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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-887

Filed 16 May 2023

Pender County, No. 21CRS50192

STATE OF NORTH CAROLINA

v.

RANDY TYLER MICHAEL TURNER, Defendant.

Appeal by defendant from judgment entered 2 December 2021 by Judge Tiffany Peguise-Powers in Pender County Superior Court. Heard in the Court of Appeals 25 April 2023.

*North Carolina Prisoner Legal Services, Inc., by Lee Matthew Pollack, for defendant-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General William Walton, for the State-appellee.*

GORE, Judge.

Defendant Randy Turner appeals from the final judgment of a superior court upon his conviction for fleeing to elude arrest and reckless driving to endanger. Defendant raises two issues on appeal: (1) whether the trial court deprived defendant of his constitutional right to a properly constituted jury by substituting an alternate

juror after deliberations had begun; and (2) whether the trial court deprived defendant of his constitutional right to be present at every essential stage of the trial against him.

Defendant's *pro se* notice of appeal is defective; we must therefore dismiss defendant's appeal for failure to comply with Rule 4 of the North Carolina Rules of Appellate procedure. In our discretion, we decline to issue our writ of certiorari to reach the merits of defendants unpreserved constitutional arguments on appeal.

I.

Defendant was indicted on one count each of fleeing to elude arrest, communicating threats, and reckless driving to endanger. This case came on for trial at the 29 November – 3 December 2021 Criminal Session of Pender County Superior Court. The original jury was charged and began deliberations on 1 December 2021. The following morning, the trial court found that a juror was missing:

THE COURT: Good morning. As you know, we're missing Juror No. Six. And unless there's an objection, we will substitute our alternate for Juror No. 6 and ask that they begin the deliberations anew. And that's the plan.

[DEFENSE COUNSEL]: No objection.

[PROSECTUOR]: No objection from the State.

THE COURT: Thank you. So we'll bring in the jurors, make that brief announcement about the substitution, do the instruction, send them out and do the plea.

[DEFENSE COUNSEL]: Your Honor, may I get my client?

THE COURT: Yes.

STATE V. TURNER

*Opinion of the Court*

(Defendant and all counsel are present.)

(Jury returns to courtroom at 10:12 a.m. and the following proceedings were had in their presence.)

THE COURT: Let the record reflect that the jury is present. And we are substituting the alternate for Juror No. 6.

So that will be your new seat.

An alternate juror has been substituted for the excused Juror No. 6. You should not speculate about the reason for the substitution. The law of this state grants the defendant the right to a unanimous verdict reached only after full participation of the 12 jurors who ultimately returned a verdict.

That right may only be assured if the jury begins deliberations anew; therefore, you must restart your deliberations from the beginning. This means you should disregard entirely any deliberations taken place before the alternate juror was substituted and consider freshly the evidence as if the previous deliberations had never occurred.

Although starting over may seem frustrating, please do not let it discourage you. It is important to our system of justice that each juror has a full and fair opportunity to explore his or her views and respond to the views of others so that you may come to a unanimous verdict. All the previous instructions given to you, including the unanimity requirement for a verdict, remain in effect.

You should now retire for your deliberations in accordance with the instructions previously given. Thank you.

After 30 minutes of deliberations, the jury returned guilty verdicts on the charges of fleeing to elude and reckless driving, but acquitted defendant on the charge of communicating threats. The trial court imposed a consolidated sentence of 5 – 15

months of imprisonment, suspended for 18 months of supervised probation with a 7-day split sentence to be served at the discretion of the probation officer. Defendant filed *pro se* written notice of appeal on 13 December 2021.

## II.

### A.

We first note that defendant's notice of appeal is defective. "In criminal cases, a party entitled to appeal a judgment must take appeal by either (1) giving oral notice at trial or (2) filing written notice with the clerk of superior court and serving copies of that notice on all adverse parties within fourteen days." *State v. Rowe*, 231 N.C. App. 462, 465, 752 S.E.2d 223, 225 (2013) (citing N.C.R. App. P. 4(a)). "Written notice of appeal must specify the party or parties taking the appeal, designate the judgment or orders from which appeal is taken and the court to which appeal is taken, and be signed by counsel of record or a *pro se* defendant." *Id.* (citing N.C.R. App. P. 4(b)). Defendant failed to properly designate the judgment appealed, the court to which appeal is taken, and did not indicate service upon the State. Accordingly, we must dismiss defendant's appeal for noncompliance with Appellate Rule 4. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (2005) ("[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal.").

### B.

Defendant also filed a petition for writ of certiorari along with his brief. Defendant requests this Court permit review of the trial court's judgment pursuant

to N.C.R. App. P. 21, N.C. Gen. Stat. §§ 15A-1444 and 1-269, in the event we determine that he waived his right to appeal the trial court’s judgment. “A writ of certiorari is an *extraordinary* remedial writ to correct errors of law, and its issuance is only appropriate when a defendant has shown merit in his arguments concerning the action to be reviewed or that error was probably committed below.” *State v. Diaz-Tomas*, 382 N.C. 640, 651, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2022) (internal quotation marks and internal citations omitted). “A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals.” *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) (internal quotation marks and citation omitted). Likewise, Rule 2 of the Rules of Appellate Procedure may be “applied in the discretion of the Court . . . to consider, in *exceptional circumstances*, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.” *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (emphasis added) (citation omitted).

Our review of defendant’s petition, the parties’ briefs, and the arguments contained therein reveal no such exceptional circumstance or merit otherwise shown. In the exercise of our discretion, we decline to issue our writ to reach the merits of defendant’s unpreserved constitutional arguments on appeal.

*1.*

First, defendant argues the trial court violated his constitutional right to a

properly constituted jury. Effective 1 October 2021, the General Assembly amended N.C. Gen. Stat. §§ 15A-1215 and 15A-1221 to permit an alternate juror to replace a regular juror after deliberations have begun. 2021 N.C. Sess. Laws 374, 374-75, ch. 94, §§ 1-2. The General Assembly added, among other language, the following: “[i]f an alternate juror replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.” N.C. Gen. Stat. § 15A-1215(a) (2021). Defendant asserts the General Assembly’s 2021 amendment to N.C. Gen. Stat. § 15A-1215(a) is unconstitutional.

Defendant cites to *State v. Ashe*, for its general rule that where “the error violates [a] defendant’s right to a trial by a jury of twelve, [a] defendant’s failure to object is not fatal to his right to raise the question on appeal.” 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citations omitted). However the Court’s holding in *Ashe* on the issue of preservation was based on the well-established principle that “when a trial court *acts contrary to a statutory mandate* and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.” 314 N.C. at 39, 331 S.E.2d at 659 (emphasis added). The Court in *Ashe* addressed the question of whether the trial court failed to comply with the statutory mandate in N.C. Gen. Stat. § 15A-1233(a). *Id.* at 40, 331 S.E.2d at 659. This statutory mandate, and Article 1, Section 24 of the North Carolina Constitution, imposed dual requirements on the trial court.

In this case, defendant does not argue that both N.C. Gen. Stat. § 15A-1215(a) and our State Constitution impose dual requirements, or that the trial court failed to comply with those dual requirements. Instead, defendant purports to raise—for the first time on appeal—a belated facial constitutional challenge to N.C. Gen. Stat. § 15A-1215(a). This he is not permitted to do. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted) (“Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.”).

**2.**

Next, defendant argues the trial court denied his right to be present at every stage of his trial by dismissing a juror while he was outside the courtroom. “The right of confrontation, as guaranteed by Article I, Section 23 of the North Carolina Constitution extends to all times during the trial when anything is said or done which materially affects defendant as to the charge against him.” *State v. Thompson*, 359 N.C. 77, 113, 604 S.E.2d 850, 875 (2004) (internal quotation marks and citation omitted). “The failure to object at trial to the alleged denial of such a right constitutes waiver of the right to argue the denial on appeal.” *State v. Miller*, 146 N.C. App. 494, 501, 553 S.E.2d 410, 415 (2001) (citations omitted).

In this case, the transcript shows defendant was not in the courtroom during the trial judge’s colloquy with counsel about the absence of juror number six. When the trial court informed counsel of its intention to substitute an alternate juror, defense counsel raised no objection. Defendant returned to the courtroom and was

present when the trial court substituted the alternate juror and instructed the jury to begin deliberations anew. “[D]efense counsel had the opportunity and obligation to raise for the record any matter to which defendant took exception.” *State v. Blakeney*, 352 N.C. 287, 306, 531 S.E.2d 799, 814 (2000) (internal quotation marks and citation omitted). Defendant abandoned his constitutional argument where the record reveals he raised it for the first time on appeal. *Miller*, 146 N.C. App. at 501, 553 S.E.2d at 415.

**III.**

For the foregoing reasons, we dismiss defendant’s appeal for lack of jurisdiction. In the exercise of our discretion, we decline to issue our writ of certiorari to reach the merits of defendant’s two unpreserved constitutional issues on appeal.

DISMISSED.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).