

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1312

Filed: 18 September 2018

Wake County, No. 16CRS207870

STATE OF NORTH CAROLINA,

v.

DENNIS JASON SPIVEY, Defendant.

Appeal by defendant from judgment entered on or about 14 February 2017 by Judge James K. Roberson in Superior Court, Wake County. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Guy J. Loranger, for defendant-appellant.

STROUD, Judge.

Because defendant failed to preserve his issue for appeal or demonstrate extraordinary circumstances for this Court to hear his appeal, we deny defendant's petition for certiorari, decline to exercise our discretion to review under Rule 2, and dismiss defendant's appeal.

STATE V. SPIVEY

Opinion of the Court

In February of 2017, defendant was convicted of resisting a public officer. Defendant has filed a petition for writ of certiorari because he failed to give oral notice of appeal and failed to file a proper written notice of appeal. Defendant filed a document purporting to be a notice of appeal but failed to serve it on the State. And even if we were to allow defendant's petition, his only argument on appeal is that the trial court should have dismissed the State's case against him due to the insufficiency of the evidence. But defendant failed to make a motion to dismiss. Defendant now contends this Court should invoke Rule 2 to suspend our rules and hear defendant's appeal. Defendant claims his case presents "exceptional circumstances" based upon the allegedly insufficient evidence and because he chose to represent himself at the trial level. On the sufficiency of the evidence, defendant is essentially asking us to consider this appeal "exceptional" based on the assumption that defendant should prevail but notes no particular insufficiency which would make this case "exceptional." Defendant's argument that the evidence was insufficient is based upon his interpretation of the evidence and credibility of the witnesses, but the jury did not have to believe defendant's contentions. Defendant's *pro se* status at trial also does not make his case "exceptional."

When a defendant elects to represent himself in a criminal action, the trial court is not required to abandon its position as a neutral, fair and disinterested judge and assume the role of counsel or advisor to the defendant. The defendant waives counsel at his peril and by so doing acquires no greater rights or privileges than counsel would have in

STATE V. SPIVEY

Opinion of the Court

representing him.

State v. Brincefield, 43 N.C. App. 49, 52, 258 S.E.2d 81, 83-84 (1979).

Having considered defendant's arguments, we decline to invoke Rule 2 and also deny defendant's petition for writ of certiorari. See *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 370 (2017), *disc. review denied*, ___ N.C. ___, 811 S.E.2d 159 (2018) ("As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because inconsistent application of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not. Because Bishop is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step. As Bishop concedes, he cannot prevail on this issue without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal." (citation and quotation marks omitted)). This appeal is dismissed.

DISMISSED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).