

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-87

No. COA20-158

Filed 16 March 2021

Columbus County, No. 11 CRS 52180

STATE OF NORTH CAROLINA

v.

CALVIN SHERWOOD WATTS, Defendant.

Appeal by Defendant from judgments entered 3 September 2019 by Judge Andrew Heath in Columbus County Superior Court. Heard in the Court of Appeals 10 February 2021.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.*

*Craig M. Cooley for Defendant-Appellant.*

INMAN, Judge.

¶ 1

Calvin Sherwood Watts (“Defendant”) appeals from judgments entered following a jury verdict finding him guilty of attempted first-degree rape, three counts of first-degree sexual offense with a child, and first-degree kidnapping. Defendant contends the trial court committed plain error by admitting into evidence an expert’s report that he argues impermissibly vouched for the credibility of the alleged victim.

Defendant also claims he is entitled to a new trial for ineffective assistance of counsel (“IAC”) because his counsel did not move to redact the allegedly prejudicial portions of the report. We hold that Defendant has failed to demonstrate reversible error.

## **I. FACTUAL AND PROCEDURAL HISTORY**

¶ 2 The record below tends to show the following:

¶ 3 One day in June 2011, A.H. (“Allison”),<sup>1</sup> an 11-year-old girl who considered Defendant to be her grandfather, was playing kickball with her cousins. She had stayed overnight in Defendant’s trailer with her cousins before and, as the day wore on, she called Defendant and asked if she could again spend the night there. Defendant agreed.

¶ 4 Defendant picked Allison up on his moped as it was growing dark. Later that evening, after Defendant and Allison had arrived at Defendant’s trailer, Defendant sexually assaulted Allison, which included but was not limited to repeated attempts at vaginal intercourse and vaginal penetration with a beer bottle. Defendant continuously screamed and protested throughout.

¶ 5 Allison reported the abuse to her maternal aunt the following day. Allison’s mother and aunt took her to the local hospital and informed the police. staff examined Allison and completed a rape kit. A few days later, Allison was seen by

---

<sup>1</sup> We use a pseudonym for ease of reading and to protect the minor’s identity.

Diane Guida, a child medical examiner, who interviewed Allison, performed a full pelvic exam, and completed a Child Medical Evaluation Program (CMEP) report detailing findings consistent with sexual abuse.

¶ 6 Defendant was tried and convicted of one count of attempted first-degree rape, three counts of first-degree sexual offense with a child, and one count of first-degree kidnapping in 2014. Defendant appealed and was ultimately awarded a new trial. *State v. Watts*, 246 N.C. App. 737, 783 S.E.2d 266 (2016), *aff'd*, 370 N.C. 39, 802 S.E.2d 905 (2017).

¶ 7 Defendant was retried in July 2019. During the second trial, Ms. Guida testified as a medical expert and her CMEP report was received into evidence without objection. The jury found Defendant guilty on all counts and the trial court sentenced him to an aggregate 1,100 to 1,356 months (99–113 years) in prison. Defendant gave oral notice of appeal.

¶ 8 While Defendant's appeal was pending, the trial court learned its sentence was contrary to the statute governing sentencing on retrial. The trial court, with the parties' consent, resentenced Defendant to consecutive active sentences of 180 to 225 and 317 to 390 months, totaling 41 to 51 years in prison. Defendant's counsel failed to orally notice an appeal from the new sentences and Defendant did not file a written notice of appeal. Defendant's appellate counsel subsequently filed a petition for writ

of certiorari with this Court, while the State filed a motion to dismiss Defendant's appeal.

## II. ANALYSIS

¶ 9 Defendant presents two arguments: (1) the trial court committed plain error by admitting Diane Guida's entire CMEP report into evidence without first reviewing it for comments, findings, or opinions that Defendant contends impermissibly vouched for Allison's credibility; and (2) in the alternative, trial counsel was ineffective because counsel did not move to redact the allegedly prejudicial portions of Ms. Guida's report. We address this Court's jurisdiction to hear Defendant's appeal before considering whether he has failed to demonstrate error and prejudice under either argument.

### ***A. Appellate Jurisdiction***

¶ 10 This Court is without jurisdiction to hear an appeal when a defendant fails to comply with the requirements of Rule 4 of the North Carolina Rules of Appellate procedure. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Defendant concedes his trial counsel failed to enter an oral or written notice of appeal following resentencing and that we lack jurisdiction to review his direct appeal; we therefore grant the State's motion to dismiss.

¶ 11 Defendant also seeks review by petition for writ of certiorari on the ground that his failure to take timely action should not preclude review. Dismissal of an

appeal and denying certiorari review of an IAC claim leaves a defendant free to pursue his IAC claim through a motion for appropriate relief (“MAR”) before the trial court. *See, e.g., State v. Cox*, 256 N.C. App. 511, 527, 808 S.E.2d 339, 349 (2017) (dismissing an IAC claim without prejudice to filing an MAR with the trial court because “[g]enerally, ineffective assistance of counsel claims should be considered through motions for appropriate relief and not on direct appeal” (quotation marks and citation omitted)); *State v. Phloykaew*, 254 N.C. App. 241, 801 S.E.2d 390, 2017 WL 2644126 (2017) (unpublished) (dismissing a defendant’s appeal arguing IAC for failure to comply with Rule 4 and denying his petition for writ of certiorari without prejudice to raising the IAC claim by MAR). Because this appeal presents a rare IAC claim that can be resolved based solely on the record without the need for further proceedings below, we grant Defendant’s petition for writ of certiorari in our discretion in the interest of judicial economy. *See, e.g., State v. Dorman*, 225 N.C. App. 599, 628, 737 S.E.2d 452, 471 (2013) (granting a petition for writ of certiorari to review an otherwise unappealable issue when doing so was “in the interest of judicial economy”).

### ***B. Admissibility of Ms. Guida’s Report***

¶ 12 Defendant acknowledges in his brief that trial counsel’s failure to object to the admissibility of Ms. Guida’s report limits his appeal to plain error review. To prevail, Defendant must show “a *fundamental* error, something so basic, so prejudicial, so

lacking in its elements that justice cannot have been done.” *State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). A fundamental error is one that results in a miscarriage of justice, undermines the integrity of the proceeding, or “ha[s] a probable impact” on the jury’s verdict. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (1983) (quotation marks and citation omitted).

¶ 13 Defendant specifically alleges that Ms. Guida’s CMEP report contains statements that impermissibly vouch for Allison’s credibility as the accuser. Defendant cannot show prejudice because none of the challenged statements was published to, described for, or seen by the jury.

¶ 14 The trial transcript reveals that Ms. Guida described portions of the report in her testimony, but that she did not mention any of the challenged statements.<sup>2</sup> None of the challenged statements were published or shown to the jury, and the jury never requested to view the full report containing the allegedly prejudicial statements during deliberations. In other words, the jury never saw or heard any descriptions of the expert statements Defendant argues were prejudicial. Defendant therefore cannot show prejudice amounting to plain error.

¶ 15 This Court held that a defendant similarly failed to show plain error in the

---

<sup>2</sup> Defendant does not argue that any portions of Ms. Guida’s oral testimony were prejudicial or inadmissible.

admission of evidence in *State v. Privette*, 218 N.C. App. 459, 721 S.E.2d 299 (2012). There, a defendant argued the trial court committed plain error when it allowed certain photographs into evidence. *Id.* at 466, 721 S.E.2d at 306. A review of the record disclosed that only one of the photographs was exhibited to the jury while the remainder were never published or described through testimony. *Id.* at 482 n.13, 721 S.E.2d at 315 n.13. We held that, “[a]s a result of the fact that these other photographs were never described in oral testimony or published to the jury, we are unable to see how any ruling that the trial court might have made with respect to these photographs could have prejudiced [the defendant].” Consistent with *Privette*, we hold that Defendant cannot show plain error in the admission of the challenged portions of the CMEP report that were never published to, described for, or seen by the jury.

### ***C. Ineffective Assistance of Counsel***

¶ 16 Defendant argues in the alternative that “trial counsel was ineffective for not moving to strike the portions of Guida’s report where she vouched for [Allison]’s credibility and opined on [Defendant]’s guilt.” To demonstrate IAC, “a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted). Defendant cannot make that showing, as the jurors never saw or heard descriptions

of the portions of the report he argues should have been redacted. Because the jurors had no knowledge of those statements, they could not have relied upon them in reaching their verdict. Consequently, Defendant's IAC claim fails for want of demonstrable prejudice. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985) (holding counsel's failures to object to the introduction of certain evidence did not establish IAC when "there [was] no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial").

### III. CONCLUSION

¶ 17 For the foregoing reasons, we allow the State's motion to dismiss, grant Defendant's petition for writ of certiorari, and hold that Defendant has failed to demonstrate plain or prejudicial error.

APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI GRANTED;  
NO ERROR.

Judges TYSON and HAMPSON concur.

Report per Rule 30(e)