

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-317

Filed 18 July 2023

Yancey County, Nos. 18 CRS 50127; 19 CRS 409

STATE OF NORTH CAROLINA

v.

JERRY MITCHELL BANKS

Appeal by defendant from judgment entered 12 October 2021 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 2 November 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kunal J. Choksi, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

PER CURIAM.

When a defendant asserts plain error on appeal, he must establish not only that, absent the error, the jury probably would have reached a different result, but also that the alleged error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Here, Defendant argues that a detective's unobjected to

STATE V. BANKS

Opinion of the Court

testimony was improper and asserts the trial court committed plain error in allowing it. However, Defendant does not argue, or even address, and the record does not demonstrate how the alleged error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Without this argument in Defendant's brief and showing, we view the issue as abandoned and dismiss his appeal.

BACKGROUND

Defendant appeals a judgment from convictions for felony possession with intent to sell or deliver a Schedule II controlled substance, misdemeanor possession of drug paraphernalia, and attaining habitual felon status.

At trial, Detective Mark Letterman testified without objection why he charged Defendant with possession with intent to sell or deliver instead of simple possession. The jury convicted Defendant of possession of drug paraphernalia and of possession with intent to sell or deliver methamphetamine, although it had also been instructed on the lesser-included offense of possession of methamphetamine.

Defendant argues that the trial court committed plain error by allowing Detective Letterman to testify, without objection, as to his opinion that Defendant was guilty of possession with intent to sell or deliver methamphetamine. Defendant contends that, without the improper testimony, the State did not have sufficient evidence tending to show the issue of intent to sell or deliver.

ANALYSIS

We “apply the plain error standard of review to unpreserved instructional and

STATE V. BANKS

Opinion of the Court

evidentiary errors in criminal cases.” *State v. Maddux*, 371 N.C. 558, 564 (2018). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” To prove fundamental error, “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.” Additionally, “because plain error is to be ‘applied cautiously and only in the exceptional case,’ the error will often be one that ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Under the plain error standard, a defendant bears the burden of proving that there was a fundamental error in the trial. *Id.* “To show fundamental error, 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.’” *Maddux*, 371 N.C. at 564 (quoting *Lawrence*, 365 N.C. at 518) (marks omitted). Furthermore, “because plain error is to be applied cautiously and only in the exceptional case,” *id.* (quoting *Lawrence*, 365 N.C. at 518), “the alleged error ‘must seriously affect the fairness, integrity or public reputation of judicial proceedings.’” *State v. Patterson*, 269 N.C. App. 640, 644 (quoting *State v. Thompson*, 254 N.C. App. 220, 224 (2017)), *disc. rev. denied*, 375 N.C. 491 (2020). A defendant must argue plain error in his brief; if he does not, “[i]t is not our role ‘to create an appeal for an appellant[.]’” and we view the issue as abandoned and dismiss it. *Id.* at 645 (quoting

Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402 (2005)).

Defendant merely argues that the trial court committed plain error by allowing without objection Detective Letterman to give opinion testimony on Defendant's guilt as to possession with intent to sell or deliver, as opposed to simple possession. Defendant contends that, absent Detective Letterman's testimony, the jury probably would have reached a different result.

Absent from Defendant's brief is any argument or even mention and the record does not demonstrate how the alleged error would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Thompson*, 254 N.C. App. at 224. Thus, we reach the same result as we did in *Patterson*:

Defendant is missing necessary reasons or arguments as to why the alleged error rises to plain error. He offers nothing on why this is an exceptional case or why this will seriously affect the fairness, integrity, or public reputation of judicial proceedings. Even if there are no magic words required to invoke our plain error analysis, we do not see the words "exceptional," "fairness," "integrity," or "reputation" anywhere in Defendant's briefs. Without any information on this portion of plain error review, we cannot impart any meaningful review for plain error. Thus, this issue is taken as abandoned and is dismissed.

Patterson, 269 N.C. App. at 645. We deem the issue abandoned and dismiss.

CONCLUSION

Defendant abandoned his plain error argument by not making any argument and the record does not demonstrate the alleged error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. This argument was

STATE V. BANKS

Opinion of the Court

Defendant's sole issue on appeal, is without merit; and, therefore, we dismiss Defendant's appeal.

DISMISSED.

Panel consisting of Judges Tyson, Murphy, and Wood.

Report per Rule 30(e).