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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-512

No. COA21-601

Filed 19 July 2022

Rockingham County, No. 17CRS1645; 17CRS52819

STATE OF NORTH CAROLINA

v.

RICKY CARLTON MARTIN, Defendant.

Appeal by Defendant from judgments entered 14 April 2021 by Judge Edwin G. Wilson Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 22 February 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock and Special Deputy Attorney General Christopher W. Brooks, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Ricky Martin ("Defendant") petitions this court by writ of certiorari to review two judgments finding him guilty of second-degree murder and felony fleeing to elude arrest with a motor vehicle. On appeal, Defendant argues 1) the trial court plainly erred by admitting evidence about his prior felony conviction and incarceration, and

2) he received ineffective assistance of counsel. In our discretion, we grant Defendant's petition for writ of certiorari. After a careful review of the record and applicable law, we conclude Defendant received a fair trial free from error and dismiss his ineffective assistance of counsel argument without prejudice to his right to file a motion for appropriate relief with the Superior Court.

I. Factual and Procedural Background

¶ 2 Defendant was indicted on December 11, 2017, for second-degree murder, felony death by vehicle, and felony fleeing and attempting to elude arrest with a motor vehicle. Defendant was tried before a jury on April 12 to 14, 2021.

¶ 3 The State's evidence tended to show the following: In November 2017, Defendant was dating Katarria Moyer ("Moyer"). Around 6:00 or 7:00 p.m. on November 16, 2017, Rachel Hairston ("Hairston") saw her cousin, Moyer, at Food Lion with Defendant. Defendant was "purchasing a case of beer." After Defendant and Moyer left Food Lion, Hairston received a call from Moyer. Moyer asked Hairston if she could "borrow $10 because she wanted—[to] get some more to drink." Hairston told Moyer she could borrow the money and Moyer "was going to come to . . . [Hairston's] home to pick up the money." At 10:47 p.m., Moyer called Hairston again to inform Hairston she and Defendant were on the way to Hairston's house.

¶ 4 Officer Will Garrison ("Officer Garrison") was on patrol that evening at West Meadow Road. According to Officer Garrison, he clocked Defendant's red Kia moving

at 52 mph in a 35 mph zone on West Meadow Road. Officer Garrison alerted Communications of the suspected traffic violation, pulled up behind Defendant, and turned on his blue lights and sirens. Officer Garrison testified that Defendant "applied the brakes and put on his left turn signal . . . made the left-hand turn on[to] North Pierce Street . . . [a]nd that's when he took off." Defendant accelerated down North Pierce Street at high speed, crossed all four yellow lines, and drove in the far-left lane towards oncoming traffic. Defendant continued speeding onto Cox Street and traveled towards North Van Buren and NC-14. Officer Garrison testified Defendant lost control of his vehicle after he turned right onto NC-14 North. He testified Defendant "went out across the turning lane, come [sic] back across the northbound lane, ran off the road into a gravel lot on his right. . . . [But] he was able to gain control and get back on 14, . . . heading northbound."

¶ 5 During the pursuit, Moyer remained on the phone with Hairston. Hairston testified she overheard Moyer tell Defendant to "[t]urn right here. Turn right here. They're behind us." Moyer then told Defendant to "pull over" and "just stop." Hairston explained once the chase ensued, Moyer sounded "ecstatic, afraid, [and] stressed" on the phone. Meanwhile, Defendant continued to speed down NC-14, traveling at 105 mph as he approached the intersection of Aiken Road, North Van Buren, and NC-14. After passing the intersection, Officer Garrison observed Defendant "box[] the curve[,]" spin out of control off the left-hand side of the road, go

down an embankment, roll, and hit the trees.

¶ 6 Officer Garrison immediately called for emergency assistance and went to Defendant's vehicle to render aid. When Officer Garrison approached Defendant's vehicle, he smelled "airbags, rubber, and alcohol." Officer Garrison observed Defendant was partially ejected from the vehicle and pinned in the window. As Officer Garrison attempted to reach Defendant, Officer Yvira Baez ("Officer Baez") arrived at the scene of the accident. When Officer Baez approached the car, he noticed beer bottles inside and surrounding the vehicle. As he was walking to the other side of the vehicle, Officer Baez saw a woman, later identified as Moyer, pinned upside down inside the passenger area. Checking on Defendant, Officer Baez saw him moving and noticed a "strong odor of alcohol coming from[] . . . Defendant."

¶ 7 The Eden Fire Department and Emergency Medical Services ("EMS") arrived at the scene and spent approximately twenty-five to thirty minutes extracting Defendant from the vehicle. Officer Baez continued to smell a strong odor of alcohol emanating from Defendant's breath during extrication. On the passenger side of the vehicle, Captain Kevin Dunn "obtain[ed] a weak radial pulse" on Moyer and proceeded to use the jaws of life to extract her. After Moyer was extracted, EMS determined Moyer had died at the scene. Detective Sam Reid ("Detective Reid") arrived at the accident scene and, during his investigation of the vehicle, observed an empty bottle of apple brandy underneath the passenger seat.

¶ 8 Initially, Defendant was taken to Morehead Hospital but, due to the severity of his injuries, was airlifted to the intensive care unit at Wake Forest Baptist Hospital. On the morning of November 17, Officer Garrison and Detective Reid interviewed Defendant at Baptist Hospital. Defendant was coherent and able to answer questions after being read his Miranda rights. Defendant waived his rights and began answering Officer Garrison's and Detective Reid's questions. Officer Garrison and Detective Reid took the following statement from Defendant:

> Me and Katarria last night, me and Katarria Moyer, my girlfriend, just left her house, I think. I'm not sure what we were doing, but she lives in Draper. I had been drinking, but only a couple of beers and a shot or two of apple brandy.
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> Then all of a sudden, I saw blue lights behind me, and then, I panicked. Instead of stopping, I just tried to get home. I live on Murray Drive at the trailer park up off NC-14.
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> I don't know how fast I was going, but I don't think it goes that fast. I don't remember anything about the wreck, except that I was driving and Katarria was in the passenger's seat. I didn't really come to until I got here at Baptist Hospital. I don't remember taking a helicopter ride from Morehead Hospital.
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> The reason I didn't stop was because of my past experience with the law. I've made some mistakes in my life. I've got locked up for almost four years when I was younger for some felonies. I don't remember what they were exactly.

After Defendant's statement, Officer Garrison and Detective Reid executed a search

warrant and acquired samples of Defendant's blood. This statement was read to the jury at trial.

¶ 9 On November 18, Detective Reid and another detective returned to the hospital to speak with Defendant again. Both detectives wore body cameras. When Detective Reid and the other detective spoke with Defendant the second time, he was recovering from surgery and was wearing a neck brace. The body camera footage was presented into evidence at trial and showed the following: Defendant told the detectives he was supposed to "answer to a charge in Virginia on a VOP" and was concerned he would receive a "failure to appear." Detective Reid asked if Defendant was referring to a "probation violation," and Defendant affirmed, elaborating it was "where he was on parole at." Defendant denied having a parole officer, explaining Virginia had released him from parole but "just want me to answer to a charge." Defendant added that "they can come up with anything they want to come up with. Hell, I did five years, and they took my life from me when I was . . . younger." When asked if Virginia had served Defendant with any paperwork, he replied, "they gave me a subpoena."

¶ 10 On April 14, 2021, a jury found Defendant guilty on all charges. The same day, Defendant stipulated to his prior convictions in Virginia, and the trial court found Defendant to have a prior record level of 2. The trial court arrested judgment on felony death by motor vehicle and sentenced Defendant to 180 to 228 months for second-degree murder and 8 to 19 months for felony fleeing and eluding arrest by

motor vehicle. The trial court ordered the sentences to run consecutively.

¶ 11 On November 19, 2021, Defendant filed a pro se "Notice of Appeal and Motion for Appellant Counsel." Defendant did not specify to which court appeal was taken, failed to include file number 17CRS52819, and did not include a certificate of service indicating the notice of appeal had been served upon the State. Defendant, concurrent with his brief, filed a petition for writ of certiorari seeking review of his case in the event the appeal was deficient under North Carolina Rule of Appellate Procedure 4.[1]

II. Jurisdiction

¶ 12 As an initial matter, we must determine whether this court has jurisdiction to review Defendant's appeal. An appeal in a criminal case may be taken by an "oral notice of appeal at trial[]" or filing a written notice of appeal within 14 days after judgment. N.C. R. App. P. 4(a). A written notice of appeal must "specify the party or parties taking the appeal; . . . designate the judgment or order from which appeal is taken and the court to which appeal is taken; . . . [be] signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record[]"; serve copies of the appeal upon all parties to the appeal; and state

[1] On December 2, 2021, Defendant filed a motion to withdraw the third issue argued in his appellant brief: The trial court erroneously determined Mr. Martin's prior record Level when it assigned two points- Mr. Martin's only points- based on a Virginia conviction without determining if the out-of-state conviction was substantially similar to a felony offense in North Carolina. Our clerk of court entered an order the following day granting Defendant's motion.

to which appellate court the appeal is taken. N.C. R. App. P. 4(b)-(d). Where Defendant had a statutory right of appeal in the case *sub judice*, he forfeited this right of appeal when his notice of appeal failed to specify the court to which his appeal is taken, failed to include file number 17CRS52819, and did not include a certificate of service indicating service upon the State.

¶ 13 Defendant now petitions this court for a writ of certiorari to review his case. This Court may grant a writ of certiorari "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[] . . . ." N.C. R. App. P. 21(a)(1); s*ee State v. Ore*, 2022-NCCOA-380, ¶ 15 ("Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." (emphasis omitted)). Notably, this court has granted a *pro se* defendant writ of certiorari notwithstanding the failure to comply with Rule 4. *See State v. Crawford*, 225 N.C. App. 426, 427, 737 S.E.2d 768, 769 (2013). In our discretion, we grant Defendant's petition for writ of certiorari to reach the merits of his appeal.

III. Discussion

¶ 14 Defendant raises several issues on appeal; each will be addressed in turn.

A. Evidence Regarding Defendant's Prior Felony Convictions and Incarcerations

¶ 15 Defendant first argues the trial court plainly erred by admitting portions of his

November 17 written statement and November 18 interview with Detectives. We disagree.

¶ 16 We review Defendant's first assignment of error for plain error because defense counsel did not object to the introduction of this evidence at trial. *See* N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error."). Moreover, the party asserting plain error bears the burden of proof. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) ("Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.")

¶ 17 A plain error occurs when, after examining the whole record,

> 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) (cleaned up) (quotation omitted); *see* Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333. A "plain error review

should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[] . . . ." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333.

¶ 18 In this case, Defendant argues that admitting the portions of the November 17 written statement and November 18 discussion regarding his prior felony convictions and incarceration were irrelevant and overly prejudicial as to rise to the level of plain error, citing N.C. Gen. Stat. § 8C-1 Rule 402 and Rule 404(b). *See* N.C. Gen. Stat. § 8C-1 R. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible."); N.C. Gen. Stat. § 8C-1, R. 404(b) ("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."). Although Defendant correctly cited North Carolina rules of evidence, his failure to preserve these arguments for appeal requires us to review this issue for plain error. *See State v. Perkins*, 154 N.C. App. 148, 153, 571 S.E.2d 645, 648 (2002) ("[W]e must review defendant's argument for plain error rather than under this standard because defendant failed to properly preserve the issue for appeal.").

¶ 19 After a careful review of the record, we conclude Defendant failed to meet his burden of proof and show absent the admission of portions of his November 17 written

statement and November 18 discussion, "the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697. At trial, Officer Garrison testified he recorded Defendant driving above the speed limit, attempted to initiate a traffic stop, and observed Defendant attempt to evade him and speed down a few streets. According to Officer Garrison, Defendant reached a top speed of 105 mph before spinning out of control and crashing into an embankment next to the road. When Officer Baez approached Defendant at the accident scene, he saw Defendant and Moyer, beer bottles inside and around the vehicle, and noticed a "strong odor of alcohol coming from[]" Defendant. Additionally, Hairston testified that she was on the phone with Moyer during Officer Garrison's pursuit of Defendant, and overheard Moyer tell Defendant to "pull over" and "just stop."

¶ 20 Moreover, the unchallenged portions of Defendant's November 17 written statement provide ample evidence to support the jury's ultimate finding of guilt. Regarding Defendant's November 17 written statement, he admitted:

> Me and Katarria last night, me and Katarria Moyer, my girlfriend, just left her house, I think. I'm not sure what we were doing, but she lives in Draper. I had been drinking, but only a couple of beers and a shot or two of apple brandy.
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> Then all of a sudden, I saw blue lights behind me, and then, I panicked. Instead of stopping, I just tried to get home. I live on Murray Drive at the trailer park up off NC-14.

> I don't know how fast I was going, but I don't think it goes that fast. I don't remember anything about the wreck, except that I was driving and Katarria was in the passenger's seat. I didn't really come to until I got here at Baptist Hospital. I don't remember taking a helicopter ride from Morehead Hospital.

In other words, Defendant admitted to drinking and driving, fleeing from Officer Garrison, and wrecking the vehicle with Moyer inside.

¶ 21 We conclude Defendant has failed to show that but for the portions of his November 17 written statement and November 18 discussion regarding his prior felony convictions and incarceration, there was a probable degree of certainty the jury would have reached a different outcome at trial. "The evidence presented at trial was sufficient for the jury to convict defendant absent the admission of the evidence in question." *Perkins*, 154 N.C. App. at 156, 571 S.E.2d at 650 (2002). Given the overwhelming evidence of Defendant's guilt, we hold the trial court did not plainly err by admitting the challenged portions of Defendant's November 17 written statement and November 18 discussion.

B. Ineffective Assistance of Counsel

¶ 22 Next, Defendant argues on appeal he received ineffective assistance of counsel because his trial attorney failed to request portions of his November 17 written statement and November 18 discussion regarding his prior felony convictions and incarcerations be redacted.

¶ 23 As a general rule, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001); *see State v. Hernandez*, 227 N.C. App. 601, 609, 742 S.E.2d 825, 830 (2013). This Court prefers a motion for appropriate relief over a direct appeal because "[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000). Indeed, only when all aspects of the relationship between defendant and his trial counsel are examined "can it be determined whether counsel was reasonably likely to render effective assistance." *Id.* (quotation omitted). Therefore, an ineffective assistance of counsel claim is properly placed in superior court as it can "assess the allegations in light of all the circumstances known to counsel at the time of the representation." *Id.* (citation omitted).

¶ 24 Based on the foregoing, we conclude Defendant improperly raised his ineffective assistance of counsel argument directly on appeal. Rather, this issue should have been raised in a motion for appropriate relief with the Superior Court. Accordingly, we dismiss Defendant's ineffective assistance of counsel argument without prejudice to his right to file a motion for appropriate relief.

IV. Conclusion

¶ 25 Because Defendant failed to prove that absent the admission of portions of his November 17 written statement and November 18 discussion, the jury would have reached a different result, we hold the trial court did not plainly err by admitting such evidence. We dismiss Defendant's ineffective assistance of counsel argument without prejudice to his right to file a motion for appropriate relief.

¶ 26 NO ERROR in part; DISMISSED WITHOUT PREJUDICE in part.

Chief Judge STROUD and Judge ARROWOOD concur.

Report per Rule 30(e).