

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-876

Filed 15 August 2023

Bladen County, No. 20 CRS 50381

STATE OF NORTH CAROLINA

v.

RICHARD DA'JAUN BRYANT

Appeal by Defendant from a judgment entered 29 September 2021 by Judge Douglas B. Sasser in Bladen County Superior Court. Heard in the Court of Appeals 7 March 2023.

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

*William D. Spence, for Defendant.*

WOOD, Judge.

Defendant appeals from a jury conviction for discharging a weapon into occupied property. Defendant argues the trial court erred by delivering a jury instruction on flight. Defendant's notice of appeal was untimely. He asks this court to issue a *writ of certiorari* in order to address his appeal. For the reasons outlined below, we grant Defendant's petition for *writ of certiorari*. We conclude the trial court

did not err.

### **I. Background**

On 8 April 2020, Keelo Daniels (“Daniels”) and Defendant argued. Later that day, Defendant drove by Daniels’s house and blew his horn, prompting Daniels to get into his car and drive to where Defendant was living. Once there, Daniels saw Defendant run to his car and grab an AK-47. He next heard a gunshot. Defendant testified at trial that he shot into the car while Daniels was still in the driver’s seat. As Daniels got out of his car, Defendant’s girlfriend, Tanaisa Bowen, and her brother, Byron Bowen, pulled Defendant into their apartment. Daniels was uninjured but later discovered a bullet hole above the gas tank of his car.

After this incident, Defendant left the area and traveled to his father’s residence in Columbus County. Defendant’s father told him that there may be a warrant for his arrest and urged his son to stay with him. Defendant never informed police of his whereabouts. He stayed with his father until law enforcement found him and arrested him.

Defendant was charged with discharging a firearm into an occupied dwelling/moving vehicle on 8 April 2020. At trial and during the charging conference, the State requested an instruction as to flight.

THE COURT: Is the State asking for an instruction as to flight?

[PROSECUTOR]: Yes, Judge.

THE COURT: [Defense Counsel], that will be 104.35. Wish to be heard regarding that proposed instruction?

[DEFENSE COUNSEL]: Well, Judge, I mean, we would prefer that it be not in there is all I can say. I don't think his – I assume you're talking about him leaving afterwards on the thing, I would not consider that to be flight, since everything had terminated, the victim had left, and he didn't go to a place to conceal himself.

THE COURT: Based upon the evidence presented, the Court believes it will be an appropriate instruction, but [will] use the parenthetical language "the State contends," parenthetical, "and the defendant denies the defendant fled."

[DEFENSE COUNSEL]: Yes, sir.

Consistent with the trial court's decision, the following instruction was given:

The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of these circumstances is not sufficient in itself, to establish the defendant's guilt.

Following the trial court's charge to the jury, the court asked if there were any objections. None were made. The jury convicted Defendant on 29 September 2021 of discharging a firearm into occupied property, the lesser crime of discharging a firearm into an occupied motor vehicle in operation. The trial court sentenced Defendant the same day to 20-36 months, suspended for 36 months of supervised probation.

Defendant did not give oral notice of appeal from his conviction during sentencing or during the same session of court. Instead, Defendant gave oral notice of appeal through his defense counsel the next week on Monday, 4 October 2021. Defendant did not file a written notice of appeal.

## **II. Petition for Writ of Certiorari**

To properly execute a notice of appeal from a criminal judgment, a defendant must either (1) give “oral notice of appeal *at trial*” or (2) file a notice of appeal “within fourteen days after entry of the judgment.” N.C. R. App. P Rule 4(a) (emphasis added). Defendant gave oral notice of appeal, through counsel, five days *after* his trial and not during the same session of court. Thus, Defendant did not take timely action in appealing the judgment.

Under our rules of appellate procedure, this Court may issue a writ of certiorari to permit review of a judgment or order “when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. Rule 21(a)(1); *Kelly v. State*, 286 N.C. App. 23, 28, 878 S.E.2d 841, 847. We note that Defendant informed his attorney he wished to appeal his judgment two days after his sentencing and that his attorney noticed appeal five days after sentencing. We also note Defendant’s attorney appeared and noticed appeal before the same judge who had sentenced Defendant. In our discretion, we grant Defendant’s petition for *writ of certiorari* to reach the merits of this appeal.

## **III. Standard of Review**

When a defendant fails to object to jury instructions at a criminal trial, the defendant is entitled to relief only if he can show that the instructions complained of constitute plain error. *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990). To establish plain error, a defendant must show the erroneous jury instruction was a fundamental error. *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012). To show 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. *Id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

#### **IV. Discussion**

Defendant challenges the trial court’s jury instruction on flight. He argues the State did not present sufficient evidence of Defendant fleeing the scene of a crime to support this instruction. We disagree.

##### **A. Preservation**

For an alleged error with a trial court’s jury instruction to be properly preserved for appellate review, a defendant must object to the instruction before the jury retires. N.C. R. App. P. 10(a)(2) (2023). The objection must be stated “distinctly” and must state “the grounds of the objection.” *Id.*

Here, during the charge conference, the trial court asked Defendant’s trial counsel if he wanted to be heard on the proposed jury instruction on flight. Defendant’s trial counsel replied, “Well, Judge, I mean, we would prefer that it be not

in there is all I can say.” The trial court then amended the instruction to include language which indicated that Defendant denied the allegation of flight. Defendant’s counsel agreed to this modified language by responding, “Yes, sir.”

These statements, when read in conjunction with the trial court’s propositions, eliminate the possibility that Defendant lodged a distinct objection. Though trial counsel need not necessarily use the magical word “objection,” it still must be clear from the record that Defendant, through his counsel, actually objected to the instruction. Moreover, even if Defendant did properly object, such objection was recanted when the trial court added language to the instruction, and trial counsel replied, “Yes, sir,” without any further argument. Therefore, because Defendant did not properly preserve the issue for appeal, this Court may only review the instruction for plain error. *Cummings*, 326 N.C. at 315, 389 S.E.2d at 75.

## **B. Jury Instruction**

“A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that [a] defendant fled after the commission of the crime charged.” *State v. Bradford*, 252 N.C. App. 371, 377, 798 S.E.2d 546, 550 (2017) (quoting *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001)). An important element of flight includes evidence that a defendant took steps to evade apprehension. *Bradford*, 252 N.C. App. at 377, 798 S.E.2d at 550.

Here, the evidence tended to show that, after Defendant fired upon Daniel’s vehicle, he ran inside his apartment before traveling to his father’s home some

distance away. During trial, both Defendant and Tanasia Bowen testified they left the scene right after the incident. Defendant did not wait for police to arrive. Instead, Defendant went to his father's home where police later apprehended him.

The State cites *State v. Norwood* to great effect. “The fact that there may be other reasonable explanations for defendant’s conduct does not render the instruction improper.” *Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, (1996). Though the jury may conclude from the evidence that Defendant did not intend to evade police and merely sought advice from his father, the jury could have equally concluded from the evidence that Defendant’s travel to his father’s home was for the purposes of avoiding apprehension. Therefore, we hold the trial court’s instruction on flight does not meet the threshold of plain error. Further, even if the trial court incorrectly instructed the jury on flight, Defendant has not addressed the effect of any alleged error on the jury’s verdict in his brief. On appeal, Defendant must demonstrate he was prejudiced by the error. The test for prejudicial error is whether there is a reasonable possibility that, “had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443 (2022).

Here, witness testimony, as well as Defendant’s own testimony, not only supports the finding that Defendant shot a gun into a vehicle but also his conviction. Shaena Lennon, the property manager where Defendant lived, testified she saw Defendant pointing the gun at the vehicle in the parking lot. Tanaisa Bowen also

testified that she “snatched” Defendant back into the house after Defendant had “just fired a firearm.” Most significantly, Defendant admitted he shot a gun into the back of Bryant’s vehicle. The circumstances of this case are similar to *State v. Hutchinson* in which the State presented sufficient evidence to satisfy the defendant’s guilt as to each element of the charged crime. 139 N.C. App. 132, 138, 532 S.E.2d 569, 573 (2000). The defendant in that case retreated to a home after committing the crime, and “after defendant entered the house, he made no attempt to leave.” *Id.* at 139, 532 S.E.2d at 574. “Even after [a witness] informed defendant that she had called the police, defendant walked away but did not attempt to hide or flee.” *Id.* at 139, 532 S.E.2d at 574. Yet, this Court held the defendant’s trial was free of prejudicial error. *Id.* at 139, 532 S.E.2d at 574. In this case, we hold the State presented sufficient evidence to satisfy Defendant’s guilt as to each element of the crime charged. If there were error, it was not prejudicial error.

## **V. Conclusion**

After careful review of the record, we hold the trial court did not plainly err when it instructed the jury on flight. Defendant received a fair trial free from error.

NO ERROR.

Judges ZACHARY and Judge CARPENTER concur.

Report per Rule 30(e).