

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA23-1124

Filed 6 August 2024

Duplin County, Nos. 18 CRS 50060-61

STATE OF NORTH CAROLINA

v.

JOHNATHAN THOMAS FOGELMAN, Defendant.

Appeal by defendant from judgment entered 23 January 2023 by Judge Joshua W. Willey, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 28 May 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Maria Bruner Lattimore, for the State.*

*William D. Spence for defendant-appellant.*

THOMPSON, Judge.

Defendant appeals from a judgment entered upon a jury's verdict finding him guilty of, *inter alia*, taking indecent liberties with a child. On appeal, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence, and in failing to intervene *ex mero motu* during the State's closing argument. After careful review, we dismiss defendant's appeal.

## **I. Factual Background and Procedural History**

After the death of her father in 2011, Ann<sup>1</sup> began to spend time with her paternal grandmother and uncle (defendant). At trial, Ann testified that when she was ten years old, she was visiting her grandmother and defendant when defendant touched her “[o]ver the chest.” Ann further testified that the following day, defendant called Ann into his room, told her to pull her pants down, and that “she was getting penetrated [in her anus].” Ann testified that she never told anyone about what happened because she “was scared” and “knew [her family] wouldn’t believe [her] or talk to [her]. Grandma stick[s] up for her boys, her grandboys, her sons. She loves her boys.”

In 2017, when Ann was sixteen or seventeen, she disclosed her allegations against defendant to relatives. On 29 May 2018, defendant was indicted upon a true bill of indictment in Duplin County Superior Court for the following offenses: sex offense with a child by an adult, two counts of indecent liberties with a child, crime against nature, assault on a child under twelve, and sexual battery. The matter came on for hearing on 17 January 2023 in Duplin County Superior Court. On 23 January 2023, defendant was found guilty of one count of indecent liberties with a child, crime against nature, assault on a child under twelve, and sexual battery. Defendant was acquitted of the charges of sex offense with a child by an adult and the other charge

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<sup>1</sup> A pseudonym is used to protect the identity of the minor child.

of indecent liberties with a child. By judgment entered 23 January 2023, the trial court sentenced defendant to an active sentence of eleven months minimum and fourteen months maximum in the custody of the North Carolina Department of Adult Correction. From this judgment, defendant appeals.

## **II. Discussion**

### **A. Appellate jurisdiction**

At the outset we note that defendant concedes that he failed to properly serve notice of appeal on the State by entering oral notice of appeal at trial, or by “failing to serve written notice of appeal on the State within 14 days after entry of the judgment” pursuant to Rules 4(a)(2), (c) of the North Carolina Rules of Appellate Procedure.

Rule 4(a)(2) of the North Carolina Rules of Appellate Procedure requires that a party may file an appeal by, *inter alia*, “filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment . . . .” N.C.R. App. P. 4(a)(2). “Compliance with the requirements for entry of notice of appeal is jurisdictional.” *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012). “[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal.” *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005). Consequently, “this Court is without jurisdiction to hear [defendant’s] appeal.” *Id.*

### **B. Petition for writ of certiorari**

Although defendant failed to enter timely notice of appeal, defendant has filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. Under Rule 21(a)(1), our Court may issue a writ of certiorari to permit review “when the right to prosecute an appeal has been lost by failure to take timely action.” *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (citation omitted) (acknowledging an appellate court’s authority to “review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner”). However, “[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, 888 S.E.2d 368, 377 (2022) (citation and internal quotation marks omitted) (emphasis in original), *cert. denied*, \_\_ U.S. \_\_, 143 S. Ct. 2638 (2023).

Upon our careful review of the record and the arguments set forth in defendant’s appellant brief, we decline to issue the writ because defendant has failed to present a meritorious argument on appeal, or demonstrate “that error was probably committed below . . . .” *Id.* Consequently, we dismiss defendant’s appeal for failure to comply with the jurisdictional requirements of the North Carolina Rules of Appellate Procedure.

DISMISSED.

Judges GRIFFIN and FLOOD concur.

STATE V. FOGELMAN

*Opinion of the Court*

Report per Rule 30(e).