An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-454

Filed: 15 January 2019

Catawba County, No. 16 CRS 4854

STATE OF NORTH CAROLINA

v.

WILLIAM DAVID GIBSON

Appeal by defendant from judgment entered 17 August 2017 and order entered 18 August 2017 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 27 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Keith Clayton, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

ZACHARY, Judge.

William David Gibson ("Defendant") appeals a judgment entered against him for trafficking opiates by sale and possession. Defendant contends that the trial court erred in admitting a surveillance video and certain statements therein. In addition, Defendant asserts that the trial court failed to give Defendant notice and an opportunity to be heard before entering a civil judgment against him for attorney's

fees. After careful review, we dismiss in part, vacate the civil judgment entered against Defendant, and remand for further proceedings.

Factual and Procedural History

On 8 October 2015, Lieutenant Chad Killian with the Catawba County Sheriff's Office arranged an undercover drug buy of oxycodone pills with the help of a confidential informant. Lieutenant Killian and the informant arrived at Defendant's residence and saw him sitting in a chair near the back of the property. During the transaction, Lieutenant Killian wore a video recording device. The informant walked up to Defendant and they both started talking about the pills. Within five seconds of Lieutenant Killian and the informant arriving, Defendant handed an orange pill bottle to the informant. The informant took the pill bottle, counted the pills, and handed the bottle to Lieutenant Killian. After receiving the pill bottle, Lieutenant Killian pulled out $300.00 in marked currency and gave it to Defendant, who put the money in his shirt pocket. After standing around for a minute or two, Lieutenant Killian left Defendant's residence. The State Crime Lab later identified the pills sold by Defendant as between four and fourteen grams of oxycodone.

On 19 September 2016, the Catawba County Grand Jury indicted Defendant for trafficking in opiates by sale and for trafficking in opiates by possession of four or more but less than fourteen grams of opiates, in violation of N.C. Gen. Stat. § 90-

95(h)(4) (2015). Defendant's trial began on 16 August 2017 in Catawba County Superior Court before the Honorable Gregory R. Hayes.

During the trial, the State moved to admit a video recording of the transaction between Defendant and the informant:

> [Prosecutor]: Lieutenant Killian, you mentioned being able to equip a video surveillance device at the time. Did it actually make a recording?
>
> [Lieutenant Killian]: Yes
>
> . . . .
>
> Q: Have you been able to observe that video since then?
>
> A: Yes.
>
> Q: Is it a fair and accurate representation of the events that happened on that day?
>
> A: Yes.
>
> Q: Would it help aid you in your testimony as well?
>
> A: Yes.
>
> [Prosecutor]: The State would move to admit State's Exhibit [3] as a recording of the transaction.
>
> THE COURT: Okay. Any objection?
>
> [Defense Counsel]: No objections to any of the statements that was made by Lieutenant Killian and [Defendant]; however, we would object to any statement that was made by the confidential informant as the State's not going to call him as a witness.

> THE COURT: Okay. Overruled as to the admission of State's Exhibit number 3. State's 3 is admitted into evidence.

On 17 August 2017, a jury found Defendant guilty of trafficking in opiates by sale and trafficking in opiates by possession. The trial court consolidated Defendant's two charges and sentenced him to 70 to 93 months' imprisonment as required by N.C. Gen. Stat. § 90-95(h)(4)(a). The trial court also imposed a mandatory $50,000.00 fine and a $600.00 lab fee as a civil judgment against Defendant. The trial court did not address attorney's fees in open court, but the judgment form contained a notation indicating that "ATTORNEY HOURS TO BE DETERMINED AT A LATER DATE." On the same day that the trial court entered the criminal judgment against Defendant, his appointed counsel filed a fee application claiming 32.2 hours for Defendant's representation. On 18 August 2017, the trial court awarded $1,932.00 to defense counsel as attorney's fees for representing Defendant. The trial court entered the amount as a civil judgment against Defendant.

Defendant gave his first notice of appeal in open court. On 18 August 2017, Defendant returned to Superior Court and withdrew his appeal in open court. Defendant entered his second notice of appeal on 22 August 2017. On 24 August 2017, Defendant returned to Catawba County Superior Court and withdrew his notice of appeal for a second time. Defendant filed a handwritten "Notice of Intent to

File a Direct Appeal" with the Catawba County Clerk of Superior Court—his third notice of appeal—on 29 September 2017.

Appellate Jurisdiction

We first address our jurisdiction to hear this case. Defendant filed three notices of appeal and withdrew the first two of those notices. Defendant filed his final notice of appeal on 29 September 2017, forty-three days after the trial court entered judgment against him. A defendant in a criminal case must either give oral notice of appeal at trial or file written notice of appeal "within fourteen days after entry of the judgment." N.C.R. App. P. 4(a)(2). Defendant has lost his right to appeal due to his untimely notice of appeal; however, Defendant filed a Petition for Writ of Certiorari asking this Court to review the judgments entered against him even though his "right to prosecute [his] appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). We exercise our discretion and grant Defendant's petition. *See State v. Ledbetter*, 371 N.C. 192, 194, 814 S.E.2d 39, 41 (2018); *see also State v. Friend*, ___ N.C. App. ___, ___, 809 S.E.2d 902, 905 (2018) ("This Court routinely allows a petition for writ of certiorari to review a criminal judgment where the defendant failed to timely appeal.").

Analysis

Defendant argues on appeal that: (1) the trial court erred by admitting the surveillance video as substantive evidence without requiring the State to lay a proper

foundation; (2) the admission of the surveillance video constituted inadmissible hearsay and violated Defendant's right to confront his accuser; and (3) the trial court erred by imposing a civil judgment for attorney's fees against Defendant without providing him notice and an opportunity to be heard. For the reasons explained below, we dismiss in part, vacate the civil judgment for attorney's fees entered against Defendant, and remand for further proceedings.

I. Admission of the Surveillance Video

Defendant argues that the trial court erred in admitting the surveillance video of the drug transaction between Lieutenant Killian and the confidential informant as substantive evidence without the State laying a proper foundation. Defendant failed to object at trial to the admission of the video as a whole nor does he argue plain error on appeal. Thus, Defendant has waived this assignment of error.

"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). When a defendant fails to object at the trial court, a defendant can nevertheless raise an unpreserved error for appellate review if the defendant argues that the unpreserved error amounts to plain error. N.C.R. App. P. 10(a)(4) ("In 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 questioned is specifically and distinctly contended to amount to plain error."). "[P]lain error review . . . is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "[W]here a defendant fails to assert plain error . . . , he has waived . . . plain error review." *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998).

At trial, the State moved to admit the video recording of the drug transaction between Defendant and the confidential informant. Defendant did not object to the admission of the video as a whole, but only objected to "any statement that was made by the confidential informant as the State's not going to call him as a witness." Defendant never objected at trial for the reason that he is now arguing on appeal; thus, Defendant's argument on appeal is unpreserved. However, this argument could have been pursued before this Court had Defendant "specifically and distinctly contended [that the error] amount[ed] to plain error." N.C.R. App. P. 10(a)(4). Defendant claimed in his brief that a *de novo* standard of review applied to this assignment of error and never stated that the trial court's action amounted to plain error. In that Defendant failed to argue that this amounted to plain error, he has waived plain error review.

II. Hearsay and the Confrontation Clause

Next, Defendant argues that the admission of the videotape constituted inadmissible testimonial hearsay that violated his right to confront his accuser. Defendant failed to make this constitutional argument before the trial court; therefore, Defendant has also waived this argument on appeal.

As stated above, appellate courts in this State will not review a trial court's decision to admit evidence unless the defendant timely objected before the trial court. *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010); *see also* N.C.R. App. P. 10(a)(1). "[A] defendant loses his remaining opportunity for appellate review when he fails to argue in the Court of Appeals that the trial court's admission of the evidence amounted to plain error," even for constitutional evidentiary issues. *State v. Brent*, 367 N.C. 73, 76, 78, 743 S.E.2d 152, 154, 155 (2013) (holding that the defendant was not entitled to appellate review of his challenge to the admission of a forensic report on Confrontation Clause grounds when the defendant did not object at trial and failed to assert plain error before the Court of Appeals).

Defendant objected in the trial court to "any statement that was made by the confidential informant" in the videotape. Although Defendant did not state the grounds for his objection, he argues on appeal that any statements of the confidential informant were hearsay. Defendant did not argue before the trial court that admission of the videotape as a whole or the statements of the confidential informant in the videotape violated his Sixth Amendment right to confront his accuser. In

addition, Defendant does not claim to this Court that this amounted to plain error. In that Defendant failed to raise this Confrontation Clause issue in the trial court and failed to argue plain error, Defendant has waived this argument on appeal.

III. Civil Judgment for Attorney's Fees

Finally, Defendant argues that the trial court erred by denying him notice and an opportunity to be heard before entering a civil judgment against Defendant for his attorneys' fees. We agree.

Trial courts may enter civil judgments against indigent defendants for payment of the legal services rendered to them. *See* N.C. Gen. Stat. § 7A-455 (2017). Before entering a civil judgment for attorney's fees against a defendant, however, the trial court must afford the defendant notice and an opportunity to be heard. *State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849-50 (1974); *State v. Jacobs*, 172 N.C. App. 220, 235-36, 616 S.E.2d 306, 316-17 (2005). When imposing a civil judgment for attorney's fees against a defendant, "the interests of the defendant and trial counsel are not necessarily aligned." *Friend*, ___ N.C. App. at ___, 809 S.E.2d at 907. Thus, when imposing civil judgments for attorney's fees against criminal defendants,

> trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id. at ___, 809 S.E.2d at 907.

Here, after the trial court indicated on the judgment that Defendant's appointed attorney's hours would be determined at a later date, defense counsel filed a fee application, and the trial judge signed the order for attorney's fees the next day. No colloquy occurred in open court between the trial court and Defendant personally. In addition, no evidence exists in the record demonstrating that Defendant "received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.* at ___, 809 S.E.2d at 907. Because no evidence exists in the record showing that Defendant received notice and an opportunity to respond to the imposition of a civil judgment against him for attorney's fees, that judgment is vacated and remanded for further proceedings.

Conclusion

Defendant waived his arguments that the trial court erred in admitting into evidence the surveillance video and the informant's statements therein. Accordingly, those arguments are dismissed. However, we vacate the civil judgment entered against Defendant for his attorney's fees and remand for further proceedings consistent with this opinion. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317.

DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).