An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-138

Filed: 15 January 2019

Buncombe County, No. 15 CRS 91878

STATE OF NORTH CAROLINA

v.

DAVID LEE DINKINS, Defendant.

Appeal by Defendant from judgment entered 9 February 2017 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

David Lee Dinkins ("Defendant") appeals following a jury verdict finding him guilty of breaking and entering. On appeal, Defendant contends the trial court committed plain error by admitting evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Defendant also filed a petition for writ of *certiorari*, due

to his failure to designate the correct court to which his appeal was taken, in violation of N.C. R. App. P. 4(b) (2017). Because Defendant fails to demonstrate his argument has merit, we deny his petition for writ of *certiorari* and dismiss his appeal.

I. Factual and Procedural Background

On 1 February 2016, a Buncombe County Grand Jury indicted Defendant for first degree burglary, assault by strangulation, and assault on a female. On 26 January 2017, Defendant filed a pre-trial motion *in limine* to exclude "[a]ll testimony or other evidence from any [S]tate's witness regarding allegations of Defendant's alleged past abuse, verbal or physical, or any other character evidence regarding Defendant's behavior that did not occur on the date of the alleged offense." Defendant argued Nicole Goodlet's allegations of prior abuse by Defendant amounted to inadmissible character evidence, in violation of Rule 404(b). The State indicated it intended to question Goodlet about an incident occurring a few days prior to the 31 October 2015 incident (the "charged incident"), where Defendant "barged" into Goodlet's home, looked around the home, did not find anyone in the home with her, and then informed Goodlet that "she was okay this time[,] [b]ut that he was going to catch her and kill everyone in here."

The State argued this testimony would be relevant under Rule 404(b) for the proper purposes of showing Defendant's intent, motive, common scheme, and plan. The trial court ruled the earlier incident would be probative of Defendant's motive,

any common scheme or plan, and any intent. The court further ruled the statement's probative value outweighed any possible prejudice and denied Defendant's motion *in limine*.

On 8 February 2017, the court called the case for trial. The State's evidence tended to show the following. Goodlet and Defendant dated for approximately four to five months. About a month into their relationship, Defendant moved into Goodlet's home, where she lived with her two-year-old son. Sometime thereafter, Defendant and Goodlet began having problems, and Goodlet asked a friend and her two daughters to move into her home.

Two weeks before the charged incident, "it got really bad[,]" and Goodlet asked Defendant to leave her home. Defendant became angry, yelled, and "[s]lapped" Goodlet, but eventually gathered his belongings and moved out of the home. A few days later, sometime during the evening, Defendant entered her home uninvited. Defendant "just came in" and told her he wanted to talk. Goodlet picked up her son and went to the back of her house, into the room where her friend and friend's boyfriend were. Goodlet's friend and her boyfriend tried to block Defendant from entering the room, but Defendant kept yelling, cursing, and trying to push his way in. Goodlet's friend grabbed a baseball bat and told Defendant, "if you come in here, I'm going to hit you." Defendant threatened to kill them but eventually left the home.

On the day of the charged incident, Defendant drove up to Goodlet's house a few times but never got out of his vehicle. Later that evening, Goodlet hung out in her living room with another friend and the friend's boyfriend. Goodlet saw Defendant standing in the doorway of her home. Defendant began yelling and pushed Goodlet. Goodlet told him he had to leave and called the police. Defendant left before police arrived.

Fifteen to twenty minutes after police left, Goodlet saw Defendant's car pull into her driveway. Again, she called the police. Defendant came to the front of Goodlet's home and began banging on the door. He yelled at Goodlet to open the door, and Goodlet told him to "go away." Defendant tried to open the kitchen window. Defendant "disappeared[,] [t]hen just like a minute or two later he just c[a]me charging up the hallway[.]" Goodlet believed Defendant entered through the back of her home. Defendant slapped Goodlet on her face, and she fell. Defendant "yoked" her up, and she felt pressure around her neck, like she was "hyper-ventilating." Goodlet remembered hearing her friend's voice and the police arriving.

Dejah Gilliland, a close family friend, lived with Goodlet for about six months. On the night of the charged incident, Goodlet called Gilliland and told her to hurry home. When Gilliland arrived at Goodlet's home, she saw Defendant "standing on the window." Defendant jumped "off the window" and came toward her vehicle. Defendant told Gilliland that Goodlet would not let him in the home.

Gilliland went to the front door, and Goodlet let her inside the home. Gilliland initially testified Defendant came in behind her but later denied knowing how he got in. Gilliland asked what was going on, and Goodlet explained that she and Defendant had gotten into an argument and he was trying to enter her home. Gilliland went back outside, and Defendant shut the door. She knocked on the door and heard Goodlet yelling. Eventually, Defendant opened the door and let Gilliland inside. Goodlet and Defendant argued while Goodlet was on the phone with police. Defendant grabbed Goodlet by the throat and slapped her twice. Gilliland tried unsuccessfully to get in between Defendant and Goodlet. Eventually, Defendant let go of Goodlet's neck, and the police arrived.

The jury found Defendant guilty of misdemeanor breaking and entering and not guilty of assault on a female and assault by strangulation. The trial court sentenced Defendant to 120 days in the custody of the Misdemeanant Confinement Program.

II. Jurisdiction

We must first address whether our Court has jurisdiction. On 16 February 2017, Defendant filed a pre-printed form entitled "NOTICE OF APPEAL" designating the court to which appeal was taken as the superior court. On 7 May 2018, Defendant filed a petition for writ of *certiorari* to this Court, in recognition of the fact his *pro se*

notice of appeal failed to designate the correct court to which his appeal was taken, in violation of N.C. R. App. P. 4(b).

Under appropriate circumstances, this Court is permitted to issue a writ of *certiorari* to review the judgments of the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (2017). The petition for writ of *certiorari* must demonstrate merit or that some error was probably committed at the trial level. *See State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017) (citation omitted); *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (2013) (citation omitted). A decision concerning whether to issue a writ is discretionary, and, thus, "the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (citation omitted).

In deciding whether Defendant shows "good or sufficient cause" to grant his petition, we look to his argument on appeal. Defendant argues the trial court committed plain error admitting Goodlet's testimony about Defendant's prior bad acts, in violation of Rule 404(b) of the North Carolina Rules of Evidence. Since

Defendant did not object to every admission of the challenged evidence,[1] Defendant asks us to review the admission of the evidence for plain error.

In criminal cases, unpreserved errors are reviewed only for plain error. N.C. R. App. P 10(a)(4) (2017).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (first and second alteration, ellipsis, and emphasis in original).

Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

---

[1] Defendant filed a motion *in limine*. At trial, Defendant objected once to the admission of this evidence, but failed to object when the trial court later admitted the evidence. Our Supreme Court "has long held that when, as here, evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984) (citations omitted).

N.C. R. Evid. 404(b) (2017). This rule is a "general rule of *inclusion* . . . subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "The list of permissible purposes for admission of 'other crimes' is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995) (citation omitted).

Defendant argues Goodlet's testimony concerning Defendant's acts before the charged incident were not sufficiently similar to the charged incident to satisfy Rule 404(b). Defendant contends the only similarity between the two incidents was Defendant entered the home uninvited, "a characteristic generic to all breaking and entering offenses[,]" and the evidence was not relevant to Defendant's intent, motive, or common scheme or plan. Defendant relies on *State v. Al-Bayyinah*, 356 N.C. 150, 567 S.E.2d 120 (2002), to support his position.

In *Al-Bayyinah*, the trial court admitted evidence of two prior robberies to establish defendant's identity as the perpetrator of a third robbery, the charged offense. *Id.* at 151-53, 567 S.E.2d at 121-22. Our Supreme Court stated "[e]vidence of a prior bad act generally is admissible under Rule 404(b) if it constitutes 'substantial evidence tending to support a reasonable finding by the jury that the

defendant committed the *similar* act.' " *Id.* at 155, 567 S.E.2d at 123 (quoting *State v. Stager*, 329 N.C. 278, 303, 406 S.E.2d 876, 890 (1991)). During prior robberies, the perpetrator "wore dark, nondescript clothing that obscured his face; carried a weapon; demanded money; and fled upon receiving it[,]" while during the commission of the crime with which the defendant was currently charged, "the robber took nothing of substantial value[,]" surprised the victim from behind, hit the victim in the back of the head, and stabbed the victim. *Id.* at 155, 567 S.E.2d at 123. The Supreme Court held the trial court erred in admitting Rule 404(b) evidence of prior crimes, because the prior bad acts and the crime charged were dissimilar. *Id.* at 155-56, 567 S.E.2d at 123.

The circumstances of the present case are distinguishable from those found in *Al-Bayyinah*. In *Al-Bayyinah*, the State offered evidence of the two prior robberies to prove defendant's identity in the third robbery. *Id.* at 151-53, 567 S.E.2d at 121-22 Here, Defendant's identity was not at issue, as it was undisputed Defendant was present at Goodlet's residence a few weeks before the charged incident and on the day of the charged incident. Although generally, Rule 404(b) evidence is admissible only if the prior act is sufficiently similar to the charged offense, similarity is not relevant if the trial court admits the evidence to show motive or intent. *See State v. Golden*, 224 N.C. App. 136, 144, 735 S.E.2d 425, 431 (2012) (where evidence of defendant's prior incidents with the victim were properly admitted to show the defendant's intent

and were part of the chain of events leading up to the crime, "similarity" was not pertinent); *State v. Haskins*, 104 N.C. App. 675, 682, 411 S.E.2d 376, 382 (1991) (citation omitted) ("When determining the relevancy of other crimes evidence offered to prove defendant's motive, the degree of similarity between the uncharged and the charged crimes is considerably less important than when such evidence is offered to prove identity.").

Upon a review of the evidence, we conclude the trial court properly admitted the prior incident with Goodlet to show Defendant's intent and motive. *See State v. Morgan*, 359 N.C. 131, 158, 604 S.E.2d 886, 903 (2004) (citations omitted) (alteration in original) (" 'Where at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]' there is no prejudicial error."). Because Defendant's argument lacks merit, there is no "good or sufficient cause" to grant his petition for writ of *certiorari*. Accordingly, in the exercise of our discretion, we deny his petition for writ of *certiorari*. Consequently, Defendant's appeal is dismissed.

III. Conclusion

For the foregoing reasons, we deny Defendant's petition for writ of *certiorari* and dismiss his appeal.

DISMISSED.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).