

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-189

Filed 07 March 2023

New Hanover County, No. 16 CRS 60436

STATE OF NORTH CAROLINA

v.

HERNAN FLORES-CONTRERAS, Defendant.

Appeal by defendant from judgment entered on or about 20 August 2021 by Judge William W. Bland in Superior Court, New Hanover County. Heard in the Court of Appeals 20 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Leslie Rawls for defendant-appellant.

STROUD, Chief Judge.

Defendant Hernan Flores-Contreras appeals from a judgment for felony hit and run with serious injury or death and misdemeanor death by vehicle entered following a jury trial. Because Defendant failed to timely object to expert testimony on the same grounds he now argues on appeal, he did not preserve the issue for appellate review. Because Defendant also failed to argue plain error in his brief, we

do not review the issue on that ground. Even if we undertook a plain error review, we would find no plain error because of the overwhelming evidence against Defendant on the same issue about which the expert witness testified.

I. Background

The State's evidence at trial tended to show on the morning of 30 December 2016 Defendant was driving in his van to work on a straight, flat stretch of road in Wilmington with clear weather and visibility. While driving on this stretch of road, Defendant fell asleep, veered "off the road[;]" and hit a man who was walking alongside the road. Not realizing he had hit a person, Defendant drove his van back home. When paramedics arrived at the scene, the man Defendant had hit was already dead.

One of the first police officers on the scene called for the Wilmington Police Department's traffic unit, and Officer Dwayne Ouellette and Detective Kevin Getman responded. After finding out the man who had been hit was dead, Officer Ouellette "started looking for any type of evidence" he could find. Officer Ouellette saw: "tire tracks that had went off the road[;]" clothing fibers from the victim's clothes located in the driveway of a business from when his body "came in contact with the ground[;]" and tread marks in the dew on the grass. Taking into account all those pieces of evidence, Officer Ouellette "could see a definitive [straight] line between where" the car that left the tire tracks started and where the victim's body lay. Officer Ouellette then used paint to preserve the straight line he saw because the tire tread

in the dew, which did not extend to the underlying grass, “wouldn’t last long.” As Officer Ouellette investigated the scene, Detective Getman assisted, using his training and expertise in crash and accident reconstruction.

After finishing the investigation at the scene, Officer Ouellette and Detective Getman notified the victim’s girlfriend of his death. While Officer Ouellette and Detective Getman made that notification, another officer called to tell them he found relevant video footage from a business near the incident site. The video footage depicted the victim “walking down the side of the street” and then, two-and-a-half to three minutes later, a vehicle “matching the description of” Defendant’s van.

Contemporaneously with the police investigation, Defendant undertook several actions. After driving his van home, Defendant took his other car to go to work. On his way to work after switching vehicles, Defendant “saw a body on the ground” in the same area he had hit something that morning. Upon seeing the body, Defendant “was nervous and felt scared,” so he called his pastor to ask for advice. Defendant’s pastor told Defendant to go home and the pastor would find an attorney, but Defendant decided to go back to work until the pastor found an attorney because he was “just going to be worried” at home. Then, Defendant’s attorney contacted the traffic unit to set up an interview because Defendant “felt bad for what happened.”

After arranging for a traffic unit officer to be a Spanish-language interpreter at the request of Defendant’s attorney, Officer Ouellette interviewed Defendant and recorded the interview on his body camera. During the interview, Defendant

explained he had been driving to work, fallen asleep, hit something, and woke up to see he was “off the road.” Defendant also recounted how he went home after the incident, switched vehicles, saw a body by the side of the road while driving back to work, and then received advice from his pastor. During the interview, Officer Ouellette also asked Defendant about the vehicle he was driving at the time of the incident and received a description of and location for the van, which he then obtained permission to “search” and “[i]nspect[.]”

Officer Ouellette gave the information about Defendant’s van and where it could be found to Detective Getman, and Detective Getman went to Defendant’s house to find the van. Detective Getman found the van “in the driveway, and it had damage consistent with having an accident” with a pedestrian.

On or about 9 September 2019, Defendant was indicted on charges of: misdemeanor death by motor vehicle; felony hit and run with injury, namely death; and failure to maintain lane control. On 3 August 2021, the State filed a “Notice of Expert Testimony” indicating it would offer Detective Getman as an expert in “crash reconstruction” at trial.

The trial began on 16 August 2021. At the start of trial, the State decided to not proceed on the failure to maintain lane control charge. At trial, the State called the victim’s girlfriend, a paramedic, Officer Ouellette, and Detective Getman to testify about the incident and resulting investigation as discussed above. The State also had a pathologist testify about his findings from the victim’s autopsy.

As part of his testimony, Detective Getman was qualified as an expert witness “in the field of accident or crash reconstruction and investigation.” After a *voir dire* of Detective Getman’s expert testimony, Defendant’s attorney argued Detective Getman’s testimony was too speculative to be relevant and therefore the testimony was inadmissible. Defendant’s attorney specifically challenged the asserted “speculative” and therefore “irrelevant” nature of Detective Getman’s opinion that the victim was off the road when he was hit. After highlighting Defendant had not “timely filed” a “proper suppression motion[,]” the State argued it had presented enough “tangible” evidence to withstand Defendant’s challenge. Also noting Defendant never filed a suppression motion, the trial court denied any motion, “if there[] [was] a motion,” with respect to Detective Getman’s testimony, but it added Defendant could “argue the strength of the evidence” and noted Defendant was planning to have his own expert testify. The court then took a brief recess.

After the recess but before the jury came back into the courtroom, Defendant’s attorney “object[ed] to the presentation of Detective Getman’s testimony[.]” The trial court told Defendant’s attorney he could make that objection “on the record when we get going,” but Defendant did not raise the objection again. Specifically, Detective Getman testified in his expert opinion the victim “was struck somewhere within” the business’s driveway where clothing fibers were found, “which would be off the roadway[.]” but Defendant’s attorney did not object to that testimony.

At trial, Defendant also presented evidence. Specifically, Defendant’s pastor

testified Defendant had a reputation as a “man of his word” and testified about his interactions with Defendant the day of the incident. Defendant’s own accident reconstruction expert testified he could not determine where the impact between Defendant’s van and the victim happened, specifically whether it was on or off the road. Further, an attorney who was driving on the same stretch of road as the incident occurred along testified that about ten to twenty minutes before the incident he passed a person “significantly in the roadway[,]” and he had to take “significant evasive action” to avoid hitting the person. Finally, Defendant testified, in pertinent part, when he woke up after falling asleep while driving to work he was “going forward on [his] lane, on the road” and “did not notice” ever going off the road.

The jury ultimately found Defendant guilty of both misdemeanor death by motor vehicle and felonious hit and run with death. On or about 20 August 2021, the trial court entered judgment on both convictions and sentenced Defendant to 12 to 24 months in prison, with all but 6 months suspended, and 36 months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Analysis

In his sole argument on appeal, Defendant contends the “trial court erred by overruling [his] objection to expert opinion testimony from Detective Getman, because the testimony did not satisfy the requirements of the Rules of Evidence[,]” specifically Rule 702, “and *Daubert v. Merrell Dow Pharmaceuticals*[,]” 509 U.S. 579, 125 L.Ed.2d 469 (1993). Specifically, Defendant argues the trial court erred by

allowing Detective Getman to “testify that in his expert opinion” the victim “was struck off the road.” Defendant also argues he “was harmed” by the admission of this “improper expert testimony.”

Rule of Evidence 702(a) allows expert opinion testimony if three requirements are met:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Because those three requirements include “virtually the same language” as the corresponding federal rule, Rule 702(a) “incorporates the standard from the *Daubert* line of cases[,]” which was based on the federal rule. *State v. McGrady*, 368 N.C. 880, 884, 888, 787 S.E.2d 1, 6-8 (2016). Thus, Defendant’s argument under “the Rules of Evidence” is the same as his argument under *Daubert*.

Within the three requirements of Rule 702(a), Defendant specifically argues Detective Getman’s testimony “failed the second two prongs of the rule[,]” *i.e.* (2) and (3) above. Defendant contends Detective Getman “testified only to what he observed and what he concluded” and not to “the reliability of his principles and methods or how he applied them to the facts.” After addressing the standard of review, we turn to Defendant’s contentions.

A. Standard of Review

Defendant and the State argue for different standards of review. Defendant asserts the standard of review is abuse of discretion based on *State v. Corbett*, 376 N.C 799, 824, 855 S.E.2d 228, 247 (2021). The State, on the other hand, contends “[t]he admissibility of evidence at trial is a question of law and is reviewed *de novo*[.]” with citation to *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009). The State’s citation to *Wilkerson* is misplaced because that case recites a *de novo* standard of review when discussing a motion to suppress the seizure of the defendant’s cell phone rather than an evidentiary issue related to expert opinion testimony. *See Wilkerson*, 363 N.C. at 433-34, 683 S.E.2d at 205.

As Defendant argues, “[a] trial court’s ruling as to the admissibility of proffered expert testimony will not be reversed on appeal absent a showing of abuse of discretion.” *See State v. Thomas*, 281 N.C. App. 159, 170, 867 S.E.2d 377, 388 (2021) (quoting *Corbett*, 376 N.C. at 824, 855 S.E.2d at 247), *disc. review denied* ___ N.C. ___, 878 S.E.2d 808 (2022). “A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.” *Id.* (brackets omitted) (quoting *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11).

B. Preservation

Before addressing the merits of Defendant’s argument, the State argues “Defendant failed to object when the testimony at issue was admitted before the jury and this issue has been waived.” The State later argues Defendant never made his

argument about Rule 702, *Daubert*, and the alleged lack of reliability of the expert's methodology before the trial court. Both of these arguments relate to whether Defendant preserved his argument for appellate review, so we review them to determine whether we can reach the merits of Defendant's appeal or whether he has waived such appellate review. *See* N.C. R. App. P. 10(a)(1) (setting out requirements for a party to "preserve an issue for appellate review"); *State v. Smith*, 269 N.C. App. 100, 104-05, 837 S.E.2d 166, 169 (2019) (holding the defendant "waived appellate review" for unpreserved issues).

"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). As a corollary to this requirement, our Courts have long held a party must argue the same theory in the trial court to preserve it for review on appeal. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.'" (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934))); *State v. Spence*, 237 N.C. App. 367, 369, 764 S.E.2d 670, 674 (2014) (applying same requirement for appeals to this Court). Thus, to preserve an argument for appellate review, a defendant must: (1) make a timely objection and (2) argue the same theory as before the trial court.

See N.C. R. App. P. 10(a)(1); *Spence*, 237 N.C. App. at 369, 764 S.E.2d at 674.

Here, Defendant did not preserve the issue based on either requirement. First, he failed to make a timely objection under Rule of Appellate Procedure 10(a)(1). *See* N.C. R. App. P. 10(a)(1). Interpreting Rule 10(a)(1), our Courts have explained:

To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony is insufficient.

State v. Snead, 368 N.C. 811, 816, 783 S.E.2d 733, 737-38 (2016) (citations and quotation marks omitted). For example, in *Snead*, our Supreme Court held the defendant “failed to preserve the alleged error for appellate review” when he only objected to testimony “outside the presence of the jury” and “did not subsequently object when the State elicited [the witness’s] testimony before the jury.” *Id.* at 816, 783 S.E.2d at 738.

Similar to *Snead*, Defendant failed to object in the presence of the jury. *See id.* Most of the argument by Defendant’s attorney against the admission of Detective Getman’s testimony about where the victim was struck occurred during an explicit *voir dire* on the issue. The only other time Defendant objected was when Detective Getman was preparing to resume his testimony, and at that time the jury had not yet returned following a recess. Critically, Defendant did not object when Detective Getman testified before the jury, “My opinion is that [the victim] was struck somewhere within this driveway . . . which would be off the roadway.” Because

Defendant only objected to Detective Getman's testimony "outside the presence of the jury" and "did not subsequently object when the State elicited [Detective Getman's] testimony before the jury[.]" Defendant "failed to preserve the alleged error for appellate review[.]" *Id.*

Defendant also did not argue the same theory before the trial court he now advances on appeal and thus failed to preserve the issue on those grounds. *See Spence*, 237 N.C. App. at 369, 764 S.E.2d at 674 (requiring a theory argued on appeal to have been raised in the trial court to preserve it). Below, Defendant's attorney repeatedly argued the trial court should bar Detective Getman's testimony because it was: "hypothetical[.]" "conjecture[.]" "speculative[.]" and otherwise lacked "certainty[.]" Defendant's attorney consistently asserted the uncertain nature of the testimony rendered it irrelevant. Thus, at trial, Defendant advanced the theory the evidence should be excluded as irrelevant because it was too speculative or indeterminate to make "any fact that [was] of consequence . . . more or less probable[.]" *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2015) (so defining "[r]elevant evidence"). Since Defendant's argument before the trial court focused only on relevancy, it necessarily did not focus on reliability under Rule 702 and *Daubert*. We will not now allow Defendant to "swap horses between courts in order to get a better mount[.]" *Spence*, 237 N.C. App. at 369, 764 S.E.2d at 674 (citation and quotation marks omitted).

On appeal, Defendant contends his counsel stated the testimony was

“speculative” and therefore argued the evidence was not reliable because “*Merriam Webster’s Dictionary* defines speculative as ‘theoretical rather than demonstrable[.]’” This argument does not alleviate Defendant’s failure to object in the presence of the jury.

Further, we reject Defendant’s attempt to convert his argument before the trial court about the testimony’s “speculative” nature to an argument as to its reliability in the context of Rule 702. Defendant’s arguments before the trial court did not address factors under Rule 702. In *McGrady*, our Supreme Court listed a number of factors “that can have a bearing on reliability” in the context of Rule 702. *McGrady*, 368 N.C. at 890-91, 787 S.E.2d at 9-10. These factors include: “whether a theory or technique can be (and has been) tested;” “[w]hether the expert has adequately accounted for obvious alternative explanations[.]” or the “expert’s professional background in the field[.]” *Id.* (citations, quotation marks, ellipses and brackets omitted). These factors relate to whether a technique, as applied by the expert, can be trusted. Additionally, Defendant’s attorney below explained he used the term “speculative” to mean irrelevant. For example, Defendant’s attorney summarized his request to the trial court as follows: “I’m asking you to exclude that testimony because it’s too speculative. It’s not – it’s irrelevant.” As a result, we reject Defendant’s argument on appeal his attorney’s focus on speculation was premised on a concern about reliability under Rule 702 and *Daubert*. Because Defendant did not

timely object and did not object based on Rule 702 and *Daubert* below, he has not preserved this issue for appellate review.

C. Plain Error

In criminal cases, a defendant's failure to properly object does not always end appellate review because a challenged action on an evidentiary or jury instruction matter "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." N.C. R. App. P. 10(a)(4) (setting out general rule on plain error); *see State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (limiting plain error to "unpreserved instructional or evidentiary error"). Defendant's Conclusion—formatted as a prayer for relief—asks this Court to "[h]old the court erred *and committed plain error* by admitting the opinions" of Detective Getman "because the testimony did not satisfy the requirements of the Rules of Evidence and *Daubert*["] (Emphasis added.) But Defendant never argues plain error in the body of his brief. The State argues Defendant's failure to raise "plain error in his brief" and lack of "authority for the same" requires "his argument [be] deemed abandoned["]

We agree with the State; Defendant has waived his plain error argument about Detective Getman's expert testimony. Rule of Appellate Procedure 10(a)(4), which permits plain error review, requires a defendant to "specifically and distinctly contend[]" an error "amount[ed] to plain error." N.C. R. App. P. 10(a)(4). Our Supreme Court has previously ruled a defendant's "empty assertion of plain error,

without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule.” *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000). In *Cummings*, the defendant “waived appellate review” by “effectively fail[ing] to argue plain error” when he “simply rel[ied] on the use of the words ‘plain error’ as the extent of his argument in support of plain error[.]” *Id.*

Here, Defendant has likewise tried to rely on the words “plain error” alone in his conclusion instead of making any argument. *Id.* Put another way, Defendant has not provided any reason or support for his contention the error here amounts to plain error. While Defendant argues the trial court erred and that he was harmed by the error, he never argues under the distinct plain error standard.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

Thomas, 281 N.C. App. at 181, 867 S.E.2d at 394 (brackets in original) (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). Specifically, Defendant never explains how “the error had a probable impact on the jury’s finding” he was guilty with reference to plain error. *See id.* Defendant merely argues he “was harmed” by Detective Getman’s testimony since it was the “primary evidence” Defendant “was off

the road when he struck” the victim. Without any argument about prejudicial impact or plain error in general beyond the words “plain error” in his conclusion, Defendant has waived his plain error argument on appeal. *See Cummings*, 352 N.C. at 637, 536 S.E.2d at 61.

Even if we were to review Defendant’s plain error argument, we would still find no plain error based upon the other evidence presented. As Defendant acknowledges, Detective Getman’s testimony was not the only evidence Defendant was off the road when he struck the victim. First, Defendant told police in his interview the day of the incident that he “was off the road” when he looked up after hitting the victim. The jury also watched the recording of that same interview. Finally, Officer Ouellette testified he could draw a straight line from tire tracks that started on the road, through tread marks in the dew on the grass and clothing fibers from the victim’s clothes located in a business’s driveway, to the place where the victim’s body lay. Since the business driveway and the grass were off the road, this evidence also supports a conclusion Defendant’s vehicle was off the road when he hit the victim. Importantly, these facts about the straight line between the tire tracks, the other items, and the victim’s body are the same ones on which Detective Getman based his expert opinion that Defendant struck the victim “off the roadway.” Thus, the State presented significant evidence, beyond Detective Getman’s expert testimony, Defendant was off the roadway when he struck the victim.

The significant other evidence in this case is relevant because “overwhelming evidence” undermines a defendant’s attempt to “show the prejudicial effect necessary to establish that the error was a fundamental error” and thus a plain error. *Lawrence*, 365 N.C. at 518-19, 723 S.E.2d at 334-35 (requiring a defendant to “demonstrate . . . fundamental error” for “error to constitute plain error” before stating, “In light of the overwhelming and uncontroverted evidence, [the] defendant cannot show that, absent the error, the jury probably would have returned a different verdict”). Because the State presented overwhelming additional evidence of Defendant being off the road when he struck the victim, including the same facts that underlie Detective Getman’s testimony, we would not find the trial court plainly erred even if Defendant had not abandoned his plain error argument.

III. Conclusion

Because Defendant did not timely object to Detective Getman’s expert testimony or object on the basis of Rule 702 and *Daubert*, he did not preserve the issue for appellate review. Further, we do not review the issue for plain error because Defendant failed to argue plain error in his brief beyond the words “plain error” in his conclusion and thereby waived the argument. Even if we did review the expert testimony issue for plain error, we would find no plain error because of the other overwhelming evidence Defendant was off the road when he struck the victim.

NO ERROR.

Judge ZACHARY concurs.

STATE V. FLORES-CONTRERAS

Opinion of the Court

Judge MURPHY concurs in Parts II-A and II-B, concurs in result only in Part II-C.

Report per Rule 30(e).