing the merits of Defendant's arguments, we must determine whether this issue was preserved for appellate review. "In order to preserve an issue

for appellate review, a party must have presented to the trial court a timely request, objection, or motion." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.'" *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (citing *State v. Ray*, 364 N.C. 272, 277 & n. 1, 697 S.E.2d 319, 322 & n. 1 (2010)). "An objection made 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient." *Id.* *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) ("this Court has consistently interpreted [N.C. R. App. P. 10(a)(1)] to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial."). In the case before us, Defendant's only objections to the admission of evidence regarding Hester's death were at pretrial hearings.

The trial court stated at the pretrial hearings that Defendant's objection to the State's forfeiture of counsel by wrongdoing argument would "be sufficient . . . to keep your argument alive." However, the trial court's response to Defendant's objection to the Rule 404(b) evidence was less clear. Even if the trial court's response is read to allow a standing objection to the Rule 404(b) evidence, Defendant was not relieved of his obligation to make a contemporaneous objection to the admission of that evidence at trial. *State v. Mays*, 158 N.C. App. 563, 578, 582 S.E.2d 360, 370 (2003). *See also State v. Howard*, 228 N.C. App. 103, 106-7, 742 S.E.2d 858, 860 (2013) ("Although

defendant mentioned Rule 404(b) in his objection, it is clear that the objection was made pursuant to Rule 403. As defendant did not object pursuant to Rule 404(b), such objection is not preserved on appeal, unless plain error is argued.").

Defendant argues that, because the trial court assured him, and the State agreed, that his pretrial objection to the Rule 404(b) evidence would be sufficient to preserve his objection to that evidence for appellate review, it would be a violation of his right to due process to now determine otherwise. Defendant provides no further reasoning and cites no authority to support that argument. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Because Defendant did not make a contemporaneous objection at the time of the introduction of the Rule 404(b) evidence at trial, this issue was not preserved for appellate review.

Even assuming, *arguendo*, that Defendant had fully stated his argument that finding Defendant's objection unpreserved would "be a violation of his basic right to due process," a similar argument was recently raised and rejected in *State v. Williams*, ___ N.C. App. ___, 801 S.E.2d 169 (2017) (Dillon, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, ___ N.C. ___, 809 S.E.2d 581 (2018). In *Williams*, defense counsel objected to the introduction of Rule 404(b) evidence prior to jury selection, during a *voir dire* of the evidence, and at the charge conference, but

failed to object when the evidence was offered in the presence of the jury. *Id*. at ___, 801 S.E.2d at 173-74. The majority opinion in *Williams* held:

> Based on the exchange between defense counsel and the trial court following *voir dire*, it is understandable that counsel would not feel compelled to renew his objection in the presence of the jury. To the extent that defense counsel relied on the trial court's statement as assurance that a subsequent objection was unnecessary to preserve the issue, it would be fundamentally unfair to fault [D]efendant on appeal—especially since the purpose for which the evidence was admitted was not settled until the charge conference. In light of the circumstances of this case, we review for prejudicial error.

Id. at ___, 801 S.E.2d at 174 (citation omitted). In a dissenting opinion, Judge Dillon, citing *Snead* and *Ray*, rejected the majority opinion's finding that failure to find the objection sufficient to preserve the argument was "fundamentally unfair," determined that the objection was insufficient to preserve the argument, and applied plain error to review the merits of the appeal. *Id.* at ___, 801 S.E.2d at 178, Dillon, J., dissenting. On appeal, our Supreme Court reversed and remanded based on the rationale stated in the dissenting opinion.

This Court has held that

> [w]hen a defendant elects to represent himself in a criminal action, the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant waives counsel at his peril and by so doing acquires no greater rights or privileges than counsel would have in representing him.

State v. Brincefield, 43 N.C. App. 49, 52, 258 S.E.2d 81, 83-84, *disc. review denied*, 298 N.C. 807, 262 S.E.2d 2 (1979). In *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), this Court held that a criminal defendant who forfeited his right to counsel was not entitled to a new trial based on his lack of access to the North Carolina Rules of Evidence or trial practice materials because "[defendant] is entitled to no special exception for the quality of his particular self-representation or his lack of access to legal materials." Defendant's argument that his objection to the Rule 404(b) evidence outside of the presence of the jury was sufficient to preserve the issue for appeal is unavailing regardless of whether it was abandoned.

Defendant has failed to argue that the admission of the contested evidence constituted plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error."). Defendant has not asked us to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to further address this issue and we do not find this to constitute an "exceptional circumstance" necessary to invoke Rule 2. *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999). Defendant's second argument is therefore not subject to appellate review.

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).