

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA19-515

Filed: 31 December 2020

Wake County, No. 17 CRS 201729

STATE OF NORTH CAROLINA

v.

WILL OWENS, JR.

Appeal by defendant from judgment entered 8 June 2018 by Judge Michael J. O’Foghludha in Superior Court, Wake County. Heard in the Court of Appeals 3 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.*

*Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.*

STROUD, Judge.

Will Owens, Jr. appeals his convictions for indecent liberties with a child and first degree sex offense with a child. Defendant argues the trial court erred by failing to submit a lesser included offense to the jury. However, Defendant did not request the instruction or argue the alleged error was plain error on appeal.

Defendant’s brief cites to the following statement of law:

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A trial court must give instructions on all lesser-included offenses that are supported by the evidence, even in the absence of a special request for such an instruction; and the failure to so instruct constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense.

*State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000). This is a correct statement of the law, but where the defendant did not request an instruction on a lesser included offense, the defendant must ask this Court to engage in plain error review. See *State v. Carter*, 366 N.C. 496, 497, 498, 739 S.E.2d 548, 549, 550 (2013) (“[W]e consider whether the trial court’s failure to give the jury an instruction on the lesser-included offense of attempted first-degree sexual offense constituted plain error in defendant’s trial for two counts of first-degree sexual offense.” “Defendant did not request an instruction on attempt.”); *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (“As the defendant did not object to the trial court’s instructions or request an instruction on lesser-included offenses, we must review this assignment under the ‘plain error’ standard of *Odom*.”).

After the State noted the correct standard of review in its brief, Defendant still did not argue for plain error review. Instead, Defendant responded, “The issue of whether submission of a lesser included offense was required by the evidence is preserved for review on appeal without an objection to its omission from the jury charge.” Defendant is correct that an alleged error in jury instruction *may* be reviewed even without an objection in the trial court, but on appeal, the Defendant

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still must “specifically and distinctly” argue plain error. N.C. R. App. P. 10(a)(4). The cases cited by Defendant for his standard of review do not address plain error, but in both cases the defendant *requested* the lesser included offense jury instruction. *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986) (“Defendant next contends the trial court committed reversible error *by denying his timely request to instruct the jury on false imprisonment.*” (emphasis added)); *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981) (“[W]hether the trial court should have instructed the jury about certain lesser included offenses, *as requested[.]*” (emphasis added)).

[T]he North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error. To have an alleged error reviewed under the plain error standard, the defendant must “specifically and distinctly” contend that the alleged error constitutes plain error.

*State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citations omitted).

Defendant has not “specifically and distinctly contended” the trial court’s failure to submit a lesser included offense amounts “to plain error.” N.C. R. App. P. 10(a)(4).

This issue was not preserved for appellate review and is dismissed.

DISMISSED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).