An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-244

No. COA21-391

Filed 5 April 2022

New Hanover County, No. 17 CRS 52998, 17 CRS 7331

STATE OF NORTH CAROLINA

v.

ANTHONY BERNARD GREEN, Defendant.

Appeal by Defendant from judgment entered 23 January 2020 by Judge Frank Jones in New Hanover County Superior Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary M. Maloney, for the State.

Gilda C. Rodriguez for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Anthony Bernard Green ("Defendant") appeals from a judgment entered following his convictions for felony fleeing to elude arrest with a motor vehicle and attaining habitual felon status. On appeal, Defendant contends that he received ineffective assistance of counsel ("IAC") due to his attorney's admission of several incriminating facts during closing argument. After careful review, and because we

cannot discern whether IAC occurred on the cold record before us, we dismiss Defendant's appeal without prejudice to filing a motion for appropriate relief ("MAR") with the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below discloses the following:

¶ 3 On 12 April 2017, a detective with the Wilmington Police Department observed a white Hyundai Sonata fail to use a turn signal and change lanes without signaling. The officer pulled directly behind the Hyundai Sonata at a traffic light and activated his emergency lights and siren once the vehicles had proceeded through the light. In response, the Hyundai Sonata signaled and pulled off on a side street before rapidly accelerating away from the officer's vehicle. A multi-officer pursuit ensued, and Defendant was eventually detained and arrested.

¶ 4 Defendant was indicted for felony fleeing to elude arrest with a motor vehicle and attaining habitual felon status and tried on 22 January 2020. Before closing argument, Defendant's counsel informed the trial court he wished to make an admission to the jury:

> [DEFENDANT'S COUNSEL]: I would request to make an admission during the closing, Your Honor.
>
> THE COURT: And has defendant authorized this admission and agreed upon it, sir, as an approved trial strategy?

> [DEFENDANT'S COUNSEL]: We've discussed it and—
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Again, [Defendant], sir, as earlier indicated, you do have the right to remain silent. You're not required to answer any questions from the Court. I understand from your attorney that he will make an admission as to one or more elements of the charged offense as part of an approved and agreed upon strategy during his closing remarks to the jury.
>
> If this is not your wishes and not consistent with your approval, now, sir, would be the time to inform the Court of that.
>
> THE DEFENDANT: I approve.
>
> THE COURT: You approve? All right.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, sir. Thank you. You may be seated.

¶ 5 During closing, Defendant's counsel admitted Defendant was driving the vehicle that fled police. He then argued that the key issue in the case was "whether this is a felony or whether this is misdemeanor conduct." Defense counsel proceeded to admit other facts central to the State's case but maintained that the conceded conduct did not amount to reckless driving—an element alleged in the indictment necessary to elevate Defendant's misconduct from a misdemeanor to a felony. Counsel concluded by telling the jury that "[t]his all boils down to your interpretation and whether or not this conduct amounts to a felony or misdemeanor and whether or

not the defendant's driving was careless and reckless while he was attempting to elude, and I ask you to find that this was a misdemeanor and not a felony."

¶ 6 The jury found Defendant guilty as charged and Defendant admitted to attaining habitual felon status. On 23 January 2020, the trial court entered a judgment sentencing Defendant to 103 to 136 months imprisonment. Defendant filed a written notice of appeal on 20 February 2020; because that notice of appeal was not filed within the fourteen days required by Rule 4 of the North Carolina Rules of Appellate Procedure, Defendant also filed a petition for writ of certiorari with this Court.

II. ANALYSIS

¶ 7 Defendant asserts that he was deprived of a fair trial under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), in which our Supreme Court held that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08. Defendant specifically contends his counsel's admission to (1) all elements of the lesser-included misdemeanor offense and (2) additional facts that could elevate the crime to a felony constituted *Harbison* error. Because we cannot discern from the cold record whether *Harbison* error occurred, we deny Defendant's petition for writ of certiorari and dismiss the appeal without prejudice to filing an MAR in the trial

court.

¶ 8 *Harbison* requires trial counsel obtain client consent prior to admitting guilt, and tasks the trial court and the parties with creating a record sufficient to confirm the defendant has done so "knowingly and voluntarily . . . after full appraisal of the consequences." *Id.* at 180, 337 S.E.2d at 507 (citations omitted); *see also State v. House*, 340 N.C. 187, 197, 456 S.E.2d 292, 297 (1995) (urging "both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial"). This is necessary not only to protect the defendant's constitutional rights, but also to allow this Court to review the record for *Harbison* error on appeal. *See, e.g., House* at 196-97, 456 S.E.2d at 296 (dismissing a *Harbison* claim without prejudice to filing an MAR because the record was "silent as to whether defendant did nor did not consent to his attorney's concession of guilt"); *cf. State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required.").

¶ 9 We are unable to discern from the record before us whether *Harbison* error occurred. There is no indication from the colloquy what facts, elements, or crimes Defendant had consented to admitting. Trial counsel's statement that he wanted "to make an admission during the closing," and the trial court's subsequent question to Defendant if he approved trial counsel "mak[ing] an admission as to one or more

elements of the charged offense," do not reveal whether Defendant consented to all or any of: (1) admitting the entire offense of misdemeanor fleeing to elude arrest with a motor vehicle; (2) admitting some subset of that crime's elements; or (3) admitting the incriminating facts that the jury may have relied upon to elevate the offense to a felony. Thus, there is no indication that he was consenting to or understood the consequences of admitting guilt of a lesser-included offense as opposed to some element or elements that, while essential to misdemeanor and/or felony speeding to elude arrest, nonetheless did not complete either crime.

¶ 10 Two cases cited by the parties demonstrate the difference between the unclear record before us and those that are sufficiently clear to permit review for *Harbison* error. In *State v. Perez*, 135 N.C. App. 543, 522 S.E.2d 102 (1999), the defendant was charged with first degree murder. *Id.* at 545, 522 S.E.2d at 105. At trial, the defendant's counsel informed the trial court that he specifically intended to admit that the defendant *caused the victim's death* and thus was guilty of a lesser-included offense. *Id.* at 548, 522 S.E.2d at 106. Then, via colloquy, the trial court confirmed with defendant on at least two occasions that he consented to counsel "telling the jury that *you are in fact responsible for the death of the victim . . . [and] that argument to the jury is, in effect, an admission of guilt . . . of some offense*[.]" *Id.* at 548-49, 522 S.E.2d at 107 (emphasis added). Because the record clearly showed that the defendant consented to the specific admission that he killed the victim and thus was

guilty of some lesser-included offense of first-degree murder, we were able to conclusively hold that no *Harbison* error occurred. *Id.* at 550-52, 522 S.E.2d at 107-08.

¶ 11 Similarly, in *State v. Holder*, 218 N.C. App. 422, 721 S.E.2d 365 (2012), the defendant's counsel specifically told the trial court he intended to admit guilt to a lesser-included offense, and the trial court asked the defendant on the record if he consented to his counsel "conced[ing] guilt as to some portion of the offenses charge[d]." *Id.* at 425, 721 S.E.2d at 367 (second alteration in original). That colloquy was sufficient to preclude any *Harbison* error because:

> defense counsel explained to the trial court in defendant's presence that defendant had consented to permitting his counsel to concede to the jury that he was guilty of [a lesser-included offense] . . . [and] [t]he trial court judge spoke directly with defendant to ensure that he understood the consequences of conceding guilt and that he did in fact consent to an admission of guilt to . . . a lesser-included offense of felonious fleeing to elude arrest, as specified by defense counsel at the beginning of the colloquy.

Id. at 427, 721 S.E.2d at 368.

¶ 12 The record in this case is unlike those in *Perez* and *Holder*. There is no indication that Defendant was consenting to the admission of particular facts or elements that necessarily completed a lesser-included offense as in *Perez*, 135 N.C. App. at 548-49, 522 S.E.2d at 106-07, nor is there any recorded consent to admitting *all* elements of misdemeanor fleeing to elude arrest "as specified by defense counsel

at the beginning of the colloquy," in *Holder*. 218 N.C. App. at 425-27, 721 S.E.2d at 367-68. In other words, we have no indication from the record what element(s) Defendant consented to admitting, and thus cannot determine whether he consented to a concession of guilt to all elements of the lesser-included offense of misdemeanor fleeing to elude arrest with a motor vehicle, some subset thereof, or any element(s) necessary to elevate it to a felony. Because we cannot discern from the cold record whether Defendant's counsel made admissions to the jury beyond the scope of his client's consent, we deny Defendant's petition for writ of certiorari and dismiss the appeal without prejudice to Defendant filing an MAR with the trial court. *See State v. Jamerson*, 161 N.C. App. 527, 530, 588 S.E.2d 545, 547 (2003) (denying a petition for writ of certiorari and dismissing an appeal without prejudice to filing an MAR).

PETITION FOR WRIT OF CERTIORARI DENIED; APPEAL DISMISSED WITHOUT PREJUDCE TO FILING AN MAR WITH THE TRIAL COURT.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).